In The

Supreme Court of the United States

No. 01-1118

Joseph Scheidler, Andrew Scholberg, Timothy Murphy and the Pro-Life Action League. Inc.,

Petitioners

v.

National Organization for Women, Inc. Et al

Respondents

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

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BRIEF OF AMICUS CURIAE, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS

(Counsel as in petition)

TABLE OF AUTHORITIES

Others

STATEMENT OF INTEREST[1]

People for the Ethical Treatment of Animals, Inc. (PETA) is a nonprofit charitable organization that aggressively uses entirely peaceful means to expose and end animal abuse wherever it occurs. PETA enjoys the support of over 750,000 members. When PETA hears allegations of abuse, we thoroughly investigate the allegations and report our findings to the proper authorities. . PETA supporters also occasionally engage in non-violent civil disobedience to call public attention to laws or practices that they find objectionable consistent with the greatest protest traditions of this nation. PETA's actions closely resemble those of many social advocacy groups throughout the country's history, each of which has, in its time, incurred the wrath of those who wish no public scrutiny and no change in the status quo In short, PETA engages in protest activity similar to that of petitioners.

Despite its purely peaceful charitable programs, PETA has been the target of false allegations of involvement or complicity in the violence or threats of violence perpetrated by other people or groups within the broad, heterogeneous animal protection movement. The danger of such false

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[1]Pursuant to Rule 37.6, this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amicus curiae,* has made a monetary contribution to the preparation or submission of this brief.

attacks is illustrated by this case in which the trial court and the Seventh Circuit labeled the petitioners as extortionists under the Hobbs Act and as racketeers under RICO without any specific finding by the jury as to which acts by petitioners constituted extortionate conduct under state or federal law. This loose application of federal anti-racketeering laws to political advocacy groups threatens PETA's aggressive advocacy for the benefit of animals and constitutes a dagger at the throat of all other movements where minor violence may accompany political action.

Thanks to the support of its members and supporters around the world, PETA has enjoyed notable success in convincing multinational corporations, small businesses, and individuals to reduce or eliminate the suffering endured by animals at their hands. For example, PETA recently convinced McDonald's, Burger King, and Wendy's fast-food restaurants to demand more humane animal care standards of their suppliers. PETA achieves these victories by encouraging, protesting, cajoling, writing letters, leading boycotts, and conducting hard-hitting campaigns to draw media attention to the plight of the animals.

PETA's success is measured by a halt to animal abuse, improved conditions for animals, and a continuing change in public and corporate attitudes toward the rights of all animals. Like the petitioners in this case, it does not obtain any tangible or intangible property from any of its adversaries as a means of accomplishing its educational mission. Therefore, the Seventh Circuit's opinion, which eviscerates the "obtaining of property" element from the Hobbs Act, threatens PETA with the continued prospect of federal court injunctions, treble damage civil suits and even possible federal prosecution as it carries out its animal protection mission.

PETA's interest is not purely hypothetical. In 1997, PETA was sued under RICO for its investigation and exposure of animal cruelty at a New Jersey animal testing laboratory even though the United States Department of Agriculture fined the lab $50,000 for federal law violations found as a result of PETA's complaint. *Huntingdon Life Sciences, Inc. v. Rokke et al.* (E.D.VA 2:97CV597) (case settled). Other animal protection activists have been sued under RICO for peaceful protests and non-violent civil disobedience outside of a fur store. *Jacques Ferber, Inc. v. Bateman et al.* (E.D. PA 99 CIV 2277) (case settled).

PETA also has a long-standing interest in this case as an amicus. PETA was granted permission to serve this Court in that capacity in its initial consideration of this case in 1994, and PETA likewise served the Seventh Circuit, both in 1994 and 1999 following this Court's remand.

PETA expresses no view on the issue of abortion. Its interests in this case relate solely to the legal issues raised in this and petitioners' brief.

SUMMARY OF ARGUMENT

Petitioners were found liable under RICO, for operating an enterprise through a pattern of racketeering activities, specifically, extortion in violation of state law, the Hobbs Act and the Travel Act. The Hobbs Act, 18 U.S.C. § 1951, forbids affecting commerce by robbery or extortion. It defines "extortion" as "the *obtaining of property* from another, with his consent,

induced by wrongful use of actual or threatened force violence or fear....” (emp. added). Here it is not alleged that the Petitioners sought to obtain any property from the Respondents, and the judge instructed the jury that “obtaining property” need not be found. Rather, Respondents claim that the property obtainment element was satisfied because the Petitioners interfered with Respondents’ ability to operate abortion clinics free from interference. Neither the language, the legislative history, nor a common sense understanding of the Hobbs Act supports the deletion of the “obtainment” element as Respondents urge.

