**Nos. 01-1118 and 01-1119**

# In the Supreme Court of the United States

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

*v.*

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

OPERATION RESCUE, PETITIONER

*v.*

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTIONS PRESENTED

1. Whether private litigants may obtain equitable relief in a civil RICO action under 18 U.S.C. 1964.

2. Whether a person's wrongful use of force, violence, and fear to induce medical clinics to cease providing abortion services constitutes extortion under the Hobbs Act, 18 U.S.C. 1951.

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## INTEREST OF THE UNITED STATES

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1964, authorizes the Attorney General of the United States to bring civil RICO suits for equitable relief. The court of appeals held that private civil RICO plaintiffs may also seek such relief. That holding could adversely affect the United States' ability to obtain equitable relief such as disgorgement when both private parties and the government seek such relief for the same conduct.

The United States brings criminal prosecutions under the Hobbs Anti-Racketeering Act (Hobbs Act), 18 U.S.C. 1951, as well as criminal and civil RICO cases that rely on Hobbs Act violations as RICO predicate acts. The United States has prosecuted various Hobbs Act violations based on a defendant's wrongful obtaining of a victim's property right to conduct a business in legitimate ways.

## STATUTORY PROVISIONS INVOLVED

The relevant provisions of RICO, 18 U.S.C. 1964, and the Hobbs Act, 18 U.S.C. 1951, are set forth in an appendix to this brief. App., *infra*, 1a-3a.

## STATEMENT

1. Petitioners are individuals and organizations engaged in pro-life and anti-abortion activities. Respondents are a national nonprofit organization that supports the legal availability of abortions and two clinics that provide medical services, including abortions. See *National Org. for Women, Inc. (NOW)* v. *Scheidler*, 510 U.S. 249, 252 (1994); 01-1118 Pet. App. 2a-3a. In 1986, respondents brought this RICO action under 18 U.S.C. 1964(c) against petitioners and other defendants alleging, *inter alia*, that they conspired to force the closure of health care clinics that perform abortions, and that they did so through a pattern of racketeering activity that included acts of extortion in violation of the Hobbs Act. In 1991, the district court dismissed the RICO claims for failure to allege that the predicate acts or the RICO enterprise were economically motivated. The court of appeals affirmed that ruling. This Court reversed and remanded, holding that RICO does not require proof that either the alleged racketeering enterprise or the predicate acts of racketeering had an economic motive. *NOW* v. *Scheidler*, 510 U.S. at 257.

2. After trial, the jury returned a verdict for respondents on their substantive RICO claims under Section 1962(c).

The jury found that petitioners or persons associated with them had committed 21 violations of the Hobbs Act, 18 U.S.C. 1951; 25 violations of state extortion law; four acts or threats of physical violence; 23 violations of the Travel Act, 18 U.S.C. 1952; and 23 attempts to commit one of those crimes. 01-1118 Pet. App. 5a, 159a-160a. The jury awarded $31,455.64 to respondent Delaware Women's Health Organization and $54,471.28 to Summit Women's Health Organization. Those damages were trebled pursuant to 18 U.S.C. 1964(c). 01-1118 Pet. App. 5a, 162a. The district court subsequently entered a nation-wide injunction that enjoins petitioners, inter alia, from wrongfully interfering with the right of clinics to conduct their business. *Id.* at 5a, 131a-141a.

3. The Seventh Circuit affirmed. 01-1118 Pet. App. 1a-31a. As relevant here, the court of appeals held that private parties may obtain injunctive relief under RICO. *Id.* at 6a-14a. The court also held that petitioners' conduct constituted extortion under the Hobbs Act. The court explained that "intangible property such as the right to conduct a business can be considered 'property' under the Hobbs Act." *Id.* at 29a. The court of appeals also rejected petitioners' argument that they did not "obtain" any property. *Ibid.* The court reasoned that "an extortionist can violate the Hobbs Act without seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required." *Ibid.*

## SUMMARY OF ARGUMENT

I. RICO does not authorize private parties to seek injunctive relief.

A. Section 1964(a) authorizes courts to enter injunctive relief, and Section 1964(b) authorizes only the Attorney General to bring injunctive actions and to obtain temporary injunctive relief. Section 1964(c) authorizes private parties to sue for treble damages and attorneys' fees, but not for any

other relief. The structure of those provisions indicates that Congress intended to vest the Attorney General with the exclusive authority to bring suit for injunctive relief.

B. Congress's intent not to authorize a private injunctive action is confirmed by the treatment of the issue under the antitrust laws. The Sherman Act, 26 Stat. 209-210, created a public injunctive action and a private treble damages action. This Court interpreted that Act to foreclose a private injunctive action. Because RICO tracks the language and structure of the Sherman Act, Congress is presumed to intend that RICO be similarly interpreted.

