Nos. 01-1118, 01-1119

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.

OPERATION RESCUE,

Petitioner,

v.

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

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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

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QUESTIONS PRESENTED

1. Whether the Hobbs Act, which makes it a crime to obstruct, delay, or affect interstate commerce "by robbery or extortion" – and which defines "extortion" as "the *obtaining* of *property* from another, with [the owner's] consent," where such consent is "induced by wrongful use of actual or threatened force, violence, or fear" (18 U.S.C. § 1951(b)(2) (emphasis added)) – criminalizes the activities of political protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there.

2. Whether injunctive relief is available in a private civil action for treble damages brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c).

RULE 24.1(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.

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

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OPINIONS BELOW

The opinion of the court of appeals (01-1118 Pet. App. 1a-31a) is reported at 267 F.3d 687. The order denying rehearing (01-1118 Pet. App. 142a-143a) is unreported. The district court's opinion disposing of the motion to dismiss the third amended complaint (*id*. at 32a-108a) is reported at 897 F. Supp. 1047. The district court's opinion denying post-trial motions and entering an injunction (01-1118 Pet. App. 109a-141a) is unreported.

JURISDICTION

The court of appeals' judgment was entered on October 2, 2001, and rehearing was denied on October 29 (01-1118 Pet. App. 1a, 142a). The petitions for certiorari were timely filed on January 28, 2002, and granted on April 22, limited to Questions 1 and 2 presented by the petition in No. 01-1118. J.A. 149. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Hobbs Act, 18 U.S.C. § 1951, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964, and various federal and New York statutes on which the Hobbs Act and RICO were modeled, are set forth in an appendix to this brief (App., *infra*, 1a-7a).

STATEMENT

For the past sixteen years, respondents have pursued this unprecedented federal racketeering lawsuit against several individuals and organizations (petitioners here) that have regularly engaged in or supported sit-ins and other political protests against abortion clinics. Following a seven-week trial, respondents persuaded a jury that petitioners had committed multiple acts of "extortion" – a serious federal felony punishable by up to 20 years in prison for each violation – by participating in or supporting protest actions that obstructed access to clinics or impeded the ability of patients to seek services, and doctors and staff to work, at the clinics. On the basis of that verdict, two of the respondent clinics obtained an award of treble damages and

all respondents secured a broad nationwide injunction restricting petitioners' protest activities for twelve years.

In affirming, the Seventh Circuit approved two substantial and unwarranted expansions of the federal racketeering laws. First, it held that the crime of extortion under the Hobbs Act – which requires "the *obtaining* of *property* from another" through certain wrongful means (18 U.S.C. § 1951(b)(2) (emphasis added)) – occurs when there is an "interference with" such "intangible" liberty or property interests as the right of putative patients "to seek medical services," or the clinics' "right to conduct a business," or the right of clinic employees "to perform [a] job[]." 01-1118 Pet. App. 28a-29a. Second, the Seventh Circuit became the first appellate court in the more than thirty years since RICO was enacted to hold that a private plaintiff may go beyond the remedies Congress has specified in 18 U.S.C. § 1964(c) – "threefold * * * damages," the "cost of the suit," and "a reasonable attorney's fee" – and secure injunctive relief. Both holdings should be reversed.

A. The Initial Phase Of This Litigation

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. Operation Rescue, the petitioner in No. 01-1119, is an unincorporated organization. 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 clinics that perform abortions.

In 1986, respondents initiated this lawsuit in the United States District Court for the Northern District of Illinois against the petitioners in these consolidated cases (and various others who ceased to be defendants before trial). In their amended complaint, 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 any unlawful activities of petitioners. NOW also claimed organizational standing to advance similar claims for its own members. Respondents alleged violations of the Sherman Act (15 U.S.C. § 1), RICO (18 U.S.C. §§ 1961-1968), and state law.

In their RICO claims, respondents alleged that petitioners 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." Respondents claimed that petitioners, by engaging in protests aimed at disrupting and closing abortion clinics, had directly or indirectly participated in the conduct of PLAN's activities through a "pattern" of "racketeering activity" in violation of 18 U.S.C. § 1962(c). The pattern of racketeering activity allegedly included acts of "extortion" in violation of the Hobbs Act, 18 U.S.C. § 1951. Specifically, respondents accused petitioners of having engaged in extortion by "wrongful[ly] us[ing] * * * actual or threatened force, violence, or fear," *id.* § 1951(b)(2), to "obtain[]" respondents' "property," by inducing doctors and clinic employees to leave their jobs and by discouraging and obstructing putative patients from obtaining abortions. Respondents also alleged a conspiracy in violation of 18 U.S.C. § 1962(d).

The district court dismissed the complaint for failure to state a valid claim, 765 F. Supp. 937 (1991), and the Seventh Circuit affirmed, 968 F.2d 612 (1992), holding in relevant part that RICO does not apply to defendants who commit "non-economic crimes * * * in furtherance of non-economic motives." *Id.* at 629. This Court reversed, holding that RICO contains no economic motive requirement. 510 U.S. 249, 256 (1994).

B. The Proceeding In The Trial Court Following Remand

Respondents filed a third amended complaint. See J.A. 33-55 (excerpts of complaint). For the first time, respondents requested injunctive relief under RICO. J.A. 40, 55.[1]

1. In 1995, the trial court dismissed the claims against certain defendants, but not the remaining RICO claims under Section 1962(c) and Section 1962(d) against petitioners. 01-1118 Pet. App. 32a-108a. The court rejected petitioners' contention that they had not "obtained" any "property" of respondents within the meaning of the Hobbs Act. *Id.* at 69a-73a. "The definition of 'property' under the Hobbs Act is expansive," the court said, encompassing "intangible as well as tangible property," including "the right to conduct business." *Id*. at 70a. Moreover, the district court said, under Seventh Circuit law property is "obtained" whenever a victim sustains some loss. *Id*. at 70a-71a. The court agreed with petitioners that "this case is analogous to sit-ins at lunch counters and Rosa Parks' civil disobedience," but suggested that this "argument works in [respondents'] favor" because "many who fought segregation using civil disobedience * * * *were* arrested, jailed, and otherwise punished." *Id*. at 73a (emphasis in original).

The district 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). 01-1118 Pet. App. 87a-90a. The court said that it was "reluctant" to read RICO "in a limited way" given this Court's "instruction that 'RICO is to be read broadly' and * * * the very purpose of the statute is to 'supplement and strengthen the means already available for fighting crime.'" *Id*. at 90a (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 498 (1985)).[2]

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[1] In their RICO Case Statement, respondents were required to list any state or federal criminal extortion convictions based on any of the scores of allegedly "extortionate" sit-ins and demonstrations that formed the basis for respondents' Hobbs Act and RICO claims. See RICO Case Statement [Amended], at 5-6, Exhs. A, B (Oct. 31, 1994). None was listed.

[2] Several years later the district court formally certified the two classes de-

2. The case was tried from March 2 to April 20, 1998. Evidence was presented concerning numerous incidents spanning the nationwide conduct of abortion protesters over a 15-year period. 01-1118 Pet. App. 4a ("hundreds of acts").[3] Over petitioners' objections, the jury was instructed:

> In order to show that extortion has been committed in violation of federal law, the plaintiffs must show that the defendant or someone else associated with PLAN knowingly, willfully, and wrongfully used actual or threatened force, violence, or fear to cause women, clinic doctors, nurses, or other staff or the clinics themselves to give up a property right.
>
> The term property right means 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 provide medical services free from wrongful threats, violence, coercion, and fear. It does not matter whether or not the extortion provided an economic benefit to PLAN. Any fear involved must be reasonable under the circumstances.

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scribed above. 172 F.R.D. 351, 363 (1997). The class of putative clinic patients who were not members of NOW sought only injunctive relief and thus was certified only under Rule 23(b)(2); the clinic class, which also sought treble damages, was certified under Rules 23(b)(2) and (b)(3). See 172 F.R.D. at 362-63 & n.8; J.A. 39, 58. Thereafter certain defendants – including Operation Rescue but not the other petitioners – moved for summary judgment. The court granted the motion in part (01-1119 Pet. App. 157a-231a), observing that this lawsuit was "paradigmatic of RICO's seemingly unlimited applicability." *Id.* at 158a. Among other things, the court held that respondents had failed to raise any triable issue of fact on certain of their more inflammatory claims, including alleged predicate acts of murder, kidnaping, and arson. *Id.* at 199a-202a. The court also reiterated its conclusions with respect to the scope of extortion under the Hobbs Act. *Id.* at 194a-199a.

[3] Consistent with its summary judgment ruling (01-1119 Pet. App. 199a-201a), the court instructed the jury that there was "no claim in this case" that the "defendants themselves are responsible for" any "incident[] of murder, arson, and bombing." 01-1118 Pet. App. 146a (Tr. 4939).

> Fear includes not only fear of physical violence but fear of wrongful economic injury.

Id. at 150a-151a (quoting Tr. 4944-4946); see also J.A.136.[4]

Not surprisingly, respondents had already taken full advantage during the trial proceedings of this sweeping definition of extortion. Time and again, they urged the jury to find acts of extortion based on sit-ins at clinics that interfered in any way with the freedom of patients to receive services.[5] Even a temporary interference with a clinic's operations or the freedom of patients to receive services, respondents told the jury, amounted to an extortion. See Tr. 5005 ("[E]xtortion occurs when a legally protected right is interfered with even for a short period of time * * *. "), 5008 ("Even a few hours of deprivation of legal rights will satisfy the RICO act of extortion."), 5037 ("Every moment that [a clinic] was closed * * * was an act of extortion.").

The jury was provided with special interrogatories and a verdict form requiring it to answer whether "any Defendant, or any other person associated with PLAN, commit[ted] any of the following acts" and to check "Yes" or "No" for each type of predicate offense alleged. J.A. 143-44. The jury was required to indicate the "number of acts" in each category. *Ibid*.[6]

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[4] During the colloquy on the jury instruction, counsel for respondent NOW noted that Operation Rescue's counsel had "asked every witness whether any tangible property was obtained," and then admitted: "everybody knows *there's no allegation* about that" in this case. Tr. 4327; accord J.A. 51-55 (third amended complaint) (failing to allege that petitioners had obtained any tangible property of respondents), 64, 68-77 (pretrial order) (respondents failed to list this as a contested issue of fact in the case).

[5] Tr. 550 ("[W]hatever service she was coming for if these defendants interfered with her right, * * * that is a violation of RICO."), 567 ("Forcible blockades are * * * an extortion of a woman's constitutional right to abortion and of the clinics' right to perform abortion services."), 4987, 4990-4991, 5003-5004, 5005, 5008.

[6] The special interrogatories form asked whether, if the jury found an act of extortion in violation of the Hobbs Act, its finding was "based solely on blockades of clinic doors or sit-ins within clinics, without more." J.A. 145. During closing argument, however, respondents' counsel told the jury that

The jury returned a verdict for respondents on their claim under Section 1962(c) and, consistent with the instructions, did not reach the RICO conspiracy claim. Based on the instructions, the jury found, among other things, that petitioners and Operation Rescue or unnamed persons "associated with PLAN" had committed 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.[7] Because the judge had rejected petitioners' request that the jury be required to specify the conduct giving rise to any predicate acts it found (Tr. 4495-98), the verdict form did not identify the basis for liability.

Based on evidence of certain increased security costs two clinics had incurred as a result of the protests (but not diminution of profits), the jury awarded $31,455.64 to DWHO in damages and $54,471.28 to Summit (but no damages to any of the other members of the clinic class).[8] Pursuant to RICO, these damages were trebled. Thereafter, on July 28, 1999, the district court entered a broad nationwide injunction regulating petitioners' future protest activities at clinics. 01-1118 Pet. App. 109a-141a. The court "retain[ed] jurisdiction to enforce the terms of this injunction for twelve (12) years." *Id*. at 141a.

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this "safe harbor" for peaceful protests and sit-ins "without more" did not apply unless a blockade "didn't keep anybody out" of a clinic. Tr. 4987.

[7] The jury also found 25 violations of state extortion law (defined in essentially the same way as Hobbs Act extortion), which qualify as predicate acts under RICO, see 18 U.S.C. § 1961(1)(A); 25 attempts or conspiracies to violate federal or state extortion law; 4 acts or threats of physical violence to any person or property in violation of the Hobbs Act, 18 U.S.C. § 1951; 23 violations of the Travel Act, which proscribes travel across state lines or use of the mails or telephone, with the intent to commit extortion under the Hobbs Act or state law, see 18 U.S.C. §§ 1952(b), 1961(1)(A); and 23 attempts to violate the Travel Act. The relevant jury instructions and the special verdict form are reprinted at 01-1118 Pet. App. 146a-157a, J.A. 142-48.

