No.

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

THOMAS BREJCHA
DEBORAH FISCHER
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

D. COLETTE WILSON
104 E. Buckthorn Street
Inglewood, CA 90301
(310) 672-3104

ALAN UNTEREINER*
ARNON D. SIEGEL
KATHRYN S. ZECCA
SHERRI LYNN WOLSON
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c).

2. 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 the 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.

3. Whether, in this civil RICO action based on the nationwide conduct of thousands of abortion protesters over a 15-year period, the jury's determination of liability and award of treble damages – and the procedures and instructions used by the trial court to channel the jury's decisionmaking – satisfied the exacting standards for the protection of First Amendment rights mandated by *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982).

RULE 14.1(b) AND 29.6 STATEMENT

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

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

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on October 2, 2001, and rehearing was denied on October 29 (App., *infra*, 1a, 142a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech." Pertinent provisions of the Hobbs Act, 18 U.S.C. § 1951, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq*., are set forth at App., *infra*, 144a-145a.

STATEMENT

This important case, involving the controversial use of civil RICO against individuals and organizations engaged in vigorous protests against abortion clinics, returns to this Court after eight years of proceedings in the lower courts. Following this Court's reversal of the dismissal of respondents' complaint, 510 U.S. 249 (1994), the case was remanded and, in the spring of 1998, tried before a jury over seven weeks. As the case now returns to this Court, the jury has found petitioners civilly liable as racketeers for various (but unidentified) acts of "extortion" – defined by the jury instructions in exceedingly broad terms – occurring over more than a decade and involving the acts of unidentified protesters. The district court entered a final judgment against petitioners, including an award of treble damages and a nationwide injunction, and the Seventh Circuit affirmed.

In its current posture, this case squarely presents three issues of surpassing importance on which the lower courts are in disarray. To resolve those conflicts, review should be granted.

1. Petitioners Joseph Scheidler, Andrew Scholberg, and Timothy Murphy are individuals who oppose abortion on moral and religious grounds. Petitioner Pro-Life Action League, Inc. (PLAL) is a nonprofit Illinois corporation. Respondents the National Organization for Women, Inc. (NOW), Delaware Women's Health Organization, Inc. (DWHO), and Summit Women's Health Organization, Inc. (Summit) are a national nonprofit organization that supports the legal availability of abortion and two affiliated clinics that perform abortions.

In 1986, respondents initiated this lawsuit in the United States District Court for the Northern District of Illinois against petitioners and various other individuals and entities.[1] 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 the unlawful activities of petitioners (represented by NOW). 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, and state law.

In their RICO claims, respondents alleged that petitioners and Operation Rescue had formed a loose association-in-fact of individuals and groups known as the Pro-Life Action Network (PLAN), united by a common ideological purpose of opposing abortion. They further alleged that PLAN was a RICO "enterprise" and that petitioners, by engaging in protests aimed at closing abortion clinics, had directly or indirectly participated in the conduct of PLAN's activities through a "pattern" of

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[1] Except for Operation Rescue, all of the other individuals and entities ceased to be defendants before trial. Operation Rescue, which was a party to the judgment in the district court and to the appeal in the Seventh Circuit, is filing a separate petition for a writ of certiorari (hereafter cited as "OR Pet.").

"racketeering activity" (18 U.S.C. § 1962(c)) that included acts of "extortion" in violation of the Hobbs Act, 18 U.S.C. § 1951. Specifically, respondents accused petitioners of having "wrongful[ly] use[d] * * * actual or threatened force, violence, or fear," *id.* § 1951(b)(2), to "obtain[]" their "property," by inducing doctors and clinic employees to leave their jobs and by discouraging and obstructing patients from obtaining abortions. Respondents also alleged a conspiracy under 18 U.S.C. § 1962(d). They requested treble damages, costs, attorney's fees, and (under the antitrust laws but not under RICO) an injunction.

In 1991, the district court dismissed the complaint for failure to state a valid claim, 765 F. Supp. 937, and the Seventh Circuit affirmed, 968 F.2d 612 (1992). In upholding the dismissal of the antitrust claims, the Seventh Circuit reasoned that the Sherman Act "was not intended to reach the activities of organizations espousing social causes." *Id*. at 618. The Seventh Circuit upheld the dismissal of the claims under Sections 1962(c) and 1962(d) on the ground that RICO does not apply to defendants who commit "non-economic crimes * * * in furtherance of non-economic motives." *Id.* at 629.[2]

This Court granted certiorari on the "economic motive" issue, 508 U.S. 971 (1993), and reversed, holding that RICO does not require proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose, 510 U.S. 249, 256 (1994). Despite considerable debate in the briefs and at oral argument over whether petitioners wrongfully "obtained" any "property" in violation of the Hobbs Act, see, *e.g.*, No. 92-780 Br. for Resp. Randall Terry *et al.*, 1993 WL 459719, at *28-45; No. 92-780 Oral Arg. Tr., 1993 WL 757635, at *14-15, *21-24, *25-32 (Dec. 8, 1993), this Court did not reach that issue. 510 U.S. at 253 n.2, 262. In a concurring opinion, Justice Souter, joined by Justice Kennedy,

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[2] On other grounds, the Seventh Circuit upheld the dismissal of respondents' separate RICO claims under 18 U.S.C. § 1962(a), see 968 F.2d at 623-24, which were based on the theory that voluntary donations made to petitioners by their political supporters was "income derived, directly or indirectly, from a pattern of racketeering activity." 765 F. Supp. at 941.

noted the risk that "a RICO action against a protest group" could "deter protected advocacy" and "caution[ed] courts applying RICO to bear in mind the First Amendment interests that could be at stake." *Id.* at 265.

2. Following remand to the trial court, respondents filed a third amended complaint. For the first time, respondents (now lacking antitrust claims) requested injunctive relief under RICO. In 1995, the trial court dismissed the claims against certain defendants, but not the remaining RICO claims under Sections 1962(c) and Section 1962(d) against petitioners. App., *infra*, 107a. It also rejected the argument that petitioners could not be found liable for extortion under the Hobbs Act because, among other things, they had not "obtained" any "property" of respondents. The court also held that respondents, as private parties, could obtain injunctive relief in a treble-damages action brought under RICO, 18 U.S.C. §1964(c). App., *infra*, 87a-90a.

Several years later, after the district court formally certified the two classes described above (172 F.R.D. 351, 363 (1997)), certain defendants – not including petitioners – moved for summary judgment. The court granted the motion in part, observing that this lawsuit was "paradigmatic of RICO's seemingly unlimited applicability." 1997 WL 610782, at *1 (N.D. Ill. 1997). Among other things, the district 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, kidnapping, and arson. *Id*. at *18-19.