ARGUMENT

THE HOBBS ACT (AND THEREFORE RICO) WAS NOT VIOLATED BY THE PROTEST ACTIVITIES OF PETITIONERS

Petitioners are members of an unpopular political advocacy movement. While their general anti-abortion position is shared by many Americans, the tactics they employ – blockading clinics, harassing patients and staff, etc.– are widely condemned. Nor are these petitioners necessarily innocent of all criminal activity. There is ample evidence in the record of this case suggesting violations of state trespassing, destruction of property, and perhaps other laws, and the Freedom of Access to Clinic Entrances (FACE) statute, 18 U.S.C. 248 (a)[2]

However, as explained in my Supreme Court Review article written after the Court's first decision in this case,[3] (and before I had any contact with any of the parties to this case) violation of these statutes does not constitute a violation of RICO because neither FACE, trespassing, nor "acts or threats of violence"[4] are among the listed "predicate crimes" necessary to constitute a RICO violation.[5] Indeed, the reason that the FACE statute was demanded by pro-choice advocates was because existing federal and state laws (including, presumably, RICO and extortion) were inadequate in dealing with abortion protestors.[6] Although respondent's complaint

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[2] Under FACE, 18 U.S.C. 248 (a), an individual may be subject to civil and criminal penalties if he:

> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates, or interferes with, or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining, or providing reproductive health services.

[3] Craig Bradley, *NOW v. Scheidler, RICO Meets the First Amendment,* 1994 Supreme Court Review 129 (1995). (Hereinafter referred to as *Bradley, First Amendment).*

[4] The jury found four (unspecified) "acts or threats of physical violence to any person or property." *Pet's* App. 160a.

[5] See 18 U.S.C. §1961 setting forth a long list of RICO predicate crimes.

[6] Attorney General Reno testified that "existing Federal laws, while perhaps applicable in some instances, (are) inadequate." Hearing before the Senate Committee on Labor and Human Resources, 103rd Cong. 1st Sess. P. 8 (May 12, 1993). Likewise, Rep. Shumer, Chairman of the House Subcommittee considering the Bill, opined that "(t)he state laws are inadequate to deal

in this case made reference to such crimes as murder, arson, and kidnapping committed by certain anti-abortion zealots, there was no proof of any such crimes having been committed by the petitioners, and these claims were dismissed by the trial judge.[7] Accordingly, the jury verdict against petitioners was based entirely on extortion–either under the Hobbs Act, the Travel Act (18 U.S.C. §1952) or state law.[8] However, just what acts or threats the jury might have been referring to in this verdict were never specified, and the trial judge refused petitioners' request to ask the jury to be specific.[9]

Thus, in a case reminiscent of Kafka's *The Trial*, petitioners were found liable for "obstruct(ing), delay(ing) or affect(ing) commerce" by "obtaining property from another...by wrongful use of actual or threatened force, violence or fear" under state and federal extortion laws, where no property was obtained, the particular acts that affected commerce were not specified by the jury and the states whose laws were violated were not identified. Moreover, these unspecified acts were then found to constitute a "pattern of racketeering activity" in violation of RICO.[10] The vagueness of this verdict, and the difficulty of other protest groups, such as PETA, in avoiding RICO violations in light of this case, renders it a disturbing precedent.

Yet the Seventh Circuit brushed off these concerns, consigning this issue to "non-serious" claims.[11] The court of appeals correctly identified the "defendant's primary contention" as being

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with the problem." Hearings before the House Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary, 103rd Cong., 1st Sess., P.1 (April 1 and June 10, 1993).

[7] 1997 WL 610782 at 18-19 (N.D. Ill 1997).

[8] *See*, *Pet.* App. 159a-160a (Special Interrogatories and Verdict form), finding 25 violations of state extortion laws, 21 violations of federal extortion law and 23 examples of "Travel across state lines or the use of the mail or telephone, with intent to commit or facilitate an unlawful act, such as extortion, under state or federal law." In fact, "extortion" is the only one of the Travel Act predicates on which these findings could possibly be based. *See*, 18 U.S.C. 1952 (b). (It is not specified whether any of these "extortion" crimes are related to the four "acts or threats of violence" also found by the jury).

[9] **Counsel for Defendants**: "Your honor...we urge that the plaintiff should list in the special interrogatories each particular incident they allege to constitute an act of force, threat or violence sufficient to be extortion." **The Court**: "Absolutely not." Tr. Trans. P.4495.