[8] At least one member of the nationwide clinic class is a non-profit corporation. See Tr. 1427-28; cf. also J.A. 35-36 (stating that "[c]linics such as DWHO and Summit" provide "low-cost abortion services").

C. The Court Of Appeals' Decision

A panel of the Seventh Circuit affirmed. 01-1118 Pet. App. 1a-31a. Two aspects of the court of appeals' decision are pertinent here. *First*, the panel rejected petitioners' argument that "the things * * * [allegedly] taken here – the class women's rights to seek medical services from the clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to provide medical services and otherwise conduct their businesses – cannot be considered 'property' for purposes of the Hobbs Act." *Id*. at 28a-29a. The Seventh Circuit "ha[d] repeatedly held that intangible property such as the right to conduct a business can be considered 'property' under the Hobbs Act," and indicated that it would "not revisit that holding here." *Id*. at 29a.

The panel also rejected petitioners' argument that, "even if 'property' was involved, [petitioners] did not 'obtain' that property; they merely forced the plaintiffs to part with it." *Ibid*. That argument was "contrary to * * * precedent in this circuit holding that as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, *or interference with the rights of*, the victim is all that is required." *Ibid*. (emphasis added; citation and internal quotation marks omitted).

The panel also held that injunctive relief is available to a private litigant under RICO, 18 U.S.C. § 1964(c). *Id*. at 6a-14a. In so holding, the court disagreed with the Ninth Circuit's decision in *Religious Tech. Ctr.* v. *Wollersheim*, 796 F.2d 1076 (1986), cert. denied, 479 U.S. 1103 (1987), and became the first appellate court to approve injunctive relief in this setting in the more than 30 years since RICO's enactment.

SUMMARY OF ARGUMENT

Both of the questions raised in this case call on the Court to interpret statutory provisions that Congress consciously modeled on prior provisions of law whose meaning was well established. In passing the Hobbs Act in 1946, 18 U.S.C. § 1951, Congress incorporated almost verbatim the definition of extortion contained in the Field Code of 1865, an early model penal

code proposed in New York, and in the New York Penal Codes of 1881 and 1909 (which in turn were based on the Field Code). Similarly, when Congress passed RICO in 1970, it included a provision authorizing private civil actions for treble damages that was modeled after virtually identical provisions in the Sherman Act of 1890 and the Clayton Act of 1914. The Court accordingly must examine these predecessor provisions.

I. The lower courts' definition of extortion is refuted by the text, structure, and legislative history of the Hobbs Act and its predecessor statute, the Federal Anti-Racketeering Act of 1934. Not only did the lower courts read the word "obtaining" out of the statute, but they also applied a concept of "property" that is so expansive that it appears to sweep in most if not all property-based rights and interests and many other liberty-based interests as well. In effect, it transforms the crime of extortion into the much broader, and less serious, crime of coercion – even though Congress elected, in passing the Hobbs Act, to punish robbery and extortion and *not* to punish coercion.

The Seventh Circuit's analysis also represents a substantial departure from the settled meaning of "extortion" – and "obtaining of property from another" – which are terms of art. The meanings of those terms of art in the Field Code of 1865, and in later New York statutes on the books in 1946, bear almost no resemblance to the broad definition of extortion endorsed by the lower courts in this case. Even if the Court were to depart from the traditional meaning of extortion, it should reject the Seventh Circuit's approach as flawed in multiple respects.

II. As this Court has repeatedly recognized, civil RICO was directly modeled on the federal antitrust laws. Specifically, Section 1964(c), which authorizes private civil lawsuits, is taken almost verbatim from a provision in the Clayton Act of 1914 (which in turn was modeled on a virtually identical provision in the Sherman Act of 1890). At the time RICO was enacted, this Court had interpreted the precursor Sherman Act provision *as not allowing private parties to seek injunctive relief*. Moreover, the text, structure, and legislative history of RICO all confirm that Congress intended to limit the relief available to private

parties to the civil remedies specified in the statute: treble damages, costs and attorney's fees. Allowing private injunctive relief would lead to a significant expansion of the scope of civil RICO by arming private litigants with a wide array of intrusive equitable remedies such as the appointment of monitors and trustees and even corporate dissolution.

ARGUMENT

I. POLITICAL PROTESTERS WHO INTERFERE WITH ACCESS TO A FACILITY OR BUSINESS THAT PROVIDES SERVICES TO THE PUBLIC, OR WITH THE FACILITY'S FREEDOM TO PROVIDE SERVICES AND OTHERWISE CONDUCT ITS OPERATIONS, DO NOT THEREBY COMMIT EXTORTION UNDER THE HOBBS ACT

The Hobbs Act makes it a felony punishable by imprisonment for up to 20 years to interfere with interstate commerce by acts of extortion. 18 U.S.C. § 1951(a). The Hobbs Act defines "extortion" to "mean[] the *obtaining* of *property from another*, with his consent, induced by wrongful use of actual or threatened force, violence, or fear or under color of official right." 18 U.S.C. § 1951(b)(2) (emphasis added). The jury in this case found that petitioners had committed 21 separate acts of extortion in violation of the Hobbs Act.

The jury based that determination, however, on a sweeping – and legally untenable – definition of "extortion." Over petitioners' repeated objections (*e.g.*, Tr. 4324-26, 4882), the trial court instructed the jury that it could find that petitioners committed extortion if it found that they – "or someone else associated with PLAN" – "knowingly, willfully, and wrongfully used actual or threatened force, violence, or fear" (including "fear of wrongful economic injury") to "cause women, clinic doctors, nurses, or other staff or the clinics themselves to *give up*" any "*property right*." 01-1118 Pet. App. 150a (quoting Tr. 4945) (emphasis added). A "property right" was in turn broadly defined as "*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 provide medical services." *Ibid.* (emphasis added). "It does not matter," the jury was instructed, "whether or not the extortion provided an economic benefit to PLAN." *Ibid.* At every turn, respondents exploited this broad definition of extortion in urging the jury to find liability. See page 6, *supra*.

As we explain below, the jury instructions in this case – and the Seventh Circuit's analysis upholding them – represent a vast and unwarranted expansion of the traditional felony of "extortion" under the Hobbs Act.

A. The Lower Courts' Broad Definition Of Extortion Is Inconsistent With The Text And Structure Of Section 1951 And With This Court's Decisions

1. The Hobbs Act defines extortion as "the *obtaining* of *property from another*, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2) (emphasis added).[9] The Seventh Circuit's definition of "extortion" is flatly inconsistent with that definition, first and foremost, because it reads the requirement of "obtaining" completely out of the statute. As a matter of common usage, to "obtain" something means to "acquire," "procure," "get hold of," or "get possession of" it. BLACK'S LAW DICTIONARY 972 (5th ed. 1979); WEBSTER'S TWENTIETH CENTURY DICTIONARY UNABRIDGED 1155 (1942); THE COLLEGE STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 786 (1943). The same idea is reflected in definitions of the verb "to extort." See BLACK'S LAW DICTIONARY, at 525 ("To gain by wrongful methods; to obtain in an unlawful manner, as to compel payments by means of threats of injury to

[9] "Robbery" is separately defined as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining." 18 U.S.C. § 1951(b)(1).

person, property, or reputation. To exact something wrongfully by threats or putting in fear.").

Contrary to the Seventh Circuit's view, to destroy or diminish the value of someone else's property is not the same as "obtaining" it. Neither is "obtaining" synonymous with "causing a deprivation." Congress knows how to reach "deprivations" of property or rights and has not done so in the Hobbs Act. Compare, *e.g.*, 16 U.S.C. § 460jjj-2 (any party "deprived of any property right" by change in law may seek compensation); 18 U.S.C. § 1346 (defining scheme or artifice to "deprive another of the intangible right of honest services" as a scheme or artifice to defraud); 18 U.S.C. § 242 (punishing willful "deprivation" of "rights" or "privileges" protected by Constitution or federal laws). As the Ninth Circuit has correctly explained:

> [U]nder the Hobbs Act, extortion, which is *a larceny-type offense*, does not occur when a victim is merely forced to part with property. Rather, there must be an "obtaining": someone — either the extortioner or a third person — must receive the property of which the victim is deprived.

United States v. *Panaro*, 266 F.3d 939, 948 (9th Cir. 2001) (emphasis added) (upholding extortion convictions of defendants who "sought not only to put [the owner of an auto shop] out of business, but actually to *get his business for themselves*"). See also *United States* v. *Nedley*, 255 F.2d 350, 352-53, 355, 357 (3d Cir. 1958) (use of physical force and violence to interfere with an owner's dominion and control over his truck and delay its movement was not "obtaining").[10]

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[10] *United States* v. *Green*, 350 U.S. 415 (1956), is not to the contrary. In holding that unions and their officials could violate the Hobbs Act by attempting to obtain benefits for union members, the Court stated that "extortion as defined in the statute in no way depends upon having *a direct benefit* conferred on the person who *obtains* the property." *Id.* at 420 (emphasis added). The Court did *not* say that property need not be obtained; it simply stated that the property could be obtained for the benefit of someone other than the defendant. *Ibid.*; accord *Panaro*, 266 F.3d at 947-48.

But the Seventh Circuit's linguistic errors do not end there. The court of appeals also concluded that a person's "right[] to seek medical services from the clinics" is "property" capable of being extorted in violation of the Hobbs Act. Although "property" – when viewed without regard to context – can be defined in a wide variety of ways, even the broadest definition does not encompass "a woman's right to seek services from a clinic." 01-1118 Pet. App. 150a (quoting Tr. 4945). No ordinary speaker of the English language would describe a prospective patient's interest in obtaining services – or right to have an abortion – as "property." Not surprisingly, *Roe* v. *Wade* classifies the types of rights a woman is exercising when visiting a clinic – the right to decide whether to terminate a pregnancy and the right to make decisions about procreation – as *liberty*, not property, interests. 410 U.S. 113, 152-53 (1973). If the law were otherwise, all manner of conduct proscribed by state law – commission of a tort, breach of contract, disturbance of the peace, even loitering – could be transformed into Hobbs Act extortion if such conduct adversely affected someone's liberty interests. That cannot be.

Nor is there a basis in the statute for the court of appeals' assumption – and the jury instructions – that "property" is synonymous with any "property *right*." 01-1118 Pet. App. 150a (quoting Tr. 4945) (emphasis added). As we explain below, the language of the Hobbs Act makes clear that not every "interest" or "right" in property can be the subject of extortion. Nor did Congress say "property interest" or "property right" when it drafted the Hobbs Act; it said "property." See 20 U.S.C. § 4302 (vesting university with "property and the rights of property * * * including the right to sue and be sued and to own, acquire, sell, mortgage or otherwise dispose of property"). In RICO, Congress has recognized that not every injury to a business is an injury to "property." See 18 U.S.C. § 1964(c) (standing to assert RICO claim requires injury to "business *or* property") (emphasis added); see also 18 U.S.C. § 2333(a) (terrorism law) (standing requires injury to "person, property, or business").

2. This conclusion – that "obtaining" is not synonymous with "interfering with," and that "property" does not encompass every "interest" that may be of "value" to human beings – gathers additional force from the "surround[ing]" language in the statute. *Smith* v. *United States*, 508 U.S. 223, 229 (1993). The Hobbs Act covers the "obtaining of property *from another*" (18 U.S.C. § 1951(b)(2) (emphasis added)), which confirms that "obtaining" connotes the *acquisition or transfer* of some item of "property" *from* the owner *to* someone else. That language also suggests that only property actually capable of being transferred or assigned is "property" under the Hobbs Act. Certain forms of property – and certain nontransferable interests or rights in property – can be damaged, impaired, or destroyed but not "obtained." *E.g.*, 2 RESTATEMENT (SECOND) OF THE LAW OF PROPERTY § 15.1 & cmt. B (1977) (tenancy at will "inherently exists only as long as both [landlord and tenant] will its continuance" and thus cannot be transferred or assigned). Thus, the language of Section 1951 makes clear that not every right or interest in property can be the subject of extortion.