3. The case was tried from March 4 to April 20, 1998. Evidence was presented concerning numerous incidents spanning the nationwide conduct of abortion protesters over a 15-year period. App., *infra*, 4a ("hundreds of acts"). 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.[3] Because the judge had rejected petitioners' request that the jury be required to specify the predicate acts it found (Tr. 4495-98), the verdict form did not identify the racketeering acts that were the basis for liability. Based on evidence presented by respondents of certain increased security costs, the jury awarded $31,455.64 to DWHO in damages and $54,471.28 to Summit; pursuant to RICO, the damages were trebled.

From June 30 to July 2, 1998, the district court conducted a hearing on respondents' request for injunctive relief. On July 28, 1999, the court denied post-trial motions and entered a broad nationwide injunction regulating petitioners' future protest activities at abortion clinics. App., *infra*, 109a-141a. The court reiterated its view that injunctive relief was available to private parties under RICO. *Id*. at 131a-132a.

4. The Seventh Circuit affirmed. App., *infra*, 1a-31a. Three aspects of that decision are of particular relevance here. *First*, the court held that injunctive relief is available to a private litigant suing under RICO. *Id*. at 6a-14a. In reaching that conclusion, the Seventh Circuit openly disagreed with the Ninth Circuit. *Second*, the court rejected petitioners' arguments that they could not have violated the Hobbs Act because, among other things, they had not "obtained" any "property" of the clinics or their customers, much less done so with their "consent." *Id*. at 28a-29a. Relying on Seventh Circuit precedent, the court ruled that the clinics' "intangible property * * * right to conduct a business" was "'property' under the Hobbs Act" and "[a] loss

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[3] 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 acts of conspiracy 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, as well as the special verdict form, are reprinted at App., *infra*, 146a-163a.

to, or interference with the rights of, the victim is all that is required." *Id*. at 29a (internal quotations omitted). *Third*, the Seventh Circuit rejected petitioners' argument that the jury's imposition of liability and treble-damages award, and the procedures and jury instructions used to ensure that the judgment was not based on petitioners' constitutionally protected exercise of their rights of free association and speech, failed to adhere to the stringent requirements mandated by *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982). App., *infra*, 14a-22a.

REASONS FOR GRANTING THE PETITION

This case involves the application of both the Hobbs Act, which severely punishes acts of robbery and extortion affecting interstate commerce, and the federal racketeering laws, to social and political protesters whose demonstrations, sit-ins, and speech interfered with the operation of clinics. As this case returns to the Court, it squarely presents three issues that satisfy the traditional criteria for this Court's review – because they are important, recurring, and have divided the lower courts. It presents the question whether injunctive relief is available in a private civil action for treble-damages brought under RICO. It raises important questions concerning the scope of the crime of extortion under the Hobbs Act. And finally, it presents the question whether the liability judgment and damages award in this sprawling RICO case – and the procedures used to channel the jury's decisionmaking – comported with the First Amendment.

I. This Court Should Resolve The Conflict Over Whether Injunctive Relief Is Available In A Private RICO Action

In holding that RICO authorizes private plaintiffs who are suing for treble damages to seek injunctive relief as well, the Seventh Circuit expressly disagreed with the Ninth Circuit's decision in *Religious Technology Ctr.* v. *Wollersheim*, 796 F.2d 1076 (1986), cert. denied, 479 U.S. 1103 (1987). In so doing, the Seventh Circuit became the first federal appellate court to uphold the availability of injunctive relief in this setting. Although the panel (like the district court) attempted to mask the extent of its departure from settled law by suggesting that "other courts of appeals * * * have addressed the point in *dicta*

and are split" (App., *infra*, 6a; see also *id*. at 88a-90a, 131a-132a), in fact every other circuit that has discussed the issue has agreed with the Ninth Circuit. To bring the Seventh Circuit into line with the other circuits and with the vast majority of district courts to address the issue, review should be granted.

A. *The Conflict in the Circuits*. 1. In *Wollersheim*, the Ninth Circuit, based on an exhaustive analysis of the text, structure and legislative history of RICO, "h[e]ld that injunctive relief is not available to a private plaintiff in a civil RICO action." 796 F.2d at 1077. The Ninth Circuit began its analysis by canvassing the relevant case law and then carefully examining the text and structure of Section 1964. *Id*. at 1081-84; see also App., *infra*, 144a-145a (setting forth relevant text of Section 1964). The Ninth Circuit's textual analysis focused on part (c), which "states that a private plaintiff may recover treble damages, costs and attorney's fees. In contrast to part (b), there is no express authority to *private plaintiffs* to seek the equitable relief available under part (a)." 796 F.2d at 1082. The "inclusion of a single statutory reference to private plaintiffs, and the identification of a damages and fees remedy for such plaintiffs in part (c)," the Ninth Circuit reasoned, "logically carries the negative implication that *no other remedy* was intended to be conferred on private plaintiffs." *Id.* at 1083. It noted that while alternate readings of the statutory text are "plausible," the "legislative history mandates us to hold that injunctive relief is not available to a private party in a civil RICO action." *Id.* at 1084.

The Ninth Circuit conducted an extensive review of the legislative history, focusing on the rejection of various amendments. 796 F.2d at 1084-86. Thus, the court explained, "the House rejected an amendment, described as 'an additional civil remedy,' which would expressly permit private parties to sue for injunctive relief under section 1964(a)." *Id.* at 1085. Moreover, "in the very next year after RICO's enactment, Congress refused to enact a bill to amend section 1964 and give private plaintiffs injunctive relief." *Id.*

The Ninth Circuit found further support for its conclusion in the provision that served as a model for Section 1964(c) of

RICO: Section 4 of the Clayton Act, 15 U.S.C. § 15(a). As the Ninth Circuit explained, Section 4 does not authorize injunctions; private antitrust plaintiffs can "secure injunctive relief only by virtue of a separate section of the Clayton Act" – Section 16, codified at 15 U.S.C. § 26 – "which expressly provides for private equitable actions." 796 F.2d at 1087. RICO, however, "contains no parallel provision." *Id.* The court also relied on this Court's cases "sharply limit[ing] the implication of causes of action or remedies not expressly provided by statute," especially where, as here, "a statute provides an elaborate enforcement scheme." *Id*. at 1087-88 (internal quotations omitted).

2. The Seventh Circuit sharply disagreed with the Ninth Circuit's conclusion and reasoning in *Wollersheim*. App., *infra*, 6a-14a. The Seventh Circuit criticized the Ninth Circuit's analysis of the text and internal structure of Section 1964 as unreasonable, explaining that contrary to the Ninth Circuit's supposed assumption, Section 1964(a) "is not purely jurisdictional, but also describes remedies available under RICO." *Id*. at 9a. "Given that the government's authority to seek injunctions 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)," the Seventh Circuit explained, "we see no reason not to conclude, by parity of reasoning, that private parties can also seek injunctions under the combination of grants in §§ 1964(a) and (c)." *Id*. at 8a. The Seventh Circuit also offered a detailed critique of the Ninth Circuit's analysis. See pages 10-14, *infra*.