[10] *H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989) required that "continuity" and "relationship" of the predicate crimes must be established by the plaintiff/prosecutor in order to establish the "pattern." Id. at p. 242-43. If the predicate crimes have not been specified, pattern cannot be proved.

[11] This issue was considered among the "hodgepodge of other challenges to the judgement, none of which need detain us long, " after the "last serious contention" was disposed. *N.O.W. v. Scheidler*, 267 F.3d 687, 705, 707 (7th Cir., 2001).

that there was no "obtaining of property" here despite the explicit requirement of the Hobbs Act.[12] However, the court then answered a different contention, stating that "this circuit has repeatedly held that intangible property such as the right to conduct a business can be considered 'property' under the Hobbs Act."[13] We agree that intangible property can satisfy the Hobbs Act, just as it can the Mail Fraud statute.[14] But just as "fraud" requires that the victim be defrauded out of "property," tangible or intangible, as this Court held in *McNally v. United States*, 483 U.S. 350 (1987), so the Hobbs Act, with its explicit "obtaining property" element, must likewise involve property obtainment.

As this Court has observed, the Hobbs Act, like its predecessor, the 1934 Anti-Racketeering Act,[15] was drawn from the New York Code. *Evans v. United States*, 504 U.S. 255, 261, n. 9 (1992).[16] Both the New York Code on which the act was based, as well as its predecessor Field Code, defined extortion as "the obtaining of property from another, with his consent, induced by a wrongful use of force or fear or under color of official right." Id.

As the New York cases cited by this Court in *United States v. Enmons*, 410 U.S. 396 (1973), make clear, an accused could not be guilty of extortion unless he "was actuated by the purpose of obtaining *financial benefit* for himself..."410 U.S. at p. 406, n. 16. [17] The Court reiterated this point in *Evans*, noting that the Hobbs Act covers "acts by private individuals pursuant to which property is obtained by means of threats, force or violence."[18] 504 U.S. at p. 261.

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[12] Id. at p. 709.

[13] Id., citing *United States v. Anderson*, 716 F.2d 446, 450 (7th Cir. 1983).

[14] 18 U.S.C. §1341. As the Court's held in *Carpenter v. United States*, 484 U.S. 19, 25 (1987). "Here, the object of the scheme was to take the (victim's) confidential business information...and its intangible nature does not make it any less 'property' protected by the mail and wire fraud statutes."

[15] The Anti-Racketeering Act of 1934 (48 Stat. 979) HR No. 238, 79th Cong. 1st Sess. (1934), was even more explicit in its property requirements. It made it a crime when any person (affecting commerce) "(a) obtains or attempts to obtain, by the use of (force, etc) the payment of money or other valuable considerations, or the purchase of or rental of property," (etc.), or (b) "obtains the property of another with his consent (etc.)." Id.

[16]Accord, 91 Cong. Rec. 11900 (1945) (Statement of Cong Hobbs): "The definitions in this bill are copied from the New York Code substantially."

[17] Quoting *People v. Adelstein* (emphasis added, citation omitted). Accord, *People v. Ryan*, 232 N.Y. 234, 235, 133 N.E. 572, 573 (1921) (intent to extort requires intent to "gain money or property."

[18] 504 U.S. at p. 261.

Forcing someone to do something against his will, by contrast, is recognized by the Model Penal Code,[19] as well as the codes of most states, as the crime of "criminal coercion," not extortion. Only a few states do not limit extortion to "obtaining property."[20] Thus it is critical, if a RICO judgement is based on extortion under state law, to identify which state's laws were violated. This was not done here.

The trial court ignored the "obtainment" element in its instructions to the jury in this case, instead telling them that, "(i)t does not matter whether or not the extortion provided an economic benefit to PLAN."[21] In short, it is respondent's position, as spelled out in their Brief in Opposition, that by threatening demonstrations unless abortion clinics closed, and in otherwise interfering with the clinics' operations, petitioners thereby "obtained" the property of the clinics.[22]

Respondents argue that, since the property in question can be intangible, it follows that it need not be "obtained" by the defendant.[23] This misconstrues the nature of intangible property. Information, as in *Carpenter*[24] where the defendant traded on proprietary information of his employer *The Wall Street Journal*, is clearly property. But the fact that it is intangible does not mean that it cannot be stolen (in a fraud case)[25] or obtained by threat in an extortion case. Getting someone to close an abortion clinic, while it may be a deprivation of property from the victim's point of view, is not an obtainment of property by the defendant. Were the defendant seeking to drive the victim out of business so that the defendant could then take over that business, this would be property obtainment and would violate the Hobbs Act, even thought the defendant did

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[19] American Law institute, *Model Penal Code and Commentaries* (Official Draft, 1980) sec. 233.4 p. 203: "Criminal Coercion punishes threats made with 'the purpose unlawfully to restrict another's freedom of action to his detriment' while extortion is ...limited to one who 'obtains property of another by' threats."