Another important structural clue to the meaning of "obtaining of property from another" (18 U.S.C. § 1951(b)) lies in the fact that the phrase applies with equal force to extortion "under color of official right." The Hobbs Act criminalizes both private and official extortion. Official extortion occurs when a public official engages in "the obtaining of property from another, with his consent, * * * under color of official right." *Id.* § 1951(b)(2). Private extortion occurs when the extortionist engages in "the obtaining of property from another, with his consent, * * * induced by wrongful use of actual or threatened force, violence, or fear." *Ibid.* Whatever it means to "obtain[] * * * property from another," that concept must have the same meaning under the official and private extortion prongs of the Hobbs Act. And it is highly implausible that Congress intended to expand the scope of official extortion vastly beyond its traditional limitations, see *Evans* v. *United States*, 504 U.S. 255 (1992); *McCormick* v. *United States*, 500 U.S. 257 (1991), to situations where public officials do not "obtain" any money or

other item of value but instead merely interfere with the liberty interests or intangible property interests of individuals.

Finally, other aspects of the Hobbs Act confirm that the "obtaining of property from another" cannot possibly have the expansive meaning it was given below – *i.e.*, any "loss" of, or "interference with," any interest or right of "value" to the victim. The Hobbs Act makes it a crime punishable by up to 20 years' imprisonment to "in *any way or degree*" interfere with interstate commerce through "extortion." 18 U.S.C. § 1951(a) (emphasis added). The crime encompasses not only acts of extortion but also *attempts* and *conspiracies* to commit extortion. And under the prevailing interpretation in the lower courts, the means by which "property" must be "obtained" – wrongful use of "force, violence or fear" – includes fear of economic injury or reputational harm in an extremely broad sense. Given these other expansive features of the Hobbs Act, it is difficult to imagine that all that is required to satisfy the element of "obtaining of property from another" is for the perpetrator to cause some "loss" to or "interference with" some interest or right of the victim. If that were true, the scope of felony extortion under the Hobbs Act would be vast indeed.

3. The Seventh Circuit's analysis is also inconsistent with several of this Court's decisions. In *United States* v. *Enmons*, 410 U.S. 396 (1973), the Court reversed the Hobbs Act convictions of labor union officials and members who had engaged in acts of physical 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 obtained property by the "wrongful use of actual or threatened force, violence, or fear" (18 U.S.C. § 1951(b)(2)), because they had acted to further "legitimate union objectives, such as higher wages in return for genuine services." 410 U.S. at 400.

In describing the "property" sought to be "obtained" from the employer, the Court in *Enmons* focused solely on the higher *wages* the union sought to win for its members; there was no

hint that the destruction of the employer's transformer, or the serious interference with its business operations during the strike, in any way amounted to "obtaining" (as opposed to *destroying* or *interfering with*) "property." The Court reasoned that "the obtaining of property" is "wrongful" within the meaning of the Hobbs Act only if "the alleged extortionist *has no lawful claim to th[e] property*." 410 U.S. at 400 (emphasis added). Because the defendants *did* have a lawful claim to higher wages, their activities were not "wrongful." But plainly the same could not be said for the destruction of the employer's transformer, the damage to its facilities, or the interference with its business operations. The defendants had no lawful claim to *that* "property." Accordingly, if "the obtaining of property from another" means what the Seventh Circuit says it means, the convictions would have been upheld in *Enmons*, and the Hobbs Act would regulate a wide array of strike activity.[11]

The lower courts' definition of "property" is also impossible to reconcile with *McNally* v. *United States*, 483 U.S. 350, 356 (1987), which held that "the intangible right of the citizenry to good government" is not "property" within the meaning of the mail fraud statute, 18 U.S.C. § 1341. "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous," this Court explained, "we read § 1341 as limited in scope to the protection of property rights." *McNally*, 483 U.S. at 360. The "right" to seek clinic services is not analytically different from the "right" to good government – both are civil liberties, not property. See also *Cleveland* v. *United States*, 531 U.S. 12, 23 (2000) (rejecting argument that State's "intangible rights of allocation, exclusion, and control" over issuance of video poker licenses constitutes "property" under the mail fraud statute); *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987) (making

[11] In the lower courts, petitioners argued that their conduct fell outside the scope of the Hobbs Act under *Enmons* because their objective was to stop abortion, which was legitimate even if the means used sometimes were unlawful. The Seventh Circuit ignored this argument. For the reasons set forth in Operation Rescue's brief (at 44-46), the Hobbs Act counts should have been dismissed on this ground alone.

clear the employer's "contractual right" to an employee's "honest and faithful service" is "an interest too ethereal to fall within the protection of the mail fraud statute"). Indeed, given the broader language of the mail fraud statute, which extends to "any scheme or artifice to defraud, or for obtaining money or property," 18 U.S.C. § 1341, the holdings of *McNally* and *Cleveland* should apply *a fortiori* here.

* * * * *

This Court need not look beyond the plain language and structure of Section 1951, and this Court's precedents, to see why the lower courts erred in defining the crime of extortion under the Hobbs Act. Whatever else the statute might cover, it does not punish the mere "interference with" the freedom of putative patients to receive clinic services. Since the sole basis for the extortion claims (and RICO standing) of respondent NOW and the class of patients it represents rested on that defective legal theory, the judgment in their favor cannot stand.[12] As for the respondent *clinics*, their claims of extortion appear to rest on different theories of "property": (1) "the right of the doctors, nurses, or other clinic staff" – who, notably, were not plaintiffs in this case – "to perform their jobs"; and (2) the "right of the clinics to provide medical services." 01-1118 Pet. App. 150a (quoting Tr. 4945). But just as with the extortion claims of the patients, the jury was not required to find that petitioners had actually "obtained" either of these interests. All that was required was a showing that the rights of the clinics and their employees had been interfered with. Because the jury

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[12] In addition to 21 Hobbs Act extortion violations, the jury found that petitioners had committed a variety of other predicate acts (all of which petitioners challenged in the court of appeals). See note 7, *supra*. But as we explained in our reply brief at the petition stage (at 7-8), the verdict does not permit a determination of which predicate acts the jury relied on in finding either two acts within the requisite ten-year period or a racketeering "pattern." 01-1118 Pet. App. 160a. There is also no way of knowing which predicate acts the jury relied on in awarding damages. For those reasons, the judgment must be vacated if the instructions on the Hobbs Act extortion counts were erroneous. *Griffin* v. *United States*, 502 U.S. 46, 53-56, 59 (1991).

instructions failed to require any "obtaining" by petitioners, the judgment of liability in favor of the clinics also cannot stand.

Given the history of this litigation, however, it is a safe bet that respondents will seek a retrial on any legal theory that survives this Court's decision. But see Br. for Pet. Operation Rescue ("OR Br."), at 49-50 (explaining why respondents are not entitled to a new trial). Because *all* of the respondents' theories of extortion suffer from additional, serious legal defects – and because the question presented is sufficiently broad to permit this Court to say so – the Court should resolve not only whether the jury instructions sustained by the Seventh Circuit were wrong in the ways just described, but also whether *any* of respondents' alternative theories can be squared with the meaning of "extortion" under the Hobbs Act. As we next demonstrate, they cannot.

B. The Antecedents Of The Hobbs Act In New York Law Make Clear That Extortion Requires An Actual Transfer Of Property From The Victim (An "Obtaining") And Covers Only Limited Forms Of Property (And Certainly Not Every "Interest" Of "Value" To Persons)

The Hobbs Act was passed in 1946 as an amendment to the Federal Anti-Racketeering Act of 1934. See Act of July 3, 1946, ch. 537, 60 Stat. 420; Act of June 18, 1934, ch. 569, 48 Stat. 979. As this Court has repeatedly explained, when Congress passed the Hobbs Act it drew the definition of "extortion" from the Field Penal Code of 1865, an early and influential model penal code for New York, as well as from New York Penal Codes of 1881 and 1909 that were based upon the Field Penal Code. See *Evans* v. *United States*, 504 U.S. 255, 261-62 nn.8-9 (1992) ("[o]ne of the models for the statute was the New York [extortion] statute" and "[t]he other model was the Field Code"); *United States* v. *Enmons*, 410 U.S. 396, 406 n.16 (1973) (discussing "[j]udicial construction of the New York statute" prior to 1946); *McCormick* v. *United States*, 500 U.S. 257, 279 (1991) (Scalia, J., concurring) (same); see also *United States* v. *Culbert*, 435 U.S. 371, 378-80 (1978). Those New York antecedents of the Hobbs Act confirm that "obtaining"

must be given its conventional meaning (a genuine *acquisition*), and "property" must be read narrowly to encompass only money and other limited forms of valuable property (and by no means every "right" or "interest" of "value" to human beings).

1. The Field Penal Code Of 1865

In one of the earliest U.S. efforts to codify criminal law, David Field and others prepared a model penal code for New York based on English and American precedents. Commissioners of the Code, *Proposed Model Penal Code of the State of New York* § 613 (1865) ("Field Code"); see Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L.J. 521, 534-37 (1988). In language almost identical to that eventually used in the Hobbs Act, the Field Code provided (at § 613):

> Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.

A cross-reference immediately after this provision referred the reader to the "note to Section 584." Field Code § 613, note, at 220. Section 584 defined larceny and provided, in its own note, that "[f]our of the crimes affecting property, require to be somewhat carefully distinguished; robbery, larceny, extortion and embezzlement. * * * All four include the criminal *acquisition* of *property*." *Id*. § 584 note, at 210 (emphasis added). "In extortion," the commentary explained, "there is again a *taking*." *Ibid*. (emphasis added).

Moreover, the notes to Section 584 provide guidance concerning the meaning of "property" that may be "the subject of larceny." Field Code § 584 note, at 211. Specifically, the commentary cites 22 English, New York, and other American cases reflecting the contemporaneous, quite narrow understanding of "property" in this setting. The cited cases holding that certain items were "property" all involve money, tangible things of value, or notes, bills, or other written documents entitling the holder to money or other tangible property.[13] Moreover, six of

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[13] See *Rex* v. *Martin*, 1 Leach 171 (1777) (wool pulled from the bodies of live

the cited cases (including four decided by New York courts) held that certain items were *not* "property" subject to the crime of larceny.[14] Those cases further confirm the exceedingly narrow understanding of "property" the drafters of the Field Code had in mind. See generally W. BURDICK, THE LAW OF CRIME § 276, at 396 (1946) ("actual receipt of money or some *thing* of value") (emphasis added); 4 W. BLACKSTONE, COMMENTARIES 141 (17th ed. 1830) ("any money or thing of value") (quoted in *Evans*, 504 U.S. at 260 n.4).

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sheep); *Rex* v. *Cheafor*, 2 Den. 361 (1851) (tame pigeons in cage open to air); *Reg.* v. *White*, 6 Cox. 213 (1853) (gas diverted from pipe running into home to avoid utility company meter); *Reg.* v. *Smith*, 7 Cox. 93 (1855) (certificates of shares in foreign railway company entitling the holder to dividends and passed as bank notes); *Reg.* v. *Jones*, 7 Cox. 498 (1858) (copper sundial affixed to wooden pole in churchyard); *Reg.* v. *Morrison*, 8 Cox. 194 (1859) (pawnbroker's duplicate ticket that was a warrant entitling bearer to delivery of the pawned goods); *Ward* v. *People*, 6 Hill 144 (N.Y. 1843) (ice when put away for domestic use); *People* v. *Caryl*, 12 Wend. 547 (N.Y. Sup. 1834) (bank bills of Canadian and Massachusetts banks, if government proved genuineness of bills and existence of banks); *Low* v. *People*, 2 Park. 37 (N.Y. Sup. Ct. 1848) (same); *People* v. *Campbell*, 4 Park. 386 (N.Y. Ct. Gen. Sess.1859) (dog); *Corbett* v. *State*, 31 Ala. 329 (1858) (bank bills); *State* v. *Bond*, 8 Clarke 540 (Iowa 1859) (bank notes); *State* v. *Taylor*, 3 Dutch 117 (N.J. 1858) (oysters); see also *Rex* v. *Headge*, 2 Leach 1033 (1809) (money); *Commonwealth* v. *Rourke*, 10 Cush. 397 (Mass. 1852) (same).