3. As the Seventh Circuit recognized (App., *infra*, 6a), the Second, Fourth, Fifth, and Sixth Circuits have all expressed serious doubts about the availability of injunctions in this setting – including in cases predating *Wollersheim*. See *Trane Co.* v. *O'Connor Sec.*, 718 F.2d 26, 28 (2d Cir. 1983) (noting "serious doubt" expressed by other courts and stating, "We have the same doubts"); *Dan River, Inc.* v. *Icahn*, 701 F.2d 278, 290 (4th Cir. 1983) ("substantial doubt"); *Bolin* v. *Sears, Roebuck & Co.*, 231 F.3d 970, 977 n.42 (5th Cir. 2000) ("considerable doubt"); *Wheeling-Pittsburgh Steel Corp.* v. *Mitsui & Co.*, 221 F.3d 924,

927 n.2 (6th Cir. 2000) (agreeing in *dicta* that private litigants may not obtain injunctions). See OR Pet. 11-12 & nn.17-18.

The Fifth Circuit, moreover, has squarely addressed the narrower but related question whether RICO authorizes *preliminary* injunctive relief for a private plaintiff, and held that such relief is not available. *In re Fredeman Litig.*, 843 F.2d 821, 828 (1988). The Fifth Circuit explained that "while § 1964(b) expressly permits the government to seek equitable relief, § 1964(c), which concerns private plaintiffs, contains no such explicit grant." *Id.* at 829. Describing "the analysis contained in the *Wollersheim* opinion" as "persuasive" (*id*. at 830), the Fifth Circuit agreed with various rationales specifically rejected by the Seventh Circuit in this case. See *id*. at 829-30.

Although the Seventh Circuit indicated that other circuits have endorsed its position in *dicta* (App., *infra*, 6a), that is untrue. The Eighth Circuit did not agree in *Bennett* v. *Berg*, 710 F.2d 1361, 1364 n.5 (en banc), cert. denied, 464 U.S. 1008 (1983), but rather expressly reserved the issue. One judge, writing separately, stated that he would uphold the availability of injunctive relief. *Id*. at 1365-66 (McMillian, J., concurring in part and dissenting in part). But Judge McMillian's discussion of this issue, which predated and thus did not have the benefit of *Wollersheim*, consisted of nothing but a long quotation from a law review article. Equally incorrect was the panel's suggestion (App., *infra*, 6a) that the First Circuit, in *Lincoln House, Inc.* v. *Dupre*, 903 F.2d 845 (1990), agreed that injunctive relief is available. The First Circuit did no such thing. See *id*. at 848. Moreover, the vast majority of district courts have agreed with *Wollersheim*. See OR Pet. 11 & n.17 (collecting cases).

4. The Court should intervene now to resolve the square conflict between the Seventh and Ninth Circuits and bring uniformity to this important area of federal law. Federal law should not allow private parties to obtain injunctive relief in private RICO actions brought in the federal courts in Illinois, Indiana, and Wisconsin but not in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington. Moreover, respondents in this case

have secured a nationwide injunction that is effective even in the Ninth Circuit, where (under *Wollersheim*) federal law does not authorize injunctive relief.

Nor is there any realistic possibility that the conflict will disappear. *Wollersheim* was decided fifteen years ago, and the Ninth Circuit has consistently applied its holding in subsequent cases. See, *e.g.*, *Oregon Laborers-Employers Health & Welfare Trust Fund* v. *Philip Morris Inc.*, 185 F.3d 957, 967-68 (9th Cir. 1999), cert. denied, 528 U.S. 1075 (2000); *Imagineering, Inc.* v. *Kiewit Pac. Co.*, 976 F.2d 1303, 1307 (9th Cir. 1992), cert. denied, 507 U.S. 1004 (1993). As explained above, the analysis or result of *Wollersheim* has been endorsed by many courts. And in this case, decided by a unanimous panel, the Seventh Circuit denied a request for en banc rehearing without a single active judge requesting a vote, despite the panel's open disagreement with the Ninth Circuit. App., *infra*, 150a-151a.

B. *The Issue Is Important and Recurring*. Whether private plaintiffs may seek injunctive relief under RICO is an important question of federal law. As the many cases cited above demonstrate, this issue has arisen with frequency in the federal courts. See also OR Pet. 11-12 & nn.16-19. Moreover, it also arises in the state courts, which have concurrent jurisdiction over civil RICO actions. *Tafflin* v. *Levitt*, 493 U.S. 455 (1990); *e.g.*, *Nakash* v. *Superior Ct.*, 241 Cal. Rptr. 578, 584-85 (Cal. App. 1987). Because elements of a RICO claim have been interpreted broadly, this is a substantial category of litigation. In recent years, this Court has repeatedly granted review to resolve conflicts over the interpretation of RICO. The Court's extensive activity confirms not only RICO's ambiguity but also the national importance of questions arising under the statute.

C. *The Decision Below Is Wrong*. Contrary to the Seventh Circuit's conclusion, *Wollersheim* is correct. The language and structure of Section 1964, together with RICO's legislative history, amply demonstrate that Congress never intended to give private plaintiffs the right to obtain injunctive relief.

In concluding otherwise, the Seventh Circuit made a number of mistakes. *First*, it discounted *Wollersheim* on the ground

that the "decision apparently misreads § 1964(b) when it states that § 1964(b) explicitly 'permits *the government* to bring actions for equitable relief.'" App., *infra*, 8a (quoting 796 F.2d at 1082). "Section 1964(b) does allow the government to seek equitable relief," the Seventh Circuit explained, "but it specifically mentions only *interim* remedies." *Id*. The suggestion that the Ninth Circuit somehow missed this distinction, and thought that Section 1964(b) authorized *permanent* injunctive relief, is baseless: elsewhere in its opinion, the Ninth Circuit stated that "part (b) grants the Attorney General the express power to seek *temporary* equitable relief." 796 F.2d at 1083. The Seventh Circuit's criticism is pure makeweight.

Second, the Seventh Circuit was wrong to suggest that "Supreme Court decisions since the 1986 *Wollersheim* opinion" demonstrate that "the approach of the Ninth Circuit" – and in particular its reliance upon legislative history – "no longer conforms to the Court's present jurisprudence." App., *infra*, 6a. Whatever skepticism individual Members of this Court may have expressed about the excessive reliance on legislative history in other statutory settings, the Court has repeatedly looked to legislative history for guidance in interpreting RICO. See, *e.g*., *Cedric Kushner Promotions, Ltd.* v. *King*, 121 S. Ct. 2087, 2092 (2001) (unanimous); *Rotella* v. *Wood*, 528 U.S. 549, 557 (2000) (same); *Reves* v. *Ernst & Young*, 507 U.S. 170, 179-83 (1993); *Holmes* v. *SIPC*, 503 U.S. 258, 267 (1992). In *NOW* v. *Scheidler*, this Court did not refuse on methodological grounds to look beyond RICO's text; it merely concluded that there was nothing in the legislative history – which, notably, "[b]oth parties rel[ied] on" – that would override statutory language that was "unambiguous." 510 U.S. at 261.