That presumption is strengthened by comparison of RICO with the Clayton Act. Section 4 of the Clayton Act (15 U.S.C. 15(a)) carries forward the Sherman Act's treble damages provision, and Congress added a new provision, Section 16 of the Clayton Act (15 U.S.C. 26), that expressly authorizes a private action for injunctive relief. The fact that Congress used Section 4 of the Clayton Act as the template for RICO's treble damages provision, 18 U.S.C. 1963(c), without also including a counterpart to Section 16 of the Clayton Act, compels the conclusion that Congress intended no such private injunctive right under RICO.

C. RICO's purposes are fully consistent with the absence of a private right to seek injunctive relief. Congress authorized wide-ranging injunctive relief in civil RICO actions, such as corporate reorganization and dissolution. 18 U.S.C. 1964(a). Congress logically vested the Attorney General with the exclusive authority to seek such relief.

II. The Hobbs Act's prohibition on extortion is violated by a defendant's wrongful use of force, violence, or fear to obtain control over a business.

A. Property under the Hobbs Act includes the tangible assets of a business as well as the right to control the use of those assets. That conclusion flows from the settled understanding of property generally recognized by this Court and

specifically recognized by New York courts in interpreting that State's extortion statute, on which the Hobbs Act was modeled. Accordingly, a business owner has a property right in controlling what products and services to offer to customers.

B. A defendant commits extortion by seeking to obtain control over a victim's business decisions by wrongful means. The Hobbs Act requires that a defendant "obtain[]" property, and defendant does so either by gaining physical possession over the property or by acquiring control over the use or disposition of the property. *United States* v. *Green*, 350 U.S. 415 (1956). When the property right at issue is the *intangible* right of a business to use its assets, the defendant obtains that property right by dictating or controlling the use of those assets, *i.e.*, acquiring the power to determine what services or products the business will offer. That form of obtaining property by extortion is exemplified by threats of violence by organized crime in order to wrest control over the operations of legitimate businesses. The same is true when the defendant seeks control of a victim's business to further the defendant's non-economic ends. And because the Hobbs Act covers attempts and conspiracies, 18 U.S.C. 1951(a), it is irrelevant whether the defendant succeeds in actually gaining control over the business. A defendant thus commits extortion when he uses wrongful acts of violence, force, or fear in order to induce his victim to cede to him the power to control the victim's business.

## ARGUMENT

### I. RICO DOES NOT AUTHORIZE A PRIVATE CAUSE OF ACTION FOR INJUNCTIVE RELIEF

#### A. RICO's Text And Structure Vest Exclusive Authority In The Attorney General To Sue For Injunctive Relief

RICO's civil remedies provision, 18 U.S.C. 1964, authorizes two causes of action: a public enforcement action for injunctive relief by the Attorney General and a treble damages action by private parties. The Attorney General's right to sue for injunctive relief derives from Sections 1964(a) and (b), and those provisions, in combination, make the Attorney General's right exclusive.

1. Section 1964(a) grants district courts "jurisdiction to prevent and restrain violations" of RICO by issuing injunctive relief. 18 U.S.C. 1964(a). Section 1964(a) does not, however, provide for a cause of action for injunctive relief by a particular plaintiff. Rather, the authority to seek such relief is found in Section 1964(b), which states that "[t]he Attorney General may institute proceedings under this section," and that, "[p]ending final determination thereof," the court may enter appropriate interim restraining orders. 18 U.S.C. 1964(b).

By empowering the Attorney General alone to institute proceedings "under this section," Congress signaled its intent that the district court's equitable jurisdiction under Section 1964(a) must be invoked by the Attorney General. Congress reinforced that only the Attorney General may seek equitable relief by providing that temporary equitable relief may be awarded "[p]ending final determination" of a proceeding brought by the Attorney General for permanent injunctive relief. There is no corresponding provision that authorizes a private party to institute proceedings "under this section" or to seek temporary injunctive relief pending

final disposition of a claim. Under Section 1964(a) and (b), therefore, the sole authority to seek final and interim injunctive relief against racketeering activities and enterprises is given to the Attorney General.

Rather than authorize private civil RICO plaintiffs to seek equitable remedies, Congress in Section 1964(c) granted private parties the right to bring suit to recover treble damages and attorneys' fees. Section 1964(c) provides that "[a]ny person injured in his business or property by reason of a [RICO] violation * * * may sue * * * and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. 1964(c). That provision has been construed to authorize private parties, and not the government, to seek treble damages. *United States* v. *Bonanno*, 879 F.2d 20, 22-24 (2d Cir. 1989) (reasoning that the United States is not a "person" under Section 1964(c)); see also *Sedima, S.P.R.I.* v. *Imrex Co.*, 473 U.S. 479, 487 (1985) (observing that Section 1964(c) creates "a private treble-damages action").