[14] See *Rex* v. *Westbeer*, 1 Leach 12, 13-14 (1739) (parchment writings authorizing the entry on land to ascertain the boundaries of a manor and water levels; reasoning that documents "concerned realty"); *State* v. *Hall*, 5 Harring 492 (Del. Ct. Gen. Sess. 1854) (pipes attached to a building that are severed and carried away in one continuous transaction); *Linnenden's Case*, 1 City. H. Rec. 30 (N.Y. 1842) (bills or notes issued by a city corporation that were not payable in money); *People* v. *Loomis*, 4 Den. 380 (N.Y. Sup. Ct. 1847) (receipt for a supposed repayment of a debt that had not in fact been repaid because it had not been duly executed and delivered and thus was worthless); *Payne* v. *People*, 6 Johns 103 (N.Y. Sup. Ct. 1810) (letter containing information only but of no intrinsic value); *People* v. *Bradley*, 4 Park. 245 (N.Y. Super. Ct. 1858) (simple receipt by a creditor of payment of a debt); *Johnson* v. *People*, 4 Den. 364 (N.Y. Sup. Ct. 1847) (bank bills where there was no evidence submitted by the prosecutor that the notes were genuine and the bank that issued them genuine except for evidence that a broker had accepted them).

2. The New York Penal Laws

a. *The definition of extortion.* The Penal Laws adopted by New York in 1881 and 1909 both defined extortion in exactly the same way as the Field Code. See N.Y. PENAL LAW § 552 (1881) ("Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right."); N.Y. PENAL LAW § 850 (1909) (same). There is no indication that the New York legislature intended these provisions to expand the definition of extortion beyond that contained in the Field Code, and the repetition of the Field Code's language suggests the opposite.

New York's extortion provision did not define "property." Here again, it is reasonable to infer that the New York legislature, in adopting the Field Code, also intended to incorporate its concept of "property." That inference is reinforced by an examination of several other provisions of Article 80 of the 1909 Penal Code; Article 80 contained the definition of extortion (in Section 850) as well as various provisions relating to extortion or other crimes involving threats. *E.g.*, N.Y. PENAL LAW § 851 (1909) (defining "fear" for purposes of extortion and separate crime of "compulsion to execute instrument"); *id*. § 852 (setting forth punishment for extortion); *id*. § 853 (defining crime of compulsion to execute instrument); see App., *infra*, 3a-4a.

Of particular interest are Sections 852 and 853. Section 852 acknowledged the close connection – rooted in the common law[15] – between extortion and robbery. It provided: "A person

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[15] Private (as opposed to official) extortion owes its origins to the common-law crime of robbery, which in turn is an outgrowth of larceny. 2 W. LAFAVE & A. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 8 (1986). Of particular interest here, larceny required a "caption," *i.e.*, the taking (or exercise of physical dominion over) the subject property by the defendant. *Id*. § 8.3, at 346. At common law, robbery was essentially aggravated larceny. See 4 BLACKSTONE at 242-43. It required a showing of every element of larceny as well as that the property was taken (1) from the person or presence of another, and (2) through the use of force or putting the victim in fear. 2 LAFAVE & SCOTT § 8.11, at 437-38. "Fear" was generally understood to encompass fear of immediate bodily injury or death to the victim, his family,

who extorts money or other property from another, under circumstances not amounting to robbery, by means of force or a threat * * *, is punishable by imprisonment not exceeding fifteen years." N.Y. PENAL LAW § 852 (1909). New York courts also recognized that extortion was an extension of the crime of robbery. See *People* v. *Griffin*, 2 Barb. 427 (N.Y. Sup. Gen. Term 1848). Robbery, of course, covered only a narrow range of tangible property – property that could be taken "from the person or in the presence of another." N.Y. PENAL LAW § 2120 (1909); note 15, *supra*.

Also instructive is Section 853, which provided that "[t]he compelling or inducing of another, by such force or threat, to make, subscribe, seal, execute, alter or destroy any valuable security, or instrument or writing affecting or intended to affect any cause of action or defense or any property is an extortion of property *within the last two sections*." N.Y. PENAL LAW § 853 (1909) (emphasis added). The "last two sections" – 851 and 852 – define the type of threats that will give rise to "fear" and, as just explained, set the penalty for extortion. Pointedly, Section 853 does *not* refer to Section 850, which defines extortion as the "obtaining of property from another." Thus, the conduct described in Section 853 was *not* already included within the language of Section 850. In other words, inducing someone to execute or destroy a valuable security is not "obtaining of property from another" within the meaning of Section 850.[16]

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or someone of his acquaintance, as well as fear caused by a threat to destroy the victim's home or accuse the victim of certain crimes. *Id*. at 447-51. Because robbery was a capital offense, courts were reluctant to extend it to other threats. *Id*. at 459. The crime of private extortion was developed in part to fill these gaps.

[16] Section 851 (which was also drawn from the Field Code) defined the kinds of threats that could give rise to a "wrongful use of * * * fear" for purposes of extortion. N.Y. PENAL LAW § 851 (1909) (see App., *infra*, 3a). In several early cases, the New York courts adopted a broad definition of the types of threatened injuries to "person or property" that would give rise to "fear" within the meaning of the extortion statute. See, *e.g.*, *People* v. *Barondess*, 31 N.E. 240, 241-42, 243 (N.Y. 1892) ($100 obtained by threatening manufacturer to prevent striking workers from returning); *People* v. *Warden*,

Finally, we note that the larceny provision of the 1909 Code also set forth a relatively narrow definition of "property," which included "any money, personal property, thing in action, evidence of debt or contract, or article of value of any kind." N.Y. PENAL LAW § 1290(1) (1909).[17] Even that definition, which is broader than the scope of "property" that could be the subject of extortion under the Field Code, does not begin to approach respondents' theories in this case.

b. *The distinct crime of coercion.* Significantly, the New York Penal Code recognized "coercing another person" as a separate (and less serious) crime than the felony of extortion. Section 530 of the Penal Code provided:

> A person who 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 abstain from doing, wrongfully and

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145 A.D. 861 (N.Y. App. Div. 1911) (money obtained from employee by threatening to have employee discharged); *People* v. *Weinseimer*, 117 A.D. 603 (N.Y. App. Div. 1907) (money and promissory notes obtained by threatening to prevent workers from returning to a job); *People* v. *Wilzig*, 4 N.Y. Crim. Rep. 403 (N.Y. County Ct. 1886) ($1000 obtained from restaurant owner by engaging in organized effort to boycott his business, picket in front of it, and inflict direct injury on tangible property). In each of these early cases, however, the "property" that was the subject of the extortionate demand – and thus "obtained from another" – was either money or promissory notes. New York courts recognized the distinction between property "obtained" under Section 850 and threatened injuries to "person or property" under Section 851. See *People* v. *Squillante*, 185 N.Y.S.2d 357, 361 (N.Y. Spec. Term 1959).

[17] Although New York's General Construction Law separately defined the terms "personal property," "real property," and "property," these definitions applied only to "a statute where its general object, or the context of the language construed, or other provisions of law, do not indicate that a different meaning is intended." *In re Bronson*, 150 N.Y. 1, 5 (1896). In *People* v. *Ashworth*, 222 N.Y.S. 24, 28-29 (N.Y. App. Div. 1927), the court in reversing a larceny conviction refused to apply the definition of "personal property" contained in the General Construction law. Moreover, the term "personal property" was also used in the closely related context of New York's robbery statute, which was the model for the definition of robbery in the Hobbs Act. See N.Y. PENAL LAW § 2120 (1909); note 9, *supra*.

> unlawfully,
>
> 1. Uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his property or threatens such violence or injury; or * * *
>
> 3. Uses or attempts the intimidation of such person by threats or force, [i]s guilty of a misdemeanor.

N.Y. PENAL LAW § 530 (1909) (emphasis added) (see App., *infra*, 2a-3a). "Extortion protects property; coercion protects autonomy." Blakey & Roddy, *Reflections on* Reves v. Ernst & Young*: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345, 1657 (1996).

3. The Pre-1946 Case Law Under The New York Statutes Cannot Be Squared With Respondents' Extortion Theories

a. *"Property"* – We have located *no case* decided under New York law prior to the Hobbs Act's enactment where the "property" that was "obtained" by the convicted extortionist was held to be anything other than money or tangible things of value (including bills and notes). And by no means did New York accept the kinds of extravagant "property" theories advanced by respondents and embraced by the court below. For one thing, New York courts did not consider "property" to be synonymous with any valuable "rights." Illustrative is *People* v. *Learman*, 28 N.Y.S.2d 360 (N.Y. App. Div. 1941), where the court reversed an extortion conviction of a police officer who had obtained $80 from the victim based on a threat to cause the victim to lose his driver's license. A driver's license, the court reasoned, is properly categorized as a "privilege" or a "right," not as "property." *Id*. at 365. The court also noted (*ibid*.) that in Section 854 of the Penal Law, which punishes "oppression" by public officials, the legislature punished an act "whereby another person is injured in his person, property, *or rights*." N.Y. PENAL LAW § 854 (1909) (emphasis added). Thus, the court reasoned, the legislature knew how to penalize injuries to rights, but chose not to in enacting Sections 850 and 851. *Learman*, 28

N.Y.S.2d at 365.

Extortion under New York law likewise did not include the mere interference with contractual relations – including that of a business with its employees – of the sort alleged by respondents. For example, in *People* v. *Squillante*, 185 N.Y.S.2d 357, 361 (N.Y. Spec. Term 1959), the court held that a store owner's freedom to contract with vendors of his choice (as opposed to vendors forced on it by a local union) could not be the subject of extortion. See also *People* v. *Weisbard*, 248 N.Y.S. 399, 401 (City Mag. Ct. 1931) (assumption of an obligation under a contract may not be the subject of larceny).[18]

Moreover, at the time the Hobbs Act was passed, New York case law suggested that nontransferable rights did not qualify as "property" within the meaning of the crime of extortion. See *Learman*, 28 N.Y.S.2d 365 ("The fact that an operator's license *is not transferable or assignable* shows that it is not property.") (emphasis added). There is no basis in this record to conclude that the clinics' contractual rights involving their physicians and other employees were transferable or assignable. In fact, it would be highly anomalous if they were. See also CORPORATE COUNSEL'S GUIDE TO EMPLOYMENT CONTRACTS § 1.089 (1999) (employment contracts "almost by definition" involve "unique personal services" and therefore typically "include a provision prohibiting assignment").

As for the "right of the clinics to provide medical services," that too appears to fall outside of the "property" that New York

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[18] Of course, interference with a business's contractual rights vis-à-vis its employees – or its relationship with its customers – is regulated by tort law in New York and other States. See W. KEETON ET AL., PROSSER & KEETON ON TORTS §§ 129-130, at 978-1031 (5th ed. 1984) (describing torts of interference with contractual relations and interference with prospective advantage); see also, *e.g.*, *A.S. Beck Co.* v. *Johnson*, 153 Misc. 363, 365, 370, 274 N.Y.S. 946 (Sup. Ct. 1934) (granting injunction to restrain picketing activities that interfered with customers); *A.L. Reed Co.* v. *Whiteman*, 238 N.Y. 545 (1924) (upholding order enjoining defendants from inducing plaintiff's employees to break their contracts, and from persuading future and current employees not to work for plaintiff).

case law recognized could be the subject of extortion.[19] Illustrative in this connection is *People* v. *Ashworth*, 222 N.Y.S. 24, 28-29 (N.Y. App. Div. 1927), a case involving defendants who had surreptitiously used the spinning facilities of a factory owned by another person to spin wool into yarn. In reversing their convictions for larceny, the New York court explained:

> It is reasonably clear * * * that all intangible personal property is not the subject of larceny, at least under section 1290 of the Penal Law as now worded. For instance, the *right to produce oil* is personal property [under the General Construction Law's definition] * * *. But it seems that it would be impossible to steal such property. * * * Take the case of a franchise. This is an incorporeal hereditament, intangible, invisible * * *. It is not easy to conceive of such a thing being the subject of larceny.

Id. at 28 (emphasis added). The same logic would appear to foreclose respondents' claim.

Finally, there was no basis whatsoever in New York extortion law at the time the Hobbs Act was passed for the notion that a person's right to seek services offered to the public was "property" that could be the subject of extortion. At best, that was a liberty interest or right, not a property interest.[20]

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[19] The respondents have at various points defined this "right" in much broader terms. For example, they argued at the petition stage that petitioners "obtained" the clinics' "right to make business decisions free from outside pressure." Br. in Opp. 17. In other words, the "property" purported to be at issue was not just a right to be a supplier of abortion services, but also the right to make operational decisions. If that is extortion, however, then so is any conduct that trenches on the freedom of a business or facility to operate.