Third, the Seventh Circuit ignored the fact that not all "legislative history" is created equal. In particular, it gave short shrift to the legislative history – which this Court has "repeatedly" taken account of – showing that "Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act." *Holmes*, 503 U.S. at 267 (case citations omitted); see also *Agency Holding Corp.* v. *Malley-*

Duff & Assocs., 483 U.S. 143, 150-51 (1987) ("Even a cursory comparison * * * reveals that the civil action provision of RICO was patterned after the Clayton Act."). This Court has also recognized that "Congress enacted § 4" using "language borrowed from § 7 of the Sherman Act." *Holmes*, 503 U.S. at 267. The language of the three provisions is virtually identical.

At the time RICO was enacted, this Court's decisions had clearly established that Section 4 of the Clayton Act does not allow private parties to seek injunctive relief. *Paine Lumber Co.* v. *Neal*, 244 U.S. 459, 471 (1917); see also *Minnesota* v. *Northern Sec. Co.*, 194 U.S. 48, 70-71 (1904) (same for Section 7 of Sherman Act). Moreover, one may

> fairly credit the 91st 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. It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.

Holmes, 503 U.S. at 268 (citations omitted). In *Holmes*, the Court held that Section 1964(c), like the antitrust provisions it was modeled after, requires a showing of proximate causation. That logic applies with equal force here.[4]

Fourth, the Seventh Circuit ignored the fact that the "private treble-damages remedy" contained in Section 1964(c) was in fact added to a bill, S. 30, whose "civil remedies * * * were limited to injunctive actions by the United States and became §§ 1964(a), (b), and (d)." *Sedima, S.P.R.L* v. *Imrex Co.*, 473 U.S. 479, 486-87 (1985). Because Section 1964(c) was "a branch

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[4] The Seventh Circuit sought to avoid this compelling evidence of Congress's intent by pointing to *another* provision of the Clayton Act, Section 16, which has no equivalent in RICO and expressly provides that "any person * * * shall be entitled to sue for and have injunctive relief." 15 U.S.C. § 26. In the Seventh Circuit's view, it was required by this Court's decisions "treat[ing] the remedial sections of RICO and the Clayton Act identically, regardless of *superficial* differences in language" (App., *infra*, 13a (emphasis added)), to read Section 1964(c) as if it represented some combination of Sections 4 and 16 of the Clayton Act. That logic is virtually self-refuting.

grafted onto the already completed trunk of the statute" (*Fredeman*, 843 F.2d at 829), it was quite wrong for the Seventh Circuit to analyze it as if it were designed to be part of a carefully drafted and integrated whole (Section 1964). In fact, Section 1964(c) is properly understood as a limited, private remedy added to a preexisting remedial scheme. See *Kaushal* v. *State Bank of India*, 556 F. Supp. 576, 583 (N.D. Ill 1983).

The statutory text strongly confirms the different origins and functions of Sections 1964(c) and 1964(b). Compare 18 U.S.C. § 1964(b) ("The Attorney General may *institute proceedings under this section*.") (emphasis added) with *id*. § 1964(c) ("Any person *injured* in his business or property by reason of a violation of section 1962 * * * may sue *therefor* * * * and shall recover *threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee*") (emphasis added). Section 1964(b)'s subsequent mention of interim relief is plainly a description of *supplemental* remedies available to the government, whereas it is possible to read Section 1964(c) as a complete listing of all relief available to private parties.

Fifth, the Seventh Circuit was wrong to suggest (albeit tentatively) that *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83 (1998), undermines "any rationale * * * that the courts of appeals *may* have followed in earlier years" (App., *infra*, 9a (emphasis added)). That case is far afield. It involved the citizen-suit provision of the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046(a)(1), which authorized civil penalties and injunctive relief. The statute also contained a provision stating that district courts "shall have jurisdiction in actions brought under subsection [11046(a)]." 42 U.S.C. § 11046(c). In *Steel Co.*, this Court rejected the argument that because Section 11046(c) referred to "jurisdiction," it followed that "all of the elements of a cause of action under [Section 11046(a)(1)]" implicated the court's subject-matter jurisdiction. 523 U.S. at 90. That holding has no relevance to *Wollersheim*, which may explain why respondents failed even to cite it in their brief in the Seventh Circuit. Nor has the Ninth

Circuit relied on an assumption that Section 1964(a) is "purely 'jurisdictional'" (App., *infra*, 8a-9a) in disallowing injunctive relief. Instead, the Ninth Circuit in *Wollersheim* relied principally on the statutory text and the compelling evidence in the legislative history described above. See pages 7-8, *supra*.

Finally, the Seventh Circuit made no attempt to address the reasons why Congress likely intended to vest the authority to seek injunctive relief under RICO exclusively in the hands of the federal government. See *Northern Sec. Co.*, 194 U.S. at 71 (noting that similar provision of Sherman Act "secur[ed] the enforcement of the act, so far as direct proceedings in equity are concerned, according to some uniform plan" and shielded business defendants from vexatious lawsuits). Nor did the Seventh Circuit take account of the fact that if private litigants may secure injunctions under RICO, they would also be entitled to secure other forms of equitable relief – including equitable recission of contracts, disgorgement of profits, appointment of a receiver, issuance of writs of attachment, and even dissolution of a corporate defendant – that have the potential to cause substantial mischief to business and non-business defendants alike.[5]

II. This Court Should Resolve The Conflicts Over The Meaning Of Extortion Under The Hobbs Act

The Hobbs Act makes it a crime to "obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce [] by robbery or extortion * * *." 18 U.S.C. § 1951(a). It defines "extortion" as "the *obtaining* of *property* from another, with [the owner's] consent," where such consent is "induced by the *wrongful* use of actual or threatened *force, violence, or fear* or under color of official right." *Id.* § 1951(b)(2) (emphasis added). A single violation of the Hobbs Act carries a punishment of up to 20 years, a fine, or both.

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[5] The Seventh Circuit made other mistakes as well. For example, it ignored other evidence in the legislative record showing that Congress did not intend to authorize injunctions for private plaintiffs (see OR Pet. 16-19 & n.22), and it disregarded this Court's cases establishing that courts must be reluctant to read additional remedies into statutes that feature elaborate and well-defined enforcement schemes (see page 12-13, *supra*). See also OR Pet.14 n.21.