Section 1964's "inclusion of a single statutory reference to private plaintiffs, and the identification of a damages and fees remedy for such plaintiffs in [Section 1964(c)], logically carries the negative implication that *no other remedy* was intended to be conferred on private plaintiffs." *Religious Tech. Ctr.* v. *Wollersheim*, 796 F.2d 1076, 1083 (9th Cir. 1986) (emphasis in original), cert. denied, 479 U.S. 1103 (1987). Coupled with the fact that Congress in Section 1964(b) explicitly authorized the Attorney General to initiate proceedings to obtain equitable relief under Section 1964(a), but did not similarly grant private parties that right, the statute makes it clear that Congress did not authorize private parties to bring actions for equitable relief.

2. In concluding otherwise, the Seventh Circuit reasoned:

> 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), 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).

01-1118 Pet. App. 8a. That analysis is flawed, however, because Section 1964(c)'s grant of a private treble damages action is not parallel to Section 1964(b)'s grant of a public injunctive action. As explained, Section 1964(b) expressly grants the Attorney General the right to bring actions under "this section," an obvious cross-reference to the court's power to award injunctive relief under Section 1964(a). Section 1964(c), by contrast, is a free-standing, self-contained grant of a private right to recover treble damages. The provision contains no express or implied reference to, or incorporation of, Section 1964(a).

The court of appeals' interpretation is also undermined by its recognition (01-1118 Pet. App. 14a) that Section 1964(b) grants only the government the right to seek *preliminary* injunctive relief. Under the court of appeals' reading of the statute, private parties may seek permanent injunctive relief but not temporary relief pending final resolution of their claims. There is no reason, however, why Congress would have intended that highly anomalous result. Rather, the logical interpretation of the statute is that Congress created a symmetrical statutory scheme under which the Attorney General may seek temporary and final injunctive relief, and private parties may seek treble damages.[1]

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[1] Contrary to the court of appeals' suggestion (01-1118 Pet. App. 10a), Congress's statement that RICO should be "liberally" construed,

### B. A Comparison With The Antitrust Laws Shows That Congress Did Not Create A Private Injunctive Action

The statutory language that forms the closest antecedent for the remedial provisions in RICO is found in the antitrust laws. At a time when Congress had provided no express authority for private antitrust plaintiffs to seek equitable relief, the antitrust laws were construed to preclude such relief. The parallels between the antitrust laws at that time and the language of RICO support the same conclusion here–particularly since RICO lacks the explicit authority to seek private injunctive relief that Congress ultimately added to the antitrust laws. RICO's legislative history reveals that the statute's omission of authority for private RICO plaintiffs to seek equitable relief was deliberate.

1. As this Court has explained, "[a] treble-damages remedy for persons injured by antitrust violations was first provided in § 7 of the Sherman Act, and was re-enacted in 1914 without substantial change as § 4 of the Clayton Act." *Pfizer Inc.* v. *India*, 434 U.S. 308, 311 (1978); accord *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 267 n.13 (1992); *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 644 n.16 (1981).[2] Section 4 of the Sherman Act also authorized courts to issue injunctive relief in actions brought

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Organized Crime Control Act of 1990, Pub. L. No. 91-452, § 904(a), 84 Stat. 947, does not override RICO's text, structure, and history (see pp. 6-13). That clause "is not an invitation to apply RICO to new purposes that Congress never intended. Nor does the clause help us to determine what purposes Congress had in mind. Those must be gleaned from the statute through the normal means of interpretation." *Reves* v. *Ernst & Young*, 507 U.S. 170, 183-184 (1993).

[2] Section 7 provided that "[a]ny person who shall be injured in his business or property * * * by reason of anything forbidden or declared to be unlawful by this act[] may sue therefor * * * and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 26 Stat. 210.

by the United States. 26 Stat. 209-210.[3] This Court repeatedly recognized that those provisions of the Sherman Act did not authorize private parties to bring suit for injunctive relief.[4] Private parties were not authorized to seek injunctive relief for violations of the antitrust laws until Congress passed Section 16 of the Clayton Act (15 U.S.C. 26) *explicitly* authorizing such a right. *California* v. *American Stores Co.*, 495 U.S. 271, 287 (1990) ("§ 4 of the Sherman Act, which authorizes equitable relief in actions brought by the United States, was reenacted as § 15 of the Clayton Act, while § 16 filled a gap in the Sherman Act by authorizing equitable relief in private actions."); accord *General Inv. Co.* v. *Lake Shore & Mich. S. Ry.*, 260 U.S. 261, 287 (1922).