[20] More than two decades *after* the passage of the Hobbs Act, New York courts, construing a new penal code enacted in 1965, *did* expand the definition of "property" that can be obtained in the new crime of "larceny by extortion" to include such intangible property interests as a "milk route which has a pecuniary value" (*People* v. *Wisch*, 296 N.Y.S.2d 882, 886 (N.Y. Sup. Ct. 1969)), the right of a garbage company under an at-will arrangement to provide services to a particular restaurant (*People* v. *Spatarella*, 34 N.Y.2d 157, 161-62 (1974)), and a tenant's non-assignable right to occupy and possess an apartment (*People* v. *Garland*, 69 N.Y.2d 144, 147 (1987)). These

b. *"Obtaining"* – We have likewise located no extortion cases in this time frame where the property "obtained" by the defendant was not the subject of a transfer or acquisition. See also *People* v. *Squillante*, 185 N.Y.S.2d 357, 361 (N.Y. Spec. Term 1959) ("'Obtaining of property from another' imports not only that he give up something, but that the obtainer receive something.").[21] This strongly suggests that New York extortion law in 1946 required a true "obtaining" and recognized only a limited type of property. As the trial court in this case acknowledged, the "concept of obtain separate from property makes very little sense in the context of intangible rights" (Tr. 4328).[22]

In sharp contrast, the New York *coercion* statute was used repeatedly before 1946 to prosecute threats to business interests of the kind asserted by respondents in this case. In *People* v. *Ginsberg*, 262 N.Y. 556 (1933), a coercion conviction was affirmed based on the defendant's threats to injure the victim's property if the victim store owner did not become a member of

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cases, however, obviously cannot inform Congress's intent in 1946 concerning an earlier New York statute. See *Evans* 504 U.S. at 268 n.15.

[21] Other States besides New York adopted extortion statutes that were based on the Field Code. See Kadish, *supra*, 19 RUTGERS L.J. at 537. But in those jurisdictions as well, we have been unable to find any cases before 1946 holding that the extortionate "obtaining" of "property from another" included conduct even remotely resembling that involved in this case. Instead, those cases all involve "property" in a very narrow sense. See, *e.g.*, *People* v. *Robinson*, 20 P.2d 369, 369-70 (Cal. App. 1933); *Wilbur* v. *Blanchard*, 126 P. 1069, 1070 (Idaho 1912); *State* v. *Coleman*, 110 N.W. 5, 6 (Minn. 1906); *State* v. *Prince*, 284 P. 108, 109 (Utah 1930). But cf. *People* v. *Cadman*, 57 Cal. 562, 564 (1881) (dicta) ("[a]ssuming" for purposes of appeal that "the right to prosecute an appeal" is property).

[22] Although the record attributes this statement to the trial judge, this may well be a transcription error (read in context, the statement appears to have been made by respondents' counsel). To the extent that respondents argued that even a temporary interference with the freedom to obtain clinic services was extortion (see page 6, *supra*), that theory also ignored the requirement that a defendant have an intent to permanently acquire the victim's property. See, *e.g.*, *People* v. *Kenny*, 119 N.Y.S. 854, 855 (N.Y. App. Div. 1909) (reversing larceny conviction where defendant temporarily took horse and wagon "to have a little fun").

a local trade association and remove certain signs from his store windows. In *People* v. *Scotti*, 266 N.Y. 480 (1934), and *People* v. *Weil*, 273 N.Y. 653 (1937), defendants were found guilty of coercion for compelling the victim manufacturers, through threats and force, into entering agreements with labor unions. And in *People* v. *Kaplan*, 240 A.D. 72 (N.Y. App. Div. 1934), coercion was established where defendants had used violence and retaliatory activity (expelling victims from a labor union) to compel the victims into dropping certain lawsuits. These cases confirm that the conduct underlying respondents' claims was not punishable as "extortion" under New York law in 1946.

C. The Legislative History Of The Hobbs Act Confirms Congress's Intent To Adhere To The Limitations Adopted Under New York Law And Not To Punish Coercion

Against the backdrop of the Field Code and New York provisions described above, Congress passed the Hobbs Act and, before it, the Federal Anti-Racketeering Act of 1934. As the legislative history of both statutes makes clear, Congress had a narrow objective in mind: to address the specific problem of "rackets" then being used by gangsters and organized crime to extract payments and other "tribute" from businesses. Moreover, in response to concerns voiced by organized labor, Congress narrowed the scope of both the 1934 Act and the Hobbs Act during their consideration, ensuring that the latter would not reach acts of coercion. Indeed, in passing the Hobbs Act, Congress eliminated all traces of coercion from the 1934 Act and replaced it with the more serious crime of *robbery*, while at the same time adopting the traditional definitions of that crime and of *extortion*.

1. The Federal Anti-Racketeering Act of 1934, 48 Stat. 979, ch. 569, included language strikingly similar to that carried forward in the Hobbs Act. See App., *infra*, 1a-2a; *United States* v. *Culbert*, 435 U.S. 371, 375 n.5 (1978). Section 2(b) of the 1934 Act provided that "[a]ny person who, in connection with or in relation to any act in any way or degree affecting trade or commerce or any article or commodity moving or about to

move in trade or commerce – * * * *obtains the property of another*, with his consent, induced by wrongful use of force or fear, or under color of official right * * * shall be guilty of a felony." 48 Stat. 979, ch. 569, § 2(b) (emphasis added). Section 2(a) separately punished anyone who with a similar effect on interstate commerce "[o]btains or attempts to obtain, by use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services." *Id.*§ 2(a). The Act expressly excluded "the payment of wages by a bona-fide employer to a bona-fide employee." *Id.* §§ 2(a), 3(b).

The 1934 Act was passed as part of a flurry of legislative activity immediately following the repeal of prohibition. See Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213, 228-35 (1984). During the summer and fall of 1933, Senator Copeland of New York had "led a subcommittee of the Commerce Committee around the country * * * to hold hearings" (*id*. at 230) on the problems caused by "the activities of predatory criminal gangs of the Kelly and Dillinger types." S. Rep. No. 1440, 73d Cong., 2d Sess. 1 (1934). On January 11, 1934, Senator Copeland introduced 13 bills aimed at combating racketeering and gangsterism. *United States* v. *Local 807*, 315 U.S. 521, 528-29, 531 (1942); S. Rep. No. 1440, at 1.[23] Among these bills was S. 2248, a measure aimed at curbing "'the typical racketeering activities affecting interstate commerce'" (including "'economic *extortion* directed by professional gangsters'"). H.R. Rep. No. 1833, 73d Cong., 2d Sess. 2 (1934) (emphasis added) (quoting letter of Att'y Gen. Cummings).

As passed by the Senate, S. 2248 was much broader than the enacted statute. See 78 CONG. REC. 5734-35 (1934) (reprinting bill). Among other things, S. 2248 included two subsections

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[23] The Copeland subcommittee's working definition of "racketeering" included organized conspiracies to "commit the crimes of *extortion or coercion*, or attempts to commit extortion or coercion, *within the definition of these crimes found in the penal law of the State of New York* and other jurisdictions." S. Rep. No. 1189, 75th Cong., 1st Sess. 3 (1937) (emphasis added).

that expressly covered acts of coercion or attempted coercion. S. 2248, 73d Cong. § 2(3), (4) (1934). It also included a subsection focusing on extortion, which criminalized "extort[ing]" or "attempt[ing] to extort money or other valuable considerations" and imposed a penalty of "imprisonment of 1 to 99 years" as well as "a fine which shall be commensurate with the amount of the unlawful gain." *Id.* § 2(2).

After organized labor objected to that broad language, see 78 CONG. REC. 5859 (1934), the Justice Department worked with labor leaders to produce a much narrower version of the bill, which the House passed. H.R. Rep. No. 1833, 73d Cong., 2d Sess. 2 (1934) (letter of Att'y Gen. Cummings); 78 CONG. REC. 11,482 (1934). The revised version omitted the broad coercion provisions in the earlier bill and recast the extortion provision (§ 2(b)) so that it tracked the language of the Field Code. The only remaining mention of coercion (in § 2(a)) was a reference to compelled "purchase or rental of property or protective services" – acts that, by their nature, involve the payment of money – and compelled "payment of money or other valuable considerations."

2. The decision in *United States* v. *Local 807*, 315 U.S. 521 (1942), was the impetus for passage of the Hobbs Act in 1946. The case involved officials and members of a union in New York City who had conspired to use and had used violence and threats to obtain payments from out-of-state truck drivers who wished to make deliveries (and pick up merchandise for the return trip) within the local's territory. 315 U.S. at 526. In reversing convictions under Sections 2(a) and (b) of the 1934 Act, this Court held that the exception for "wages paid by a bona-fide employer to a bona-fide employee" largely shielded the defendants from liability under Sections 2(a) and (b).

3. "Congressional disapproval of this decision was swift." *United States* v. *Enmons*, 410 U.S. 396, 402 (1973). To overrule *Local 807*, Congress passed the Hobbs Act. *Id.* at 403; *Culbert*, 435 U.S. at 376-77; *United States* v. *Green*, 350 U.S. 415, 419 (1956). Congress reaffirmed its objective of stopping "those persons who have been impeding interstate commerce and

levying tribute from free-born American citizens." H.R. Rep. No. 238, 79th Cong., 1st Sess. 10 (1945) (emphasis added). In its definition of "extortion," the Hobbs Act carried forward the language of Section 2(b) of the 1934 Act without significant change. See *Evans*, 504 U.S. at 262. At the time Congress acted, no court had interpreted Section 2(b) of the 1934 Act as extending beyond extortion as defined in the Field Code.[24]

Tellingly, the Hobbs Act replaced Section 2(a) of the 1934 Act with a provision outlawing interference with interstate commerce by "robbery." Congress was well aware of the New York coercion statute when it first considered amending the 1934 Act. See *Hearings on H.R. 5218, H.R. 6752, H.R. 6872, and H.R. 7067 Before the Subcommittee No. 3 of the House Committee on the Judiciary*, 77th Cong., 2d Sess. 213-14 (1942) (quoting coercion statute). Labor representatives vigorously opposed any reference in the various bills to "coercion" – or to continuation of Section 2(a) of the 1934 Act, which included a very limited reference to coercion – on the ground that this crime was too amorphous and could jeopardize the rights of unions. See *id.* at 126, 154, 158, 227, 233-34. According to Representative Hobbs, these concerns prompted him to redraft the bill to omit Section 2(a) of the 1934 Act and employ instead the traditional crimes of "extortion" and "robbery." 91 CONG. REC. 11,912 (1945) (remarks of Rep. Hobbs); *Culbert*, 435 U.S. at 377.

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[24] In every published opinion between 1934 and 1946 describing the nature of an extortion prosecution under the 1934 Act, the extortionist sought to extract *money* from the victim or victims. See, *e.g.*, *United States* v. *Local 807*, 315 U.S. at 626-27 (payments from truck drivers); *Ladner* v. *United States*, 168 F.2d 771, 773 (5th Cir.) (payments from truck operators), cert. denied, 335 U.S. 827 (1948); *United States* v. *Compagna*, 146 F.2d 524, 525 (2d Cir.) (conspiracy to extort money from producers and exhibitors of motion pictures), cert. denied, 324 U.S. 867 (1945); *United States* v. *Hirsch*, 136 F.2d 976, 977 (2d Cir.) (perjury before grand jury investigating "moneys extorted by racketeers" from motion picture industry), cert. denied, 320 U.S. 759 (1943); *Nick* v. *United States*, 122 F.2d 660, 667 (8th Cir.) (payoffs in exchange for concessions in labor contracts), cert. denied, 314 U.S. 687 (1941); *United States* v. *McGlone*, 19 F. Supp. 285, 286 (E.D. Pa. 1937) (obtaining payment of money).

As this history shows, Congress carefully framed the language of the Hobbs Act to punish extortion but not coercion.[25] Congress's decision to incorporate the traditional definition of extortion, moreover, was intended to eliminate ambiguity and ensure that only very serious criminal acts would be reached. To achieve those ends, Congress employed the terms "robbery or extortion" – words that "have been construed a thousand times by the courts. Everybody knows what they mean." 91 CONG. REC. 11,912 (1945) (remarks of Rep. Hobbs); *id*. at 11,900 (remarks of Rep. Hancock) ("The courts of the States of this county have tried thousands of cases of robbery and extortion. They know what those crimes are."). It also replaced the broader provisions of the 1934 Act with the more serious offense of robbery. The Seventh Circuit's decision is manifestly inconsistent with Congress's intent as reflected in this history.

D. The Seventh Circuit's Broad Definition Of Extortion Should Be Rejected For Other Reasons As Well

Beyond the flaws noted above, the Seventh Circuit's analysis should be rejected because it ignores the rule of lenity, threatens to federalize vast expanses of state criminal law, goes beyond even the broad definitions of "property" recently endorsed by certain federal courts, creates serious ambiguities, and would lead to absurd and undesirable consequences.