Petitioners were found to have committed 21 violations of the Hobbs Act as predicate offenses under RICO. This was possible, however, only because the trial court used an unduly expansive definition of the elements of Hobbs Act extortion. Over petitioners' objections, the jury was instructed that "[t]he term property right means *anything of value*, including *a woman's right to seek medical services from a clinic*, the right of doctors, nurses, or other clinic staff to perform their jobs, and the right of the clinics to provide medical services." Tr. 4945 (emphasis added). In closing argument, respondents' counsel emphasized to the jury that "[p]roperty rights include a woman's right to choose." Tr. 4987. The trial court did not define the term "obtain"; instead, it instructed the jury that class members must have "*give[n] up* a property right," and that "[i]t does not matter whether or not the extortion provided an economic benefit to [defendants]." *Id*. (emphasis added).[6]

On appeal, petitioners challenged the jury's instructions and findings under the Hobbs Act on various grounds. The court made short work of these objections, dismissing them as part of "a hodgepodge" of challenges, "none of which need detain us long." App., *infra*, 25a. "Property," the Seventh Circuit reasoned, easily encompasses "intangible" economic or liberty interests such as those involved here. *Id*. at 29a. As for "obtaining," the court explained that "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." *Id.* (internal quotations omitted).

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[6] The jury was instructed that "fear" could include "not only fear of physical violence but fear of *wrongful economic injury*." Tr. 4945 (emphasis added); see also *id*. ("Exploitation of the victim's reasonable fear constitutes extortion regardless of whether or not the defendant was responsible for creating that fear and despite the absence of any direct threats."). Among other things, respondents argued to the jury that abortion protesters' use of sit-ins to obstruct access to clinics constituted "force" – and the concern engendered in the clinics about the economic effects of such sit-ins constituted "fear" – within the meaning of the Hobbs Act. See Tr. 5005-08, 5037.

The Seventh Circuit's interpretation of the Hobbs Act conflicts with the decisions of other circuits and this Court. It also represents an unwarranted departure from the common-law meaning of extortion. If left uncorrected, it will no doubt contribute to the growing tendency to use civil RICO – predicated on broad Hobbs Act claims – against all manner of protesters, a development that raises serious First Amendment concerns.

A. *The Conflicts in the Lower Courts*. 1. Although the Hobbs Act explicitly states that "extortion" means the "*obtaining* of property from another" (see 18 U.S.C. § 1951(b)(2) (emphasis added)), the Seventh Circuit held that neither petitioners nor anyone else needs to actually receive any property from the victims. Accord *United States* v. *Arena*, 180 F.3d 380, 394 (2d Cir. 1999), cert. denied, 531 U.S. 811 (2000).

The Ninth Circuit recently reached the opposite conclusion in *United States* v. *Panaro*, 266 F.3d 939 (2001). In that case, the organized crime defendants were convicted, among other things, of Hobbs Act extortion for their involvement in forcing a business associate to give up his interests in an auto shop and a loansharking business. *Id*. at 947. On appeal, defendants argued that the evidence was insufficient to sustain their convictions. *Id*. In rejecting that argument, the Ninth Circuit explicitly addressed the "obtaining" element:

> The four conspirators sought not only to put [the associate] out of business, but actually to *get his business for themselves*. That is important with regard to the "obtaining" element of the Hobbs Act.

Id. (emphasis added). "[U]nder the Hobbs Act," the court explained, "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." *Id*. at 947-48 (emphases added); accord *United States* v. *Nedley*, 255 F.2d 350, 352-53, 355, 357 (3d Cir. 1958) (no "taking or obtaining" under related Hobbs Act provision prohibiting robbery where defendants used physi-

cal force and violence to interfere with an owner's dominion and control over his truck and delay its movement).[7]

If this case had been brought in the Ninth Circuit, petitioners would not have been found to have violated the Hobbs Act. As a result of their actions, neither petitioners nor anyone else received respondents' "property" (*i.e.*, their interests in seeking or providing abortions or other services). Indeed, even assuming that those interests qualified as "property," they were not susceptible to being "obtained" (as opposed to being destroyed or diminished). All that the jury could have found – and all the jury was required to find under the flawed instructions given in this case – was that respondents were "forced to part" with those rights. This is plainly insufficient under *Panaro*. The Court should intervene now to resolve the conflict between the Seventh and Ninth Circuits.

2. The Seventh Circuit also concluded that "property" included "the class women's rights to seek medical services from the clinics." App., *infra*, 29a. By expanding the term "property" to encompass the right to seek clinic services, the lower court placed itself into conflict with the Second Circuit.[8]

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[7] *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. *Id*.; accord *Panaro*, 266 F.3d at 947-48.

[8] Although at common law the crime of extortion covered the taking of "money" or any other "*thing* of value" by a public official, see *Evans* v. *United States*, 504 U.S. 255, 279 (1992) (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting) (internal quotations omitted; emphasis added), courts have consistently ruled that the Hobbs Act's reference to "property" extends beyond tangible items to intangible forms of property. It does not follow, however, that every economic interest constitutes "property" (see note 13, *infra*), much less that social or political rights and liberty interests are included within that term. Certain intangible property interests are incapable of being "obtained" (as opposed to impaired or destroyed).

In the Second Circuit, "property" must be economic. In *Town of West Hartford* v. *Operation Rescue*, 915 F.2d 92 (2d Cir. 1990), the town brought a RICO action against protesters, alleging extortion under the Hobbs Act as a predicate offense. The town claimed that the protesters had attempted to extort a "softened police response" to future protests and a reduction or abandonment of the criminal charges against arrested protesters, and had caused the town to incur overtime police expenses. The court first noted that "'property' under the [Hobbs] Act includes, in a broad sense, any valuable right *considered as a source or element of wealth*, including a right to solicit business." *Id*. at 101 (internal quotations omitted; emphasis added). Using this definition, the Second Circuit reasoned, the town's claimed interests – including its interest in avoiding higher costs of operation – could not be considered "property." *Id*. at 102. Indeed, the court sharply criticized the town's theory as "blatantly implausible" and falling outside "any coherent meaning" of the language used in the Hobbs Act. *Id*. at 101-02; see also *G.I. Holdings, Inc.* v. *Baron & Budd*, 2001 WL 1598340, at *22 (S.D.N.Y. Dec. 1, 2001) (right of business to petition government for economic legislation not "property" under Hobbs Act).

A woman's right to seek services offered by a clinic is not "a source or element of wealth," and, therefore, would not be "property" in the Second Circuit (though the clinics' and doctors' rights to conduct their business might satisfy the Second Circuit's test). Moreover, the same result would obtain in the First Circuit, for a related reason: lack of standing under Section 1964(c) of RICO. See *Libertad* v. *Welch*, 53 F.3d 428, 436-37 (1st Cir. 1995) (patient "deterred from entering the clinic for her appointment" lacked standing because she had not "suffered any injury to business or property"). Thus, the Seventh Circuit's definition of "property" is broader than in other circuits. Had this case been brought in the First or Second Circuit, the extortion claims of NOW and the class of women it represents would have failed for failure to allege a loss of "property" within the

meaning of 18 U.S.C. §§ 1951(b)(2) and 1964(c).[9]

3. The Seventh Circuit's analysis is also in considerable tension with this Court's decisions. For example, 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 violence, force, or fear" (18 U.S.C. § 1951(b)(2) (emphasis added)), 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 interference with its business operations during the strike, in any way amounted to the "obtaining" (as opposed to the *destruction*) of "property." Indeed, if the latter had been true, the result would have been different in *Enmons*, because the Court there reasoned that "the obtaining of property" is "wrongful" within the meaning of the Hobbs Act only where "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 and damage to its facilities. The defendants had no lawful claim to *that* property. Accordingly, if "the obtaining of property" means what the Seventh Circuit says it means, the convictions would have been upheld in *Enmons*, and

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[9] As explained above (at 5), the damages awarded to Summit and DWHO were *not* for lost profits but rather for *increased security costs* they incurred as a consequence of protest activity. Compare *Town of West Hartford*, 915 F.2d at 102 (incurring "overtime police expense[s] as a result of" protests "does not provide a colorable basis to claim a Hobbs Act violation").

the Hobbs Act would regulate a wide array of strike activity.[10]

The Seventh Circuit's sweeping definition of "property" is also difficult 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" that can be "obtain[ed]" 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." 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.