The Sherman Act thus "envisaged two classes of actions, —those made available only to the Government, * * * and, in addition, a right of action for treble damages granted to redress private injury." *United States* v. *Cooper Corp.*, 312 U.S. 600, 608 (1941) (holding that the United States may not recover treble damages under the Sherman Act). The Court reached that conclusion despite the fact "that there are no words of express exclusion of the right of individuals to act

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[3] Section 4 of the Sherman Act provided that:

> The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * * [P]ending [a] petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

26 Stat. 209-210.

[4] *General Inv. Co.* v. *Lake Shore & Mich. S. Ry.*, 260 U.S. 261, 286 (1922); *Geddes* v. *Anaconda Copper Mining Co.*, 254 U.S. 590, 593 (1921); *Paine Lumber Co.* v. *Neal*, 244 U.S. 459, 471 (1917); *D.R. Wilder Mfg. Co.* v. *Corn Prods. Ref. Co.*, 236 U.S. 165, 174 (1915); *Minnesota* v. *Northern Sec. Co.*, 194 U.S. 48, 70-71 (1904).

in the enforcement of the statute, or of courts generally to entertain complaints on that subject." *D.R. Wilder Mfg. Co.* v. *Corn Prods. Ref. Co.*, 236 U.S. 165, 174 (1915). The Court explained that "such exclusion must be implied * * * because of the familiar doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.'" *Id.* at 174-175 (quoting *Farmers' & Mechanics' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 35 (1875)).[5]

Although the Sherman Act authorizes public injunctive actions in one paragraph (Section 4), while RICO does so in two paragraphs (Section 1964(a) and (b)), the statutes are identical in the respects critical here. First, both confer on courts "jurisdiction" to enjoin violations through permanent and injunctive relief, but expressly authorize only the Attorney General to seek such relief. Second, both provide private parties a separate right to recover treble damages and attorneys' fees, but no other forms of relief. In light of the precedents construing the Sherman Act, Congress is presumed to be aware when it enacted RICO that, absent inclusion of an *express* private right to obtain injunctive relief, the language it selected would be construed to exclude such a right. *Holmes*, 503 U.S. at 268 (construing the term

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[5] For those reasons, respondents erred below in relying on the courts' "inherent powers to issue injunctions * * * absent the clearest congressional command to the contrary." Resp. C.A. Br. 39 (citing *Califano* v. *Yamasaki*, 442 U.S. 682, 705 (1979)). That presumption is inapplicable here, where Congress passed RICO against the backdrop of this Court's Sherman Act decisions that held that courts had no authority to award injunctive relief to private parties notwithstanding the absence of any "words of express exclusion" of that authority. *D.R. Wilder Mfg. Co.*, 236 U.S. at 174. Indeed, the Court adhered to that conclusion despite arguments of dissenters that the courts had inherent equitable power to enjoin Sherman Act violations in suits by private parties. See *Paine Lumber Co.*, 244 U.S. at 473-477 (Pitney, J., dissenting).

"by reason of" in Section 1964(c) and observing that the Court "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.").

Indeed, to authorize private antitrust plaintiffs to seek equitable relief, Congress enacted a separate section of the Clayton Act, Section 16. RICO, however, lacks any provision comparable to Section 16 of the Clayton Act. Juxtaposed with Congress's explicit modeling of RICO's private treble damages provision "on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act," *Holmes*, 503 U.S. at 267, the absence of a counterpart to the Clayton Act's Section 16 makes clear that Congress did not intend to create a private right to equitable relief under RICO.

2. The legislative history of RICO confirms that Congress made a deliberate choice in omitting authority for a private injunctive action. "The civil remedies in the bill passed by the Senate, S. 30, were limited to injunctive actions by the United States and became §§ 1964(a), (b), and (d)." *Sedima*, 473 U.S. at 486-487; *Agency Holding Corp.* v. *Malley-Duff & Assocs.*, 483 U.S. 143, 152 (1987) (same). "During hearings on S. 30 before the House Judiciary Committee, Representative Steiger proposed the addition of a private-treble damages action" that was modeled after Section 4 of the Clayton Act. *Sedima*, 473 U.S. at 487. That amendment also would have authorized private parties to seek injunctive relief and the government to seek damages, as well as other procedural changes. 116 Cong. Rec. 27,739 (1970). When the Judiciary Committee responded by passing only the private treble damages provision, Representative Steiger complained that the bill did "not do the whole job," since it "fail[ed] to provide * * * two important substantive remedies included in the Clayton Act: compensatory damages to the United States when it is injured in its

business or property, and *equitable relief in suits brought by private citizens*." *Id.* at 35,228 (emphasis added).