[20] According to LaFave and Scott, *Substantive Criminal Law* (Vol. II, p. 460, 1986) the only states that do not limit "extortion" to "obtaining property" are Alaska, Colorado, Kansas, New Mexico, Ohio, and Wyoming.

[21] Pet's App. P. 150a.

[22] Brief In Opposition p. 17.

[23] Id.

[24] Supra n.12.

[25] "The words 'to defraud' in the mail fraud statute have the 'common understanding' of 'wronging one in his property rights by dishonest methods or schemes," and 'usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching.'" *Carpenter*, supra, 484 U.S. at p. 27 (citations omitted).

not acquire the physical aspects of the victim's business. See, e.g., *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969) cert. den. 397 U.S. 1021.

Respondents cite a raft of older cases, including *United States v. Green*, 350 U.S. 415, 420 (1956), and many court of appeals cases to support their claim. But none of the holdings support the proposition that interference with another's use of property interests is sufficient to violate the Hobbs Act, though there is some dictum in these cases to that effect.

In *Green*, this Court held that the Hobbs Act covered a union representative's threatening violence in order to obtain a payment for "imposed, unwanted, superfluous and fictitious services" by union members.[26] That is, it was not necessary for the defendant to attempt to "obtain property" for *himself*. It was sufficient that he sought to obtain it for the union members.[27] In fact, all of the cases (except those involving abortion clinics) cited by Respondent involve defendants who sought to obtain "property", i.e. economic advantage, whether it be the right to engage in the trash business, [28] money that the defendant never showed up to receive,[29] or a business contract. [30]

However, the fact that some defendants didn't succeed in obtaining the property they sought, as in *Frazier* where the defendant didn't show up to receive a ransom payment, led some courts to declare that "the gravamen of the offense is the loss to the victim."[31] Likewise, in *United States v. Lewis*, 797 F.2d 358 (7th Cir. 1986), cert. den. 479 U.S. 1095 (1987), where the defendant's scheme was so far fetched that it had little chance of success, the court declared that "the defendant would have violated §1951 if, for example, he had simply demanded that the victim burn $1 million cash."[32] The *Lewis* court further declared that the defendant's "gain" could also simply be the humiliation of the victim.[33]

These decisions were in turn relied upon by courts, such as the Second Circuit in *United States v. Arena*, 180 F.3d 380 (2nd Cir. 1999) cert. den. 531 U.S. 811(2000) and the Third Circuit in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3rd Cir. 1989) when they

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[26] 350 U.S. at p. 417.

[27] Id. at p. 420.

[28] *United States v. Tropiano*, supra.

[29] *United States v. Frazier*, 560 F.2d 884 (8th Cir. 1977) cert. den. 435 U.S. 968 (1978).

[30] *United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978) cert. den. 440 U.S. 910 (1979).

[31] 560 F. 2d at p. 887.

[32] *Lewis*, 797 F.2d at p. 364.

[33] Id. at fn 3.

concluded that interfering with abortion clinics' right to do business also constituted extortion. But this conclusion was wrong.[34] While the right to do business is certainly "property," the defendant doesn't violate the Hobbs Act "when a victim is merely forced to part with property," as the Ninth Circuit recently held in *United States v. Panaro,* 266 F.2d 939, 948 (2001). "Rather, there must be an 'obtaining': someone–either the extortioner or a third person–must receive the property of which the victim is deprived."[35]

But why should this be so? Isn't the damage to the victim, and the culpability of the defendant, precisely the same if the defendant seeks $1 million for himself as if he demands that the victim burn $1 million, as the Seventh Circuit hypothesized in *Lewis*? There are two answers to this proposition.