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

Because the Hobbs Act is so often used, an expansion of its scope has wide-ranging implications. When this case was previ-

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[10] In the lower courts, petitioners objected to the broad instruction on "fear" (see note 6, *supra*) and 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. See *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270, 274 (1993); *Town of West Hartford*, 915 F.2d at 106 (Kearse, J., dissenting) (expressing "serious doubts" that the defendants' "allegedly extortionate actions," including "resisting arrest" and "threatening to renew their demonstrations," constitute the "wrongful use of actual or threatened force, violence, or fear" under the Hobbs Act). Although it rejected the latter argument, the trial court acknowledged that petitioners' "ends" were "constitutionally protected." App., *infra*, 145a. The Seventh Circuit simply ignored these arguments.

ously before this Court, Justice Scalia asked counsel whether it was sufficient under the Hobbs Act to "intimidat[e]" the victim "into not doing something," or whether, instead, it must be proven that the defendant "g[o]t money or property" from the victim. No. 92-780 Oral Arg. Tr., 1993 WL 757635, at *13; *id.* at *21-22. The "combination" of a "broad interpretation of extortion" and RICO, he observed (*id.* at *23-24), creates

> a situation where any * * * national organization which has adherents and hangers-on who may commit a tort, hitting someone with a picket sign or trespassing upon property, by committing an unlawful act can be charged with committing extortion even though they're not trying to get money. * * * [I]f it were applied to the NAACP in the days of civil rights activism, it would have been very debilitating.

On remand, the district court agreed that "this case is analogous to sit-ins at lunch counters and Rosa Parks' civil disobedience," but stated that this argument "works in [respondents'] favor" because those protesters were "arrested, jailed, and otherwise punished." App., *infra*, 73a; see also Tr. 4339-40. Academic commentators have also voiced concerns. See, *e.g.*, Bradley, NOW v. Scheidler*: RICO Meets the First Amendment*, 1994 SUP. CT. REV. 129, 161-67; Note, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691 (1999).

Nor is this case an isolated example. In the past decade, RICO has repeatedly been deployed against abortion protesters, with mixed success.[11] There is no reason why, if the Seventh Circuit's interpretation is correct, RICO actions based on predicate Hobbs Act offenses could not also be pursued against social protesters of all stripes, including those demonstrating for civil rights, environmental causes, or animal rights – a point respondents' counsel conceded in her closing argument. Tr. 4963 (RICO "enterprise" could consist of "an animal rights

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[11] See, *e.g.*, *Palmetto State Med. Ctr., Inc.* v. *Operation Lifeline*, 117 F.3d 142 (4th Cir. 1997); *Feminist Women's Health Ctr.* v. *Codispoti*, 63 F.3d 863 (9th Cir. 1995); *Libertad* v. *Welch*, 53 F.3d 428 (1st Cir. 1995).

group that bars entry to a restaurant that serves veal"). Indeed, because the statute extends to the "wrongful" use of "threatened * * * fear" (18 U.S.C. § 1951(b)(2)) – including, under the jury instructions in this case, fear "of wrongful economic injury" (Tr. 4945) – almost any economic boycott by consumers is now actionable under RICO in the Seventh Circuit.[12] The fact that the Hobbs Act also punishes *attempts* and *conspiracies* to commit "extortion" (18 U.S.C. § 1951(a)) only enhances the threat to civil liberties presented by the Seventh Circuit's construction.

C. *The Decision Below Is Wrong.* Review should also be granted to correct the Seventh Circuit's unnatural and manifestly incorrect reading of the Hobbs Act. As a matter of common usage, to "obtain" something means to "acquire," "procure," "get hold of" or "gain[] possession of" it. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2000); BLACK'S LAW DICTIONARY 972 (5th ed. 1979). To destroy or diminish the value of someone else's property is not the same as to "obtain" it. Thus, the lower court was wrong to say that all that was required for "obtaining" was "a loss to" the victim or an "interference with the [victim's] rights." App., *infra*, 29a.

Equally far-fetched as a linguistic matter was the Seventh Circuit's conclusion that the "right[] to seek medical services from the clinics" qualified as "property" capable of being extorted in violation of the Hobbs Act. No ordinary speaker of the English language, we submit, would describe a prospective patient's interest in obtaining services as "property." Put differently, "property" is simply not the same as liberty. If it were, 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 the ability of customers to patronize a business. That cannot be the law.

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[12] See also Lindgren, 35 UCLA L. REV. at 834-35 (noting that "the meaning of 'fear'" in the Hobbs Act "is ambiguous," and pointing out that "[f]ear is present in many valid economic transactions," such as where a bank "uses the fear of foreclosure to collect on a delinquent loan" or an employer uses the fear of termination to induce a worker "to come[] to work on time").

Moreover, as this Court made clear in *Evans* v. *United States*, when Congress enacted the Hobbs Act in 1946, it drew upon New York law in defining the terms "extortion" and "robbery." 504 U.S. at 264-65; see also *Enmons*, 410 U.S. at 406 n.16. Under New York law, "it was well settled that extortion required an unlawful taking." Bradley, 1994 SUP. CT. REV. at 140. The same is true today. See N.Y. PENAL LAW § 155.05.2(e) (McKinney 2001) ("a person obtains property by extortion when he compels or induces another person *to deliver such property to himself or to a third person*") (emphasis added). What petitioners are alleged to have done here is more appropriately described under New York law as "coercion in the second degree," which occurs when someone "compels or induces a person to * * * abstain from engaging in conduct in which [the victim] has a legal right to engage" by "instilling * * * fear." *Id*. at § 135.60; accord Bradley, 1994 SUP. CT. REV. at 140-41 (noting that coercion is not a predicate offense under RICO). "Coercion" is not the same as "extortion."[13]

The Seventh Circuit's decision also gives short shrift to the serious implications its broad reading of the Hobbs Act poses