Representative Steiger subsequently offered another amendment, again to authorize a private injunctive action and a public damages action. *Sedima*, 473 U.S. at 487; 116 Cong. Rec. 35,228; *id.* at 35,346. Concerned about "the potential consequences that this new remedy might have," Representative Poff asked Representative Steiger to withdraw the amendment for further study by the Judiciary Committee, and Representative Steiger agreed. *Agency Holding Corp.*, 483 U.S. at 154-155 (citing 116 Cong. Rec. 35,346).

Shortly after RICO was enacted, Senators Hruska and McClellan, RICO's sponsors, introduced S. 16, a bill that again would have authorized damage actions by the United States and injunctive relief actions by private persons. *Agency Holding Corp.*, 483 U.S. at 155 ("[T]he purpose of [S. 16] was to broaden even further the remedies available under RICO. In particular, * * * it would have further permitted private actions for injunctive relief."). The Senate, but not the House, passed S. 16, and therefore it never became law. *Wollersheim*, 796 F.2d at 1086.

Congress thus passed RICO without authorizing private injunctive actions despite repeated attempts to do so, and despite Congress's explicit grant of such a right in Section 16 of the Clayton Act. Congress shortly thereafter rejected an amendment to RICO that would have added such a right. The clear current in the legislative history is that, consistent with RICO's text, Congress intended to create a private right of action for only treble damages.

### C. Policy Considerations Do Not Support A Private Right To Injunctive Relief Under RICO

The purposes underlying RICO are fully consistent with limiting injunctive actions to suits brought by the Attorney General. RICO was designed "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello* v. *United States*, 464 U.S. 16, 26 (1983). To eradicate that sustained criminal conduct, Congress expressly authorized district courts to enter wide-ranging injunctive relief, including divestiture and corporate reorganization and dissolution. *United States* v. *Turkette*, 452 U.S. 576, 585 (1981). Corporate dissolution, however, is "a judgment of corporate death, which represent[s] the extreme rigor of the law." *California* v. *American Stores Co.*, 495 U.S. at 289 (internal quotation marks and ellipses omitted). It is therefore not surprising that Congress entrusted the Attorney General, acting with "official unity of initiative," with the exclusive authority to obtain such relief. *D.R. Wilder Mfg. Co.*, 236 U.S. at 174. As this Court explained in discussing the Sherman Act, Congress wanted to "confine the right to question the legal existence of a corporation * * * to public authority sanctioned by the sense of public responsibility and not to leave it to individual action prompted it may be by purely selfish motives." *Id.* at 176.

It is neither necessary nor appropriate to construe RICO implicitly to place those same remedies in private hands. Congress explicitly authorized a private right of damages under RICO and provided for a treble damages remedy as a deterrent against future harm. In particular contexts when Congress has wished to go further and authorize private injunctive relief for a new statutory right, it has so provided. For instance, although the conduct at issue here pre-dates the Freedom of Access to Clinic Entrances Act of 1994 (FACE), Pub. L. No. 103-259, § 3, 108 Stat. 694 (18 U.S.C. 248), that Act expressly provides for suits by private

persons to obtain temporary and injunctive relief against threats or acts of force that interfere with the obtaining or providing of abortion services. 18 U.S.C. 248 (a) and (c)(1)(B).

## II. THE HOBBS ACT CRIMINALIZES WRONGFUL USES OF FORCE, VIOLENCE, OR FEAR TO OBTAIN CONTROL OVER A BUSINESS

The Hobbs Act makes it a crime for anyone who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. 1951(a). The Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2). Property under the Hobbs Act includes not only the tangible and intangible assets of a business but also the *control* over those assets. A defendant obtains, or attempts to obtain, that property right when he wrongfully uses force, violence, or fear to secure, with the victim's consent, effective control over decisions about the victim's business.[6]

### A. The Right To Control A Business Is Property Under The Hobbs Act

1. It was settled when Congress passed the Hobbs Act in 1946 that the term "property" includes the exclusive right to control the use of business assets, such as buildings and

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[6] The trial court instructed the jury that "property" includes (1) "a woman's right to seek services from a clinic," (2) "the right of the doctors, nurses, or other clinic staff to perform their jobs," and (3) "the right of the clinics to provide medical services free from wrongful threats, violence, coercion, and fear." 01-1118 Pet. App. 150a. The court of appeals discussed only the third basis for finding a property right, holding that "the right to conduct a business can be considered 'property' under the Hobbs Act.'" *Id.* at 29a. This brief addresses the validity of that holding.

equipment, in any legitimate manner. It is "elementary" that "[p]roperty is more than the mere thing which a person owns," and "consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land." *Buchanan* v. *Warley*, 245 U.S. 60, 74 (1917) (citing 1 W. Blackstone, *Commentaries* *127). In other words, the "bundle of rights," *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979), that constitutes property includes the exclusive "power over [the] use" of physical assets. *Marsh* v. *Nichols, Shepard & Co.*, 128 U.S. 605, 612 (1888).