The first is that, just because the effect on the victim and the culpability of the defendant are the same does not mean that crime A is therefore the same as crime B. As a practical matter, threatening someone that you'll beat him up now if he doesn't give you money, or threatening that you'll beat him up tomorrow, have the same impact on the victim and the same culpability for the defendant. Yet the first crime is robbery, the second extortion–a distinction made by the Hobbs Act itself. Likewise, this Court held in *Fasulo v. United States*, 272 U.S. 620 (1926), that threatening someone through the mails is extortion, but not mail fraud, even though the threat might have exactly the same consequences as a fraudulent statement. Extortion, as demonstrated above, is limited to crimes in which the defendant obtains, or attempts to obtain, property. By Respondents' reasoning, threatening to punch an anti-abortion demonstrator unless he stops demonstrating would now be robbery, and threatening to call the police would now be

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[34] Bradley, *First Amendment*, p. 139:

> "The problem is that, in the cases cited by the plaintiffs, even though the loss to the victim may have been intangible, the defendant nevertheless sought to obtain property, that is, *economic advantage*....Even the cases cited by N.O.W. in which the defendant's primary motivation may have been political, such as *United States v. Anderson,* in which the defendant kidnapped an abortion clinic doctor, all included demands for economic advantage as well."

Accord, Brian Murray, *Note: Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms,* 75 Notre Dame L.R. 691, 720 (1999) reviewing the case law and concluding that Respondents' "approach ignores the fundamental nature of extortion."

[35] Id.

extortion,[36] since the clinic operator would be "interfering with the right of the victim," as the court below put it,[37] to demonstrate.

The second problem with the *Lewis* hypothetical lies in the First Amendment. As Justice Souter recognized in his concurring opinion in *NOW I,* 510 U.S. 249, 264, "[c]onduct alleged to be Hobbs Act extortion may turn out to be fully protected First Amendment activity...." If the "obtaining property" element is removed from the Hobbs Act, then threatening to demonstrate peacefully outside an abortion clinic, and thereby interfere with business, becomes a Hobbs Act violation.[38] This is the paradox of extortion: threatening to do that which is legal becomes illegal.[39] But when the action threatened is protected by the First Amendment, it is clearly unconstitutional to criminalize the threat unless property is sought by the defendant.[40]

In *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971), a civil rights group demanded that the respondent cease his "blockbusting" real estate sales practices or they would distribute pamphlets critical of him. The Court struck down an injunction on the pamphleteering as a prior restraint, and, in the process, also made it clear that the original threat to the respondent was protected: "The claim that the expressions were intended to have a coercive impact on respondent does not remove them from the reach of the First Amendment."[41]

As I interpreted this case in 1994:

> This is not extortion, but not because the threat is to perform some legitimate activity since, as noted above, threats to perform legitimate acts may nevertheless be the basis of an extortion charge. Nor is it that the act threatened is constitutionally protected. If X threatens a merchant that CORE will picket, legally, outside his store and drive away business unless he contributes $500 to CORE, this is probably extortion as well. Rather,

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[36] It's not clear that such a threat would violate the Hobbs Act, which is limited to obtaining property "induced by wrongful use of force, violence or fear...."18 U.S.C. §1951(b)(2). But. if the "obtaining property" element is eliminated, it would violate the Model Penal code and the codes of many states. §223.4 of the Model Penal Code defines "theft by extortion" as "obtaining property by threatening to...(2) accuse anyone of a criminal offense...."

[37] 267 F.3d at p. 709. (citation omitted).

[38] It is well settled that the "fear" element is satisfied by fear of economic loss. See, e.g. *United States v. Capo,* 817 F.2d 947 (2nd Cir. 1987) (*en banc).*

[39] James Lindgren, *Unraveling the Paradox of Blackmail,* 84 Columbia L.R. 670 (1984).

[40] Bradley, *First Amendment,* p. 161.

[41] *Keefe,* supra, at p. 419.

the reason must be, as in *Keefe*, that the threat is to perform a legal act, *and* the goal is to achieve a political end, rather than to obtain property from a particular victim.[42]

In conclusion, the "obtainment" element is an integral part of the Hobbs Act. It distinguishes extortion from the crime of "criminal coercion." To read it out of the Hobbs Act, as the court below did in this case, is to subject all political protests, or the threat thereof, which have a tendency to interfere with business, to prosecution. But this result would clearly violate the First Amendment.

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[42] Bradley, *First Amendment*, supra at p. 162. This is not to say that violence or threats of violence are protected by the First Amendment. They are not. E.g. *N.A.A.C.P. v. Claiborne Hardware*, 458 U.S. 886, 916 (1982). Nor is the commission of nonviolent crimes protected. See, *Adderly v. Florida*, 385 U.S. 39 (1966). But the threat to commit non-violent crimes in the name of political protest is protected just as much as the threat to commit legal protest because the civil disobedience, and the ensuing arrest, may be an essential part of the protest activity. See, Bradley, *First Amendment* at pp. 163-165, expanding on this theme.