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[13] Use of a broad definition of "property" gives rise to serious line-drawing problems. For example, respondents argued to the jury that "[e]ven a *few hours* of deprivation of legal rights" caused by a sit-in "will satisfy the RICO act of extortion." Tr. 5008 (emphasis added). A broad definition also seriously blurs the line between extortion, which punishes wrongful obtaining "with [the owner's] consent," and robbery, which punishes the unlawful obtaining of certain property "against [the owner's] will." 18 U.S.C.§ 1951(b)(1), (2). In this case, for example, much of the interference with the operation of abortion clinics and the freedom of their customers occurred "against [their] will." Under the Seventh Circuit's sweeping definitions of "property" and "obtaining," political protesters engaged in demonstrations and sit-ins that disrupt businesses could also be indicted for "robbery" under the Hobbs Act. Yet something is amiss with an approach that yields such a ludicrous result. Nor should the line between "robbery" and "extortion" hinge, for example, on whether a business targeted by political protesters voluntarily closes its doors for the day (or a few hours) to avoid disruption. Equally troubling are the implications of the Seventh Circuit's broad reading of "property" and "obtaining" for the scope of "extortion" by a public official "under color of official right." *Id.* § 1951(b)(2). See OR Pet. 20-21.

not only for civil liberties (see pages 21-22, *supra*) but also for federalism. The Seventh Circuit's interpretation has the 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. But 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). The decision below also fails to give appropriate weight to the rule of lenity. See *McNally*, 483 U.S. at 359-60.

Finally, there are 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 otherwise be applied to anti-war protesters. Note, 75 NOTRE DAME L. REV. at 696-97. Second, as explained above, 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 protesters inappropriate. 18 U.S.C. § 1963(a); *Alexander* v. *United States*, 509 U.S. 544 (1993).

III. The Court Should Review The Seventh Circuit's Holding That The Jury's Imposition Of Liability And Treble Damages Under RICO Satisfied The Exacting Standards Of *NAACP* v. *Claiborne Hardware Co.*

The Seventh Circuit's decision also merits review because it substantially erodes the judicial safeguards required under this Court's decisions to ensure that civil liability does not in-

trude on the sphere of activities protected by the First Amendment, including the freedom of association and speech. More specifically, the Seventh Circuit's holding and analysis are inconsistent in several respects with this Court's unanimous decision in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), and with a decision of the Second Circuit.

A. *Claiborne* involved a tort action brought in state court against black protesters engaged in a collective, organized effort to boycott white merchants in Claiborne County, Mississippi. The boycott, which was aimed at pressuring the merchants to address demands for racial equality by threatening them with "economic ruin," lasted for seven years and included multiple acts of physical force and violence, threats, and intimidation targeting the merchants as well as their customers. 458 U.S. at 892 n.8, 898, 903-06. Emphasizing the profound importance of "the freedom of association," this Court explained that "the presence of activity protected by the First Amendment imposes restraints" not only "on the grounds that may give rise to damages liability" but also "on the persons who may be held accountable for those damages." *Id*. at 916-17.

The Court went on to identify three principles that courts must apply in this setting to safeguard First Amendment freedoms. *First*, civil liability may not be imposed "merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." 458 U.S. at 920. *Second*, in addition to this limit on the imposition of *any* civil liability, the Court indicated that the *scope of relief* must also be closely tailored to the unprotected conduct. "While the State may legitimately impose damages for the consequences of *violent* conduct, it may not award compensation for the consequences of *nonviolent, protected activity*." *Id*. at 918 (emphasis added). "[O]nly those losses *proximately caused by unlawful conduct*," the Court explained, "may be recovered." *Id*. (emphasis added). The Mississippi Supreme Court's decision failed to

satisfy this requirement, the Court reasoned, because it upheld the trial judge's award of damages for *all* business losses sustained by the merchants during the entire seven-year protest even though certain losses plainly "were not proximately caused by the *violence and threats of violence*" that had occurred. *Id.* at 921 (emphasis added).

Third, this Court reaffirmed the importance of precise findings in the trial court and searching appellate review. The judiciary has a "special obligation" in this setting, the Court explained, to "examine critically the basis on which liability was imposed" by conducting "an independent examination of the whole record." 458 U.S. at 915 & n.50 (internal quotations omitted); see *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 499 (1984). It faulted the Mississippi trial judge for failing to "*specifically identify* the evidence linking any of the defendants" to a purported agreement to use force, violence and threats to effectuate the boycott, and criticized the state supreme court for relying on "ambiguous findings" that failed to "differentiat[e]" the exact conduct of individual defendants and therefore were "inadequate to assure the *precision of regulation* demanded by" the First Amendment. *Id*. at 895, 920-21, 925, 934 & nn.15, 69 (emphasis added; internal quotations omitted).

B. The Seventh Circuit acknowledged that petitioners, like the protesters in *Claiborne*, had "engaged in a substantial amount of protected speech," including "picketing on public sidewalks in front of clinics and verbally urging patients not to have abortions." App., *infra*, 14a. It also agreed that liability "cannot constitutionally be imposed" for this "portion of their conduct," which was "closely intertwined with" the unprotected conduct. *Id*. And it acknowledged that *Claiborne "*is directly applicable to this case." *Id*. at 18a. The Seventh Circuit ruled, however, that the requirements of *Claiborne* were fully satisfied. In so doing, the court focused almost exclusively on compliance with the first *Claiborne* principle, ignored entirely the second principle, and failed to discharge its obligation to ensure the "precision of regulation" required by the First Amendment.

To see why this is so, it is necessary to understand the safe-

guards that the trial court imposed (and refused to impose) on the jury's factfinding in this case. Despite the welter of evidence presented to the jury of events and incidents involving thousands of protesters over a 15-year period, the district court refused petitioners' repeated requests that the jury be required, through the use of a detailed special verdict form, to identify the "predicate acts" on which it rested any ultimate finding of RICO liability. The jury was also instructed that to prove their RICO claims, respondents need not show that *petitioners themselves* committed the requisite predicate acts; it was enough if "*other people* associated with PLAN" committed those acts. Tr. 4943 (emphasis added). In addition, the jury was not instructed that it *had to agree* on the *same* predicate acts. And it was instructed that any finding of proximate cause need not rest on the unspecified "predicate acts"; it could instead be based on "any overt act taken in furtherance of PLAN's goal." Tr. 4948.[14]

Taken together, these jury instructions make it impossible to determine whether the jury's imposition of liability on the RICO claims, or its exaction of punitive damages, complied with the limits imposed by *Claiborne*. As the district court candidly admitted, "the jury did not state which defendants did the[] [predicate] acts or when they occurred, only the total number of acts" and, for that reason, the court simply "d[id] not know which evidence the jury relied upon in its findings." App., *infra*, 126a. Plainly, the Seventh Circuit was in no better position to divine the basis for the jury's decision. All that we know – and all the Seventh Circuit could have known – is that the jury found 21 unspecified violations of the Hobbs Act (as well as

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[14] The proximate causation instruction was plainly erroneous under *Beck* v. *Prupis*, 529 U.S. 494 (2000), and *Sedima*, 473 U.S. 479, which make clear that even with respect to a Section 1962(d) conspiracy claim under RICO, proximate causation must be based upon predicate acts and not on overt acts. Similarly, the absence of a unanimity instruction as to predicate acts was inconsistent with *Richardson* v. *United States*, 526 U.S. 813 (1999) (involving the analogous Continuing Criminal Enterprise statute). The Seventh Circuit simply ignored these errors. The relevant portions of the jury instructions are reproduced at App., *infra*, 146a-157a.

various other unspecified predicate acts) committed by unidentified persons. See pages 4-5 and note 3, *supra*.