Because "[t]here can be no conception of property aside from its control and use," 73 C.J.S. *Property* § 5, at 170 (1983), this Court has recognized in a variety of contexts that the intangible right to use property is itself property. See, *e.g.*, *United States* v. *Craft*, 122 S. Ct. 1414, 1423 (2002) (observing that "essential property rights" include "the right to use the property"); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("Property rights in a physical thing have been described as the rights 'to possess, use, and dispose of it.'") (quoting *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945)); *Crane* v. *Commissioner*, 331 U.S. 1, 6 (1947) (observing that "ordinary, everyday" understanding of "property" includes "the aggregate of the owner's rights to control and dispose of [a physical] thing"); *Dobbins* v. *City of Los Angeles*, 195 U.S. 223, 236 (1904) (describing constitutional rights "to use and enjoy property").[7]

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[7] In *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627, 672-675 (1999), the Court rejected an asserted property right based on a "generalized right to be secure in one's business interests" free from a competitor's false advertising, because that right lacked the element of exclusivity. The Court did not address, much less reject, the principle repeatedly embraced by this Court in the cases

2. The principle that the right to control and use property is itself property accords with New York's extortion statute on which Congress modeled the Hobbs Act. *Evans* v. *United States*, 504 U.S. 255, 261 n.9, 264 (1992); accord *United States* v. *Enmons*, 410 U.S. 396, 406 n.16 (1973). When Congress passed the Hobbs Act, New York law defined extortion as "the obtaining of property from another, with his consent, induced by a wrongful use of force or fear" and further provided that "[f]ear * * * may be induced by a threat * * * [t]o do an unlawful injury to * * * property." N.Y. Penal Law §§ 850, 851 (Consol. 1909); accord Commissioners of the Code, *Proposed Penal Code of the State of New York* §§ 613, 614 (1865). In the earliest decision interpreting the meaning of "property" under that statute, *People* v. *Barondess*, 31 N.E. 240, 241 (1892), New York's highest court held that the term broadly extends to intangible rights, and that an injury to a "business" in the form of work stoppages occasioned by a strike constitutes an injury to "property."

The court in *Barondess* reasoned that the extortion statute "has not employed" the term "property" "to apply * * * solely to tangible articles * * * but it has included [the term] in its broad and unrestricted sense" "to include the business itself. * * * [F]or it has been said by Blackstone that *property consists in the free use, enjoyment, and disposal of all the owner's acquisitions, without any control or diminution, save only by the laws of the land.*" 31 N.E. at 241, 242 (emphasis added). Other New York decisions that pre-date the passage of the Hobbs Act likewise have held that "property" includes the intangible rights of a business. *People* v. *Hughes*, 32 N.E. 1105 (N.Y. 1893); *People* v. *Weinseimer*, 102 N.Y.S. 579, 614 (App. Div.) ("an injury to one's business is an injury to property"), aff'd, 190 N.Y. 537 (1907).

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cited above that the right to use and control property in a manner that is not prohibited by law is itself a property right.

While those decisions involved the meaning of the term "property" under the section of the statute defining wrongful acts inducing fear, there is no basis for a different meaning of the same word when used elsewhere in the same statute. *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (noting "basic canon of statutory construction that identical terms within an Act bear the same meaning"). Indeed, in *People* v. *Spatarella*, 313 N.E.2d 38, 39-40 (1974), New York's highest court embraced that principle in holding that extortion applies to the obtaining of intangible property rights that are not capable of physical delivery. In affirming a defendant's extortion conviction for threatening personal injury to a garbage collector unless he stopped servicing a restaurant, the court in *Spatarella* reasoned that its earlier decisions

> have construed the term 'property' for one purpose under the extortion statute, *i.e.*, for the purpose of defining the kind of property which can be threatened, and consistently held the term to include intangible rights. We are not disposed to construe the term differently in defining the sort of property which can be demanded under pain of injury * * * within the contemplation of the statute. Surely, the extortionist's demand for the business itself, or a part of it, is, if anything, more egregious than the demand simply for money.

313 N.E.2d at 40; see also *People* v. *Garland*, 505 N.E.2d 239 (N.Y. 1987) (affirming extortion conviction of defendants who sought to obtain tenants' intangible property right to occupy apartments).

3. The term "property" in the Hobbs Act should receive a similar construction. In passing the Hobbs Act, Congress legislated against a well-established background principle, recognized in decisions of this Court and the New York courts, that property, as stated by Blackstone, includes the intangible right of a business to freely use, enjoy, and control

its assets in any legitimate manner. Consistent with that understanding, in the first appellate decision to consider the issue under the Hobbs Act, *United States* v. *Tropiano*, 418 F.2d 1069, 1076 (1969), cert. denied, 397 U.S. 1021 (1970), the Second Circuit held that defendants who threatened owners of a garbage removal company with physical violence unless the owners ceased soliciting customers in certain areas extorted the owners' property "right to solicit business from anyone in any area without any territorial restrictions" by the defendants. Every appellate court that has considered the issue since has held that "property" under the Hobbs Act includes the intangible right to control a business in any legitimate manner.[8]

This Court has held in an analogous context that the exclusive right to control the use of corporate assets is itself property. In *Carpenter* v. *United States*, 484 U.S. 19, 26 (1987), the Court considered whether intangible property rights are protected under the mail and wire fraud statutes, which prohibit the use of the mails or of electronic transmissions to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341, 1343. The Court held that "property" in those statutes includes the "right to exclusive use" of confidential business information, including control over the timing of the release

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[8] *E.g.*, *United States* v. *Arena*, 180 F.3d 380, 393 (2d Cir. 1999), cert. denied, 531 U.S. 811 (2000); *Libertad* v. *Welch*, 53 F.3d 428, 444 n.13 (1st Cir. 1995); *Northeast Women's Ctr.* v. *McMonagle*, 868 F.2d 1342, 1350 (3d Cir. 1989); *United States* v. *Lewis*, 797 F.2d 358, 364 (7th Cir. 1986), cert. denied, 479 U.S. 1093 (1987); *United States* v. *Hoelker*, 765 F.2d 1422, 1425 (9th Cir. 1985), cert. denied, 475 U.S. 1024 (1986); *United States* v. *Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980), cert. denied, 450 U.S. 916 (1981); *United States* v. *Santoni*, 585 F.2d 667, 673 (4th Cir. 1978), cert. denied, 440 U.S. 910 (1979); *United States* v. *Franks*, 511 F.2d 25, 32 n.8 (6th Cir.), cert. denied, 422 U.S. 1042 (1975); *United States* v. *Nadaline*, 471 F.2d 340, 344 (5th Cir.), cert. denied, 411 U.S. 951 (1973).

of the information, "for exclusivity is an important aspect of confidential business information and most private property for that matter." 484 U.S. at 26-27. The lower courts construing the mail and wire fraud statutes similarly have held that the "right to control a thing, for example, money, is an integral part of the property right in the thing itself." *United States* v. *Granberry*, 908 F.2d 278, 280 (8th Cir. 1990), cert. denied, 500 U.S. 921 (1991).[9] That analysis applies with equal force to the term "property" in the Hobbs Act.

4. Nothing in the common law definition of extortion detracts from the conclusion that property under the Hobbs Act includes the exclusive right to control the use of business assets. At common law, extortion was limited to corrupt acts by public officials for the performance of official duties. *Evans*, 504 U.S. at 260. While prosecutions typically involved the receipt of money, extortion was said to extend to the taking of any "thing of value."[10] In passing the Hobbs

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[9] Accord *United States* v. *Simpson*, 950 F.2d 1519, 1523 (10th Cir. 1991); *United States* v. *Madeoy*, 912 F.2d 1486, 1492-1493 (D.C. Cir. 1990), cert. denied, 498 U.S. 1105 (1991); *United States* v. *Shyres*, 898 F.2d 647, 652 (8th Cir.), cert. denied, 498 U.S. 821 (1990); *United States* v. *Fagan*, 821 F.2d 1002, 1010 n.6 (5th Cir. 1987), cert. denied, 484 U.S. 1005 (1988); cf. *Cleveland* v. *United States*, 531 U.S. 12, 23 (2000) (concluding that a State's regulatory rights to control and issue video poker licenses were not property because those rights involved only the "sovereign power to regulate").

[10] 1 W. Russell, *Crimes and Misdemeanors* 573-574 (8th ed. 1923) ("Extortion * * * signifies the unlawful taking by any officer, by colour of his office, of any money or thing of value."); 2 J. Bishop, *Criminal Law* § 401, at 331-332 (9th ed. 1923) ("In most cases, the thing obtained is money * * *. But probably anything of value will suffice."); 3 F. Wharton, *A Treatise on Criminal Law* § 1898, at 2095 (1912) ("it is enough if any valuable thing is received"); 2 E. Coke, *Institutes of the Laws of England* pt. 1, at 368b (1832) ("Extortion * * * is a great misprision, by wresting or unlawfully taking by any officer, by colour of his office, any money or valuable thing."); 4 W. Blackstone, *Commentaries* *141 (extortion is "an abuse of public justice, which consists in an officer's unlawfully

Act, Congress "unquestionably *expanded* the common-law definition of extortion to include acts by private individuals pursuant to which property is obtained by means of force, fear, or threats." *Id.* at 261 (emphasis in original). By explicitly defining extortion under the Hobbs Act to reach the obtaining of "property," 18 U.S.C. 1951(b)(2), Congress expressed its intent to reach the acquisition of all forms of property, including intangible property rights, by wrongful acts of violence, force, or fear.

### B. A Defendant Obtains A Property Right When He Secures Control Over The Use Of Business Assets

1. Under the Hobbs Act, a defendant "obtains" property when he acquires, takes, appropriates, gains, or gets the property right at issue by the proscribed wrongful acts.[11] Because the Hobbs Act reaches attempts and conspiracies, 18 U.S.C. 1951(a), an extortionist can be convicted even if he fails in his ultimate goal to obtain the property at issue. See, *e.g.*, *Northeast Women's Ctr.* v. *McMonagle*, 868 F.2d 1342, 1350 (3d Cir. 1989); *United States* v. *Arena*, 180 F.3d 380, 394 (2d Cir. 1999), cert. denied, 531 U.S. 811 (2000).

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taking, by colour of his office, from any man, any money or thing of value."). The phrase "thing of value" is a term of art that includes intangible rights. See, *e.g.*, *United States* v. *Girard*, 601 F.2d 69, 71 (2d Cir. 1979); cf. *Bell* v. *United States*, 462 U.S. 356, 360 (1983).

[11] *Webster's New International Dictionary* 1485 (1917) (defining "obtain" as "[t]o get hold of by effort; to gain possession of; to procure; to acquire, in any way"); *American Heritage Dictionary* 1250 (3d ed. 1994) ("[t]o succeed in gaining possession of * * *; acquire"); *Random House Dictionary* 1338 (2d ed. 1987) ("[t]o come into possession of; get, acquire, or procure, as through an effort or by a request"); *Black's Law Dictionary* 972 (5th ed. 1979) ("[t]o get hold of by effort; to get possession of; to procure; to acquire, in any way"); 7 J. Murray, *New English Dictionary* 37 (1909) ("[t]o come into the possession or enjoyment of (something) by one's own effort, or by request; to procure or gain, as the result of purpose and effort; hence, generally, to acquire, get").

When the property being extorted is a physical object, such as money, the defendant may obtain the property by gaining possession over it. But where the property at issue is a business's *intangible* right to exercise exclusive control over the use of its assets, the defendant obtains that property by obtaining control over the use of those assets. Cf. *County Court* v. *Allen*, 442 U.S. 140, 161-162 & n.21 (1979) (possession of drugs may be shown by proof of dominion and control). A defendant thus may attempt to obtain property, *i.e.*, control over the use of business assets, by threatening acts of violence in order to determine what products or services a business will offer, and to which customers. See *Arena*, 180 F.3d at 394 (extortionist obtains property by controlling the fate of a business).

2. The principle that a defendant may commit extortion by obtaining control over property is shown by this Court's decision in *United States* v. *Green*, 350 U.S. 415 (1956). In that case, a union official was convicted of extortion for attempting to obtain from employers, by threats of violence, money in the form of wages to laborers for fictitious and unwanted services. *Id.* at 417. The trial court reversed the conviction based on its belief that the "Hobbs Act covers only the taking of property from another for the extortioner's personal advantage." *Id.* at 418. This Court found that interpretation "erroneous" and held 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). Because the defendant in *Green* did not physically obtain any property from the victims, the decision necessarily rests on the premise that the defendant satisfies the element of "obtaining property" under the Hobbs Act when he controls the disposition of the property that is taken from the defendant.

3. When a defendant uses acts or threats of violence to gain control over the use of the victim's business assets, the

property "obtain[ed]" is no different from the property obtained in cases where organized crime, by threats or violence, forces a victim to abandon its business operations or otherwise wrongfully exerts control over the business. *E.g.*, *United States* v. *Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980) (defendants committed arson and threatened murder to force nightclub owner to close his business), cert. denied, 450 U.S. 916 (1981); *United States* v. *Gambino*, 566 F.2d 414, 418 (2d Cir. 1977) (defendants threatened to injure garbage collectors unless they ceased servicing certain accounts), cert. denied, 435 U.S. 952 (1978); *Tropiano*, 418 F.2d at 1076) (same); *United States* v. *Glasser*, 443 F.2d 994, 997, 1007 (2d Cir.) (defendants destroyed windows installed by non-union glaziers to force store owners to use union glaziers), cert. denied, 404 U.S. 854 (1971).

Although some courts have described the right being extorted as the victim's right to solicit customers (*e.g.*, *United States* v. *Nadaline*, 471 F.2d 340, 344 (5th Cir.), cert. denied, 411 U.S. 951 (1973); *Tropiano