1. Even if the Court were to conclude that the language and legislative history of the Hobbs Act do not *compel* the foregoing interpretation of the terms "property" and "obtaining," our view is at least a reasonable one. Under the rule of lenity "ambiguity concerning the ambit of criminal statutes should be resolved in

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[25] Every example of extortion given during the legislative debate on the Hobbs Act involves an "obtaining of property from another" in the sense long used by the New York courts (as described above). See, *e.g.*, 91 CONG. REC. 11,907 (1945) (remarks of Rep. Fellows) (referring to compelled "payment to the[] extortionist] of a day's wage"); 89 CONG. REC. 3194 (1943) (Rep. Fish) ("extorting or attempting to extort fees from helpless farmers"). See also 91 CONG. REC. 11,908 (1945) (Rep. Walters) ("I call the gentleman's attention to the fact that a mere threat does not constitute a crime. There must accompany that threat an unlawful *taking*.") (emphasis added).

favor of lenity." *Rewis* v. *United States*, 401 U.S. 808, 812 (1971) (citing *Bell* v. *United States*, 349 U.S. 81, 83 (1955)). As the Court recognized recently in *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000), "[t]his interpretive guide is especially appropriate" in construing the Hobbs Act, because, like the mail fraud statute at issue in that case, the Hobbs Act "is a predicate offense under RICO." The rule of lenity should be dispositive here.

2. The Seventh Circuit's definition should also be rejected because of its potential to federalize all manner of traditional state offenses – such as trespassing and breach of the peace – into Hobbs Act violations punishable by 20-year sentences. Courts must not be "quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *United States* v. *Bass*, 404 U.S. 336, 349 (1971). There is no reason to permit such a "sweeping expansion of federal criminal jurisdiction." *Cleveland*, 531 U.S. at 24.

3. The Seventh Circuit's conclusion that petitioners "obtained" the "property" of the clinics and their patients is also difficult to reconcile even with some of the extremely broad definitions of those terms that some federal courts have adopted in recent years.[26] For example, even the Second Circuit, which has adopted a sweeping understanding of "property," nonethe-

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[26] The reasons for this judicial departure from the traditional meaning of extortion are not difficult to find. Many of the earliest federal decisions are predicated on a complete failure to distinguish between the concept of "property" that must be "obtained * * * from another" and the much broader notion of the threatened "injuries to person or property" that can give rise to "fear." See note 16, *supra*. See, *e.g.*, *United States* v. *Tropiano*, 418 F.2d 1069, 1075-76 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970). Others rely on cases decided in New York decades after the Hobbs Act was passed. See note 20, *supra*. Finally, in the half-century since the Hobbs Act was enacted, American law and jurisprudence have experienced a remarkable expansion in the concept of property. See, *e.g.*, Reich, *The New Property*, 73 YALE L.J. 733 (1964); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); see also *United States* v. *Bellomo,* 176 F.3d 580, 593 (2d Cir.) (right to democratic participation in a union election is "property"), cert. denied, 528 U.S. 987 (1999).

less limits that concept to valuable rights that are "considered as a source or element of wealth." *Town of West Hartford* v. *Operation Rescue*, 915 F.2d 92, 101-02 (2d Cir. 1990). A woman's right to seek services offered by a clinic plainly is not "a source or element of wealth."[27]

Of course, that fact that these expansive theories of extortion were not developed by the federal courts until more than 30 years after the enactment of the Hobbs Act (and its predecessor provisions in the 1934 Act) is yet another reason to doubt their validity. *Enmons*, 410 U.S. at 410 ("It is unlikely that if Congress indeed wrought such a major expansion of federal criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved."); *McCormick*, 500 U.S. at 277 (Scalia, J., concurring) (noting that "[f]or more than 30 years after enactment" of the Hobbs Act and its predecessor, the 1934 Act, there was "no indication that it applied to the sort of conduct alleged here"); note 24, *supra*.

4. If endorsed by this Court, the Seventh Circuit's view that any "loss to, or interference with the rights of, the victim" constitutes "extortion" as long as some "valuable right" – including presumably any interest in intangible property and most if not all "valuable" liberty interests – is impaired would create serious ambiguities and uncertainties. For example, how is one to discern which interests are excluded under the Seventh Circuit's test? How do courts assess whether intangible property or liberty interests are "valuable"? Does the interference with a money-losing business (or the operation of a non-profit facility) result in the loss of valuable "property"?

Equally problematic, the lower court's approach unaccept-

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[27] It is not clear that the clinics' right to offer services – whether on a for-profit or not-for-profit basis – would qualify as "property" even under the broader reach of the mail fraud statute. See, *e.g.*, *United States* v. *Henry*, 29 F.3d 112, 114-16 (3d Cir. 1994) (banks' right to fair opportunity to bid for potential deposits is not "property"); *Lancaster Community Hosp.* v. *Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405-06 (9th Cir. 1991) (hospital's attempt to take away market share of a competitor does not involve any taking of "property").

ably blurs the line between extortion, which requires the obtaining of property with the owner's "consent," and robbery, which requires the taking of personal property "against the will" of the victim. See 01-1118 Pet. 23 n.13. This case is a good example. When is the voluntary shutdown of a clinic the product of induced consent and when is it accomplished against the facility's will? If the shutdown is consensual, when does the consent occur (so that the crime of extortion is complete)? Any definition of "obtaining" the "property" of another that gives rise to such serious uncertainties should be rejected out of hand. See *McNally*, 483 U.S. at 360 (federal criminal statute should not be construed to "leave[] its outer boundaries ambiguous").

5. If the lower courts' interpretation were correct, RICO actions based on predicate Hobbs Act offenses could be pursued against social protesters of all stripes, including those demonstrating for civil rights, environmental causes, or animal rights – a point respondents conceded in closing argument. Tr. 4963 (RICO "enterprise" could consist of "an animal rights group that bars entry to a restaurant that serves veal"). In addition, the scope of official extortion would expand to cover all manner of official conduct. And virtually any act of coercion having a negative effect on an interest or right that is said to be "valuable" would violate the Hobbs Act – and be actionable under RICO if there are two or more such acts comprising a pattern within a ten-year period. As explained above, Congress deliberately omitted any mention of coercion when it passed the Hobbs Act in 1946. Moreover, Congress could have made coercion a predicate crime under RICO, but it chose not to do so. See *United States* v. *Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 793 F. Supp. 1114, 1132 (E.D.N.Y. 1992).[28]

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[28] There are at least four additional reasons to doubt that Congress intended the Hobbs Act to be used in conjunction with RICO against political protesters. First, as the legislative history of RICO makes clear, an early version of the statute was narrowed in response to concerns expressed by the Justice Department and ACLU that it was too broad and might be applied to anti-war protesters. Note, *Protesters, Extortion and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 696-97

II. RICO DOES NOT AUTHORIZE PRIVATE PLAINTIFFS TO SEEK INJUNCTIVE RELIEF

RICO was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified at 18 U.S.C. §§ 1961-1968). In addition to its criminal proscriptions, RICO includes a civil remedies provision, 18 U.S.C. § 1964, which authorizes the Attorney General (*id.* § 1964(b)) to initiate civil proceedings to remedy RICO violations. Section 1964(c) also authorizes any "person" who is "injured in his business or property" to bring suit and recover "threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c).[29]

In the more than 30 years since RICO was enacted, nearly every court to opine on the issue has concluded that Section 1964(c) does not (or at least expressed serious doubt that it does) authorize private parties to go beyond the remedies specified by Congress and obtain *injunctive* relief. See 01-1119 Pet. 11 &. nn.16-18 (collecting cases). In the decision below, the Seventh Circuit became the first appellate court to hold that private injunctions are available. The court's reasons for breaking with 30 years of precedent, however, do not withstand analysis.

(1999). Second, as explained below, RICO was modeled after the antitrust laws, which do not reach political protest activities (including boycotts by individuals who are not seeking an economic advantage). See *FTC* v. *Superior Court Trial Lawyers' Ass'n*, 493 U.S.411, 426-27 (1990). Third, it is difficult to see why Congress in 1994 would have enacted the Freedom of Access to Clinic Entrances Act (FACE Act), 18 U.S.C. § 248, if it believed that RICO, combined with the Hobbs Act, *already* reached the physical obstruction of access to abortion clinics. And fourth, RICO's severe criminal penalties and forfeiture provisions, and its quasi-punitive provision for treble damages, make its application to political protesters singularly inappropriate. 18 U.S.C. § 1963(a); *Alexander* v. *United States*, 509 U.S. 544 (1993).

[29] For the sake of simplicity we use the terms "private party" and "person" interchangeably throughout this brief. There is, however, some uncertainty about whether some governmental units are "persons" that may sue and be sued under civil RICO. See U.S. DEP'T OF JUSTICE, RACKETEER INFLUENCED & CORRUPT ORGANIZATIONS: A MANUAL FOR FEDERAL PROSECUTORS 36-37 & n.39 (2000) ("*DoJ RICO Manual*").

A. The Language And Structure Of 18 U.S.C. § 1964 Demonstrate That Private Plaintiffs Are Not Entitled To Injunctive Relief

1. Section 1964(c) allows private parties who are injured to bring suit for treble damages, costs, and attorney's fees. As this Court has "repeatedly observed," "Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws." *Holmes* v. *SIPC*, 503 U.S. 258, 267 (1992) (citing cases). "[E]ven a cursory comparison * * * reveals that the civil action provision of RICO was patterned after [Section 4 of] the Clayton Act," *Agency Holding Corp.* v. *Malley-Duff & Assocs.*, 483 U.S. 143, 150-51 (1987), which, in turn, was "borrowed from Section 7 of the Sherman Act," *Holmes*, 503 U.S. at 267.

Section 1964(c) provides, in relevant part:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor * * * and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee * * *.

At the time RICO was adopted in 1970, Section 4 of the Clayton Act provided, in relevant part (Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15(a)) (see App., *infra*, 6a)):

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

At the time the Clayton Act was adopted in 1914, Section 7 of the Sherman Act provided, in relevant part (Law of July 2, 1890, ch. 647, § 7, 26 Stat. 209, 210 (repealed 1955) (see App., *infra*, 5a-6a)):

> Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor * * * and shall recover threefold the damages by

him sustained, and the costs of suit, including a reasonable attorney's fee.

In *Paine Lumber Co.* v. *Neal*, 244 U.S. 459 (1917), and *Minnesota* v. *Northern Securities Co.*, 194 U.S. 48 (1904), this Court held that Section 7 of the Sherman Act did not allow parties other than the federal government to seek injunctive relief. Congress's intent "was to limit direct proceedings in equity to prevent and restrain such violations of the anti-trust act as cause injury to the general public, or to all alike, * * * to those instituted in the name of the United States." *Northern Securities*, 194 U.S. at 71. "[A] private person cannot maintain a suit for an injunction under § 4 of the [Sherman Act]." *Paine Lumber*, 244 U.S. at 471; see also *United States* v. *Cooper Corp.*, 312 U.S. 600, 608 & n.9 (1941) (Sherman Act "envisaged two classes of actions[] – those made available only to the Government, which are first provided in detail, and, in addition, a right of action for treble damages granted to redress private injury").

A *different* provision of the Clayton Act – not the model for Section 1964(c) or any other provision of RICO – expressly authorizes private injunctive relief. Section 16 of the Clayton Act provides, in relevant part, "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief * * * against threatened loss or damage by a violation of the antitrust laws * * *." Clayton Act, ch. 323, § 16, 38 Stat. 730, 737 (1914) (codified at 15 U.S.C. § 26) (see App., *infra*, 6a-7a). "[T]he sole purpose of § 16 * * * was to extend to private parties the right to sue for injunctive relief." *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 634 n.5 (1977) (plurality); *California* v. *American Stores Co.*, 495 U.S. 271, 287 (1990).

This Court credits the "Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4." *Holmes*, 503 U.S. at 268. Congress "used the same words," so "we can only assume it intended them to have the same meaning that courts had already given them." *Ibid.*; see also *Associated Gen. Contractors of California, Inc.* v. *California State Council of Carpenters*,

459 U.S. 519, 534 (1983) ("When Congress enacted § 4 of the Clayton Act * * * it adopted the language of § 7 [of the Sherman Act] and presumably also the judicial gloss * * *."). Thus, the language of Section 1964(c) must be understood as having the same meaning as the virtually identical language of Section 7 of the Sherman Act and Section 4 of the Clayton Act.

This Court has repeatedly relied on Congress's decision to model Section 1964(c) after these antitrust precursors in determining the meaning of RICO's civil enforcement scheme. See *Holmes,* 503 U.S. at 267 (Section 1964(c) includes a proximate causation requirement because federal courts had read a similar requirement into the precursor provisions of the Sherman and Clayton Acts); *Agency Holding*, 483 U.S. at 150-156 (Clayton Act's 4-year statute of limitations applies to suits brought under Section 1964(c)); *Rotella* v. *Wood*, 528 U.S. 549, 559 (2000) (RICO's "civil enforcement scheme parallel to the Clayton Act regime" incorporates antitrust accrual precedent); *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 188-191 (1997).

The reasons to rely on the antitrust models are especially strong in this case. This case does not involve filling in an indispensable concept left out of civil RICO (such as the statute of limitations) with a principle taken from Section 4 of the Clayton Act. Instead, it involves the meaning of *statutory language* – creating a private right of action for treble damages and specifying the available remedies – that is *virtually identical* in Section 1964(c) and its antitrust predecessor provisions.

In "reject[ing] this line of analysis," the Seventh Circuit gave two utterly implausible reasons. 01-1118 Pet. App. 13a. First, the panel stated that "the mere fact that the Clayton Act spreads it remedial provisions over a number of different sections of the U.S. Code and RICO does not, adds little to our understanding of either statute." *Ibid.* But Congress did not carve up language in one statute and reallocate it to different places in another; one statute (the Clayton Act) has entirely *different* language not included *anywhere* in RICO.

Second, the court of appeals reasoned that this Court has

"regularly treat[ed] the remedial sections of RICO and the Clayton Act identically, regardless of superficial differences in language." 01-1118 Pet. App. 13a (citing *Klehr* and *Holmes*). But the inclusion of the express authorization of private injunctive relief in Section 16 of the Clayton Act, contrasted with its omission from RICO, is hardly a "superficial difference[] in language." And the remedial provisions of RICO that *Klehr* and *Holmes* "treated * * * identically" are Section 1964(c) of RICO and Section 4 of the Clayton Act. That any wording difference in *those* two provisions is "superficial" proves our point.

2. The Seventh Circuit purported to find evidence to support its reading in the remainder of Section 1964 – and in particular in Sections 1964(a) and (b). That was error.

Sections 1964(a) and (b) provide:

> (a) The district courts of the United States shall have *jurisdiction* to *prevent and restrain* violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person * * * ; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General *may institute proceedings under this section*. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

18 U.S.C. § 1964(a), (b) (emphasis added).

The notion that Congress's inclusion of Sections 1964(a) and (b) reflects an intent to expand the meaning of Section 1964(c) beyond its antitrust-law precursors runs up against an insurmountable problem: both the Sherman Act and the Clayton Act *also* included provisions (1) granting equitable jurisdiction to the district courts to "prevent and restrain" violations and (2) authorizing the United States to "institute proceedings"

under those statutes. Law of July 2, 1890, ch. 647, § 4, 26 Stat. 209 (current version at 15 U.S.C. § 4); Clayton Act, ch. 323, § 15, 38 Stat. 730, 736-37 (1914) (current version at 15 U.S.C. § 25); see App., *infra*, 5a-6a. In the Clayton Act, Congress saw fit to add a separate provision – Section 16 – which expressly grants private parties the right to seek injunctive relief. Clayton Act, § 16, 38 Stat. 737 (App., *infra*, 6a-7a). RICO, by contrast, contains no such provision. Sections 1964(a) and (b) accordingly reflect no intent to authorize private injunctive relief.

Even apart from this historical context, which the Seventh Circuit ignored, the language of Sections 1964(a) and (b) does not support the result below. Although Section 1964(a) provides that district courts "shall have jurisdiction to" order a variety of equitable remedies, it does not state who is entitled to invoke that jurisdiction. Section 1964(b) broadly authorizes the Attorney General to "institute proceedings" under Section 1964. According to the Seventh Circuit, the Attorney General's authority to seek permanent injunctive relief "comes from the combination of the grant of a right of action to the Attorney General in § 1964(b) and the grant of district court authority to enter injunctions in § 1964(a)." 01-1118 Pet. App. 8a.[30]

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[30] The Attorney General's unrestricted right to "institute proceedings under this section" necessarily carries with it the right to seek all available equitable remedies that federal courts have jurisdiction to grant pursuant to Section 1964(a). Indeed, the reference to "proceedings" in Section 1964(b) is almost certainly an abbreviation for "proceedings in equity," the term used in the precursor provisions of the Sherman and Clayton Acts after which Section 1964(b) was modeled. See Law of July 2, 1890, ch. 647, § 4, 26 Stat. 209 (current version at 15 U.S.C. § 4); Clayton Act, ch. 323, § 15, 38 Stat. 730, 736-37 (1914) (current version at 15 U.S.C. § 25). The "prevent and restrain" language of Section 1964(a) similarly reveals a focus on proceedings in equity (as opposed to the "suit[s]" for "damages" authorized under Section 1964(c)). See also *Organized Crime Control: House Hearings on S. 30 Before the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 520 (1970) (statement of Rep. Steiger) (describing Section 1964(c) as "similar to the private damage remedy found in the anti-trust laws" and explaining that "those who have been wronged by organized crime should at least be given access to a *legal* remedy") (emphasis added).

The Seventh Circuit concluded "that private parties can also seek injunctions under the combination of grants in §§ 1964(a) and (c)," 01-1118 Pet. App. 8a, but that analysis overlooks key evidence in the statutory text (as well as the historical evidence set forth above). In contrast to Section 1964(b)'s broad authorization allowing the Attorney General to "institute proceedings under this section" and therefore to invoke the injunctive relief district courts are empowered to issue in such proceedings by virtue of Section 1964(a), Section 1964(c) provides a far more circumscribed right of action. It permits any person who has been "injured in his business or property" as a consequence of "a violation of section 1962 of this chapter" to "sue *therefor*" and specifies that in such a lawsuit the plaintiff "shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." In contrast to Section 1964(b), Section 1964(c) can – and should – be read as an exhaustive list of the remedies available to a "person" authorized to sue for past injuries to "business or property."

The Seventh Circuit was therefore quite wrong to suggest that the first sentences of Sections 1964(b) and (c) are "equivalent" (01-1118 Pet. App. 8a) – a conclusion that the court could reach only by excising the language in Section 1964(c) specifying the remedies provided by Congress. See 01-1118 Pet. App. 8a (stating that Section 1964(c), selectively edited in this way, does not "address[] what remedy the plaintiff may seek"). Where, as here, Congress did not allow private parties to "institute proceedings under this section," but rather only to sue for treble damages and other specified relief, the inference is inescapable that Congress did not intend to allow private parties to invoke the equitable jurisdiction conferred by Section 1964(a). See also pages 45-47, *infra* (describing repeated, unsuccessful proposals to add language to Section 1964 authorizing private parties to "institute proceedings under subsection (a)").[31]

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[31] Equally questionable is the Seventh Circuit's conclusion that Section 1964(a) is not "purely 'jurisdictional'" in nature. 01- 1118 Pet. App. 8a. That

The legislative history of RICO further demonstrates the error of the Seventh Circuit's view that Section 1964(c) must, "by parity of reasoning" (01-1118 Pet. App. 8a), be regarded as bearing the same relationship to Section 1964(a) as does Section 1964(b). That analysis again overlooks the antitrust models on which Section 1964 was based. Both the Sherman Act and the Clayton Act combined in a single provision the predecessor language on which Sections 1964(a) and (b) were modeled. See Law of July 2, 1890, ch. 647, § 4, 26 Stat. 209 (current version at 15 U.S.C. § 4); Clayton Act, ch. 323, § 15, 38 Stat. 730, 736-37 (1914) (current version at 15 U.S.C. § 25). And both included as an entirely separate provision the model for Section 1964(c). This common origin suggests a special relationship between subsections (a) and (b) not shared by subsection (c).

Furthermore, as this Court has acknowledged, the Senate version of the bill that became RICO allowed the Attorney General to seek injunctive relief in civil cases, but did not provide any cause of action for private parties. *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 486 (1985). The private treble-damages provision was later added by the House Judiciary Committee and approved by the House. *Id.* at 487-88. In the final version of RICO, the Senate provisions became Sections 1964(a), (b), and (d), *id.* at 486-87, while the House provision became Section 1964(c), *id.* at 487-88. As that history makes clear, Section 1964(c) was a limited, private remedy engrafted onto a preexisting remedial scheme. See *Kaushal* v. *State Bank of India*, 556 F. Supp. 576, 583 (N.D. Ill. 1983); see also *In re Fredeman Litigation*, 843 F.2d 821, 829 (5th Cir. 1988). As such, it necessarily bears a different relationship to Section

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conclusion is difficult, if not impossible, to reconcile with the text of Section 1964(a), which does nothing more than vest the federal district courts with certain "jurisdiction." See also *Tafflin* v. *Levitt*, 493 U.S. 455, 460 (1990) (describing Section 1964(c) as an independent "grant of federal jurisdiction"). Nor does this Court's decision in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), support the Seventh Circuit's analysis. As we explained in our petition for certiorari (at 13-14), *Steel Co.* is far afield from this case.

1964(a) than does Section 1964(b).[32]

3. Even read in a vacuum, Section 1964(c) would not support the Seventh Circuit's reading. In recent years, this Court has repeatedly emphasized that "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001); see also *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979); *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). Given that Congress explicitly granted private parties the right to seek treble damages, costs, and attorney's fees, granting additional rights would be manifestly inappropriate.

B. Other Evidence In The Legislative History Confirms Congress's Intent Not To Allow Private Parties To Seek Injunctive Relief

In interpreting RICO, this Court has repeatedly looked to

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[32] The Seventh Circuit's reliance on RICO's liberal construction clause and the "underlying purpose" of the statute (01-1118 Pet. App. 10a-11a) was misplaced. As this Court has stated, the liberal construction clause "is not an invitation" to depart from Congress's intent as "gleaned from the statute through the normal means of interpretation." *Reves* v. *Ernst & Young*, 507 U.S. 170, 183-84 (1993); see also *Fredeman Litig.*, 843 F.2d at 830 (liberal construction clause "neither compels nor authorizes" court to "disregard convincing evidence from the legislative history that Congress believed it had not approved private injunctive remedies and balked at so doing"). Nor does RICO's "underlying purpose" trump the clear evidence in the text, structure, and legislative history of the statute that Congress did not intend to authorize private injunctive relief. In any event, Congress's purpose in enacting Section 1964(c) was both to "remedy economic injury" and to "bring to bear the pressure of 'private attorneys general' on a serious national problem." *Agency Holding*, 483 U.S. at 151. As this Court has pointed out, "the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages." *Ibid.*; see also *Rotella* v. *Wood*, 528 U.S. 549, 557-58 (2000) ("The object of civil RICO is * * * not merely to compensate victims but to turn them into prosecutors * * *. The provision for treble damages is accordingly justified by the expected benefit of suppressing racketeering activity * * *."). Moreover, as the Court recently stated, "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Great-West Life & Annuity Ins.* v. *Knudson*, 122 S. Ct. 708, 718 (2002) (quotation omitted).

legislative history for guidance. See, *e.g.*, *Rotella*, 528 U.S. at 557; *Reves* v. *Ernst & Young*, 507 U.S. 170, 179-83 (1993); *Holmes*, 503 U.S. at 267; *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 238-39 (1989). RICO's legislative history further demonstrates that Congress did not intend to authorize private parties to seek injunctive relief.

1. Both the Senate and House entertained – but did not adopt – proposals that would have expressly given private parties the right to seek injunctive relief. In the Senate, S.1623, a predecessor to RICO, included "a private civil cause of action * * * providing explicitly for injunctive relief as well as for treble damages." *Sedima S.P.R.L.*, v. *Imrex Co.*, 741 F.2d 482, 488 n.18 (2d Cir. 1984), rev'd on other grounds, 473 U.S. 479 (1985); see S.1623, §§ 3(c), 4(a), 91st Cong., 1st Sess. (1969); 115 CONG. REC. 6995-96 (1969). So, too, did an earlier Senate bill. See S. 2049, §§ 4(c), 5(a), 90th Cong., 1st Sess. (1967); see also *Sedima*, 473 U.S. at 486-87. "The Senate Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary replaced S.1623 with S.1861," which did not provide a private civil cause of action. *Sedima*, 741 F.2d at 488 n.18. The bill as passed by the Senate, S. 30, also lacked a private civil cause of action. *Sedima*, 473 U.S. at 486-87.

In the House, competing bills were also introduced. See, *e.g.*, H.R. 19215, 91st Cong., 2d Sess. (1970); H.R. 19586, 91st Cong., 2d Sess. (1970). Like the early Senate bills that never made it into law (S. 1623 and S. 2049), H.R. 19215 included separate subsections authorizing private parties to recover, respectively, treble damages and injunctive relief. In contrast, H.R. 19586 included a provision authorizing only treble damages. "The language of RICO as enacted into law is identical to the language of H.R. 19586." Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts – Criminal and Civil Remedies*, 53 TEMPLE L.Q. 1009, 1020 n.63 (1980) ("*Basic Concepts*").

Moreover, during the hearings conducted by the House subcommittee to consider S. 30 and other measures, Representative Steiger made a proposal that the committee add to S. 30

not only a private treble-damages provision but also a separate provision authorizing private injunctive relief. *Organized Crime Control: House Hearings on S. 30 Before the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 520-21 (1970). The latter would have provided:

> *Any person may institute proceedings under subsection (a) of this section*. In any action brought by any person under subsection (a) of this section, relief shall be granted in conformity with the principles which govern the granting of *injunctive relief* from threatened loss or damage in other cases. Upon * * * a showing of immediate danger or irreparable loss or damage, a preliminary injunction may be issued * * *.

Ibid. (emphasis added); see also 116 CONG. REC. 35,346 (1970). As reported out of the Judiciary Committee, however, the bill did not include this provision. See *Sedima*, 741 F.2d at 489 n.20 (noting that subcommittee had "rejected this language and explicitly created only the private action for treble damages which was eventually enacted as § 1964(c)").

Representative Steiger was not content to leave it at that. On October 6, 1970, on the floor of the House he proposed an amendment to the bill that would have added the provision quoted in the preceding paragraph (as well as other provisions, including one drawn from the Clayton Act, as amended, that would have authorized the United States to sue for actual damages). 116 CONG. REC. 35,227-28 (1970). Representative Steiger pointed out that he had urged the subcommittee to "add * * * the additional civil remedies now provided by law for antitrust cases," which "include treble damages actions by private citizens who have been harmed in their business or property, suits for equitable relief for private citizens threatened with such injury, and actions by the United States for actual damages to its business or property." *Id.* at 35,227. He criticized the reported bill on the ground that it "does not do the whole job. It makes the mistake of merely authorizing [treble-damage] suits * * * without granting to the courts the full extent of remedial authority contained in the comparable antitrust laws." *Ibid.*

He continued, "the Judiciary Committee version * * * *fails to provide* * * * important substantive remedies included in the Clayton Act: * * * *equitable relief in suits brought by private citizens*." *Id.* at 35,228 (emphasis added).

During floor debate the next day, Representative Steiger again proposed but later withdrew his amendment to the bill. 116 CONG. REC. 35,346-47 (1970). In urging withdrawal, Representative Poff pointed out that the amendment "offer[ed] an additional civil remedy"; noted that "prudence would dictate that the Judiciary Committee very carefully explore the potential consequences that this new remedy might have in all the ramifications which this legislation contains"; and suggested that withdrawal would permit the new remedies to be "properly * * * considered by the Judiciary Committee when Congress reconvenes following the elections." *Id*. at 35,346. In agreeing to this course of action, Representative Steiger stated: "I would like to make it very clear that this is worthy of separate legislation when we do return in the fall or next year." *Id*. at 35,347.

2. The following year, Senators McClellan and Hruska (who introduced the bill that eventually became RICO, see *Agency Holding*, 483 U.S. at 155) introduced S.16, the Civil Remedies for Victims of Racketeering Activity and Theft Act of 1972, which included a proposed amendment to Section 1964. See 118 CONG. REC. 29,369-70 (1972) (statement of Sen. McClellan). The bill would have added to Section 1964 a provision authorizing private injunctive relief that was virtually identical to the amendment offered by Representative Steiger. Compare *id*. at 29,368 with 116 CONG. REC. 35,346 (1970). As this Court has previously recognized, "the purpose of the bill was to broaden even further the remedies available under RICO" by "permit[ing] private actions for injunctive relief" and other remedies. *Agency Holding*, 483 U.S. at 155 (citing 118 CONG. REC. 29,368 (1972)). There is ample other evidence in the legislative record confirming this conclusion. See *Religious Tech. Center* v. *Wollersheim*, 796 F.2d 1076, 1086 (9th Cir. 1986), cert. denied, 479 U.S. 1103 (1987); OR Br. 17-18 n.16. The Senate passed the bill unanimously, *Basic Concepts* at 1020

n.67 (citing 118 CONG. REC. 29,379 (1972)), but the House did not act on the bill. *Ibid.* RICO, therefore, was never amended.[33]

Thus, there is abundant evidence in RICO's legislative history that Congress intended *not* to authorize private injunctive relief. As the Ninth Circuit correctly observed in *Wollersheim*, "Congress was repeatedly presented with the opportunity *expressly* to include a provision permitting private plaintiffs to secure injunctive relief," and, "[o]n each occasion, Congress *rejected* the addition of any such provision." 796 F.2d at 1086 (emphasis added). The Seventh Circuit's refusal to credit this evidence was erroneous.

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987); see also *Chickasaw Nation* v. *United States*, 122 S. Ct. 528, 534 (2001) (courts "ordinarily will not assume that Congress intended to enact statutory language that it has earlier discarded in favor of other language") (quotations omitted); *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983). In ignoring that principle, the Seventh Circuit erred.

C. Allowing Private Parties To Seek Injunctive Relief Under Section 1964(a) Would Vastly Expand The Scope Of Civil RICO

In the Seventh Circuit's view, "Congress intended the general remedies explicitly granted in § 1964(a)" – including but *not* limited to injunctions – "to be available to all plaintiffs." 01-1118 Pet. App. 10a. That conclusion would arm private litigants with far-reaching and novel equitable remedies. Without good evidence that Congress intended to bring about that extraordinary result, this Court should hesitate to approve it.

Section 1964(a) vests the district courts with broad jurisdiction to "issu[e] appropriate orders, including, but not limited to:

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[33] Under respondents' view, the Senate's vote to pass S. 16 was a futile act. Notably, a similar measure was again introduced in 1973. OR Br. 18 n.16.

ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person * * *; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons." 18 U.S.C. § 1964(a). As the text makes clear, the examples given are merely illustrative.

In civil RICO actions brought by the United States, the federal courts have granted a broad range of equitable remedies to prevent racketeering activity and eliminate corruption from labor unions and other entities. See *DoJ RICO Manual*, at 283-97 (describing case law). Consistent with the language of Section 1964(a), courts have ordered the divestiture of interests held in a racketeering enterprise. *Id.* at 285-86 & n.10 (citing cases). They have also routinely ordered disgorgement in government suits. See *DoJ RICO Manual*, at 286-87 & n.12 (collecting cases).[34] And they have prohibited defendants, at the request of the government, from pursuing their livelihood in certain geographic areas, associating with co-defendants for commercial purposes, or participating in union activities. See, *e.g.*, *United States* v. *Carson*, 52 F.3d 1173, 1184-85 (2d Cir. 1995).

Moreover, the federal courts have at the government's request "frequently appointed officers, also referred to as monitors or trustees, to supervise the activities of the [RICO] enterprise." *DoJ RICO Manual*, at 284. Such monitors and officers have exercised "broad powers, including * * * (1) conduct[ing] the legitimate business of the enterprise; (2) review[ing] and approv[ing] hiring, certain contracts and financial expenditures; (3) impos[ing] and implement[ing] ethical practice codes * * *; (4) investigat[ing], prosecut[ing], and adjudicat[ing] in civil proceedings allegations of violations of the ethical practice codes and other rules; (5) impos[ing] * * * fines, disciplin[ing] or remov[ing] from the enterprise * * * individuals found guilty

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[34] Disgorgement can involve devastatingly large sums of money. See, *e.g.*, *United States* v. *Philip Morris Inc.*, 116 F. Supp. 2d 131, 134-35, 150-52 (D.D.C. 2000) (seeking "billions of dollars" from eleven entities).

of such violations; and (6) implement[ing] various reforms in the enterprise, including election reform for corrupt union enterprises." *Id.* at 284-85.

What is more, Section 1964(a) expressly authorizes the government to seek corporate *dissolution*. In *California* v. *American Stores Co.*, 495 U.S. 271 (1990), this Court held that Congress's broad authorization under Section 16 of the Clayton Act allowing private parties to "have injunctive relief" included the remedy of divestiture. At the same time, however, the Court distinguished the more drastic or "grave" remedy of corporate dissolution in the sense of an order "terminat[ing] the corporate existence." *Id*. at 292-93; *id*. at 289 (likening dissolution to a "judgment * * * of corporate death") (internal quotations omitted). As the Court noted in *American Stores*, there are strong reasons to believe that private plaintiffs are *not* entitled to the remedy of dissolution under Section 16 of the Clayton Act. *Id*. at 290-94 (citing *Graves* v. *Cambria Steel Co.*, 298 F. 761 (N.Y. 1924) (Hand, J.)). If so, then it is difficult to fathom why Congress would have authorized such a drastic remedy for private parties in Section 1964(a) of RICO. In fact, Congress's express provision of the dissolution remedy in Section 1964(a) goes far toward confirming that private parties are not entitled to invoke the equitable jurisdiction conferred by that subsection.[35]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[35]Unlike federal prosecutors, private plaintiffs are not responsible for acting in the public interest or ultimately accountable to the electorate. See *Northern Securities*, 194 U.S.at 71 (exclusive government authority to seek permanent injunctive relief under Sherman Act ensures that this extraordinary remedy will be deployed "according to some uniform plan, operative throughout the entire country"). In the hands of private plaintiffs, the far-reaching equitable remedies available under RICO (including corporate dissolution) could have a devastating effect on individual, business, and organizational defendants.

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APPENDIX

The Hobbs Act, 18 U.S.C. § 1951, provides in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or 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.
>
> (b) As used in this section –
>
> > (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
> >
> > (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

The Federal Anti-Racketeering Act of 1934, 48 Stat. 979, ch. 569, provided in pertinent part:

> § 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce –
>
> (a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the pay-

ment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages of a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

The Proposed Model Penal Code of the State of New York (1865), provided in pertinent part:

§ 613. "Extortion" defined. Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.

The New York Penal Law of 1909 provided in pertinent part:

§ 530. Coercing another person a misdemeanor

A person who 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 abstain from doing, wrongfully and unlawfully,

1. Uses violence or inflicts injury upon such other person or his family, or a member thereof, or upon his

property or threatens such violence or injury; or,

2. Deprives any such person of any tool, implement or clothing or hinders him in the use thereof; or,

3. Uses or attempts the intimidation of such person by threats or force,

Is guilty of a misdemeanor.

* * * * *

§ 850. Extortion defined.

Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.

§ 851. What threats may constitute extortion.

Fear, such as will constitute extortion, may be induced by a threat:

1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his or to any member of his family; or

2. To accuse him, or any relative of his or any member of his family, of any crime; or

3. To expose, or impute to him, or any of them, any deformity or disgrace; or

4. To expose any secret affecting him or any of them.

§ 852. Punishment of extortion.

A person who extorts any money or other property from another, under circumstances not amounting to robbery, by means of force or a threat mentioned in the last two sections, is punishable by imprisonment not exceeding fifteen years.

§ 853. Compulsion to execute instrument.

> The compelling or inducing of another, by such force or threat, to make, subscribe, seal, execute, alter or destroy any valuable security, or instrument or writing affecting or intended to affect any cause of action or defense or any property is an extortion of property within the last two sections.

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964, provides in relevant part:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
>
> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to

establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

The Sherman Act of 1890 (Law of July 2, 1890, ch. 647, 26 Stat. 209), provided in pertinent part:

§ 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. [current version at 15 U.S.C. § 4]

* * * * *

§ 7. Any person who shall be injured in his business or property by any other person or corporation by reason of

anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee. [repealed 1955]

The Clayton Act of 1914 (ch. 323, 38 Stat. 730), provides in pertinent part:

> § 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [current version at 15 U.S.C. § 15(a)]
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> § 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. * * * [current version at 15 U.S.C. § 25]

§ 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue * * * . [current version at 15 U.S.C. § 26]