The instructions used by the trial court were manifestly "inadequate to assure the *precision of regulation* demanded by" the First Amendment. 458 U.S. at 895 & n.15, 920-21; see also *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 729, 732-35 (1966). Despite the trial court's obvious failure to comply with *Claiborne*, the Seventh Circuit refused to disturb the liability judgment. It relied largely on the fact that the jury was given an instruction patterned after *Claiborne* (No. 30), which stated that "in order to find the defendants liable," the jury had to "conclude that the enterprise, or those acting on behalf of the enterprise, directly or indirectly authorized or ratified unlawful activities and that the defendants held a specific intent to further those illegal objectives." Tr. 4949. The Seventh Circuit brushed aside petitioners' other arguments about the defects and ambiguities in the jury instructions relevant to their First Amendment challenge, reasoning that appellate review of the jury instructions is "deferential" and limited to determining whether, taken as a whole, the instructions "adequately informed the jury of the applicable law." App., *infra*, 21a.

This analysis is flawed at every turn. First, the Seventh Circuit's application of "deferential" review is squarely at odds with this Court's teaching that the First Amendment imposes a "special obligation" on appellate courts to conduct a searching review. No such deference was accorded to the Mississippi courts in *Claiborne*, and none was warranted here. See *Gibbs*, 383 U.S. at 732-35 (evaluating jury instructions in analogous context). Second, Instruction 30 was limited in its effect. All the instruction did was to inform the jury that it should observe the *first* limitation on liability recognized in *Claiborne*; it said nothing at all about the *second* limitation on the award of damages. See also Tr. 4360-61 (trial court refused to give jury instruction on second *Claiborne* limitation). Third, Instruction 30 did not (and could not) discharge the "special obligation" of *reviewing courts* to ensure that the jury honored the limits imposed by the First Amendment, much less produce the kind of specific, par-

ticularized findings needed for appellate review. Fourth, Instruction 30 was marred by ambiguities that rendered it of dubious value even for ensuring that the jury complied with the first *Claiborne* limitation. See OR Pet. 28. For example, it referred broadly to "unlawful acts" without specifying that such acts had to be the predicate acts of racketeering found by the jury (not other acts, such as trespassing, made illegal by state law).[15]

The Seventh Circuit's decision also strays from *Claiborne* by upholding a damages award that plainly violates the *second* limitation recognized in that case: "only those losses *proximately caused by unlawful conduct*" – and, in particular, by "*violent* conduct" – "may be recovered." 458 U.S. at 918 (emphasis added). As just explained, the instructions all but invited the jury to exceed that limitation by authorizing damages for "overt acts" done by persons other than petitioners. Nor did the Seventh Circuit *even attempt* to discharge its obligation to conduct a searching review of whether the damages award satisfied the *second* requirement of *Claiborne*. Had it done so, it would have concluded that the award cannot possibly be sustained. Indeed, it may well be that a treble damages award, by its very nature, runs afoul of the second *Claiborne* principle.[16]

To be sure, the Seventh Circuit did attempt to conduct an independent review of whether the judgment of liability satisfied the first *Claiborne* requirement. App., *infra*, 18a-22a. The jury's apparent conclusion that Instruction 30 was satisfied, the court explained, was supported by the record because respondents had presented "ample evidence that the individual defendants and others associated with PLAN had engaged in illegal

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[15] The district court's decision to give Instruction 30, moreover, came only after the parties had rested. During the trial, the district court repeatedly refused petitioners' requests to put on evidence of their specific intent, yet Instruction 30 turned on whether they possessed such intent.

[16] The jury's verdict suggests that it found only four discrete acts or threats of violence. See note 3, *supra*. There is no basis for concluding that the increased security costs underlying the damages awarded to Summit and DWHO flowed from those unidentified acts of violence, which were the only permissible basis for damages. See also OR Pet. 28-29.

conduct." *Id*. at 17a (emphasis added).[17] But again, even putting aside the fatal ambiguity of terms like "unlawful conduct" (which do not necessarily denote the predicate crimes), this analysis is flawed because it is impossible to know which predicate acts the jury relied on in imposing liability.

C. The Seventh Circuit's lax approach contrasts sharply with the more stringent approach taken by other courts of appeals. In a recent case involving the FACE Act, for example, the Second Circuit vacated a preliminary injunction in part because the trial court failed to make specific findings relating to an individual defendant. *New York* v. *Operation Rescue Nat'l*, 273 F.3d 184, 198-200 (2001). Had the Seventh Circuit applied an equally stringent approach, it could not have upheld either the judgment of liability or the damages award in this case.

D. Finally, this case presents an excellent vehicle for clarifying the proper application of First Amendment safeguards and the principles of *Claiborne* to decisionmaking by juries. As the Seventh Circuit noted, cases like *Claiborne* and *Bose* involved factfinding by courts. App, *infra*, 15a-16a. The Court should take this opportunity to provide greater guidance to the lower courts faced with the difficult challenges of protecting First Amendment rights in RICO cases of this sort.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[17] Like the opinion's early catalogue of "[a] few of the more egregious acts the plaintiffs *alleged*" (App., *infra*, 4a-5a (emphasis added)), the evidence cited in support of this conclusion consisted mostly of the conduct of unidentified "protesters." *Id*. at 17a. The evidence cited of unlawful conduct *by petitioners themselves*, in contrast, consisted primarily of *participation in political meetings and speech itself*. See *id*. at 5a, 17a, 19a. Apparently relying on its broad interpretation of extortion under the Hobbs Act, the Seventh Circuit held that certain letters sent by petitioner Scheidler, which asked clinics to honor a "Christmas Truce" and voluntarily close on a particular day (and stated that noncomplying clinics would be subjected to "non-violent direct action"), "constituted true threats outside of the protection of the First Amendment." *Id*. at 5a, 17a. But cf. *Claiborne*, 458 U.S. at 927-29 (holding that Charles Evers's speeches, which included "references to the possibility that necks would be broken," were constitutionally protected).

Respectfully submitted,

THOMAS BREJCHA
DEBORAH FISCHER
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

D. COLETTE WILSON
104 E. Buckthorn Street
Inglewood, CA 90301
(310) 672-3104

ALAN UNTEREINER*
ARNON D. SIEGEL
KATHRYN S. ZECCA
SHERRI LYNN WOLSON
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

JANUARY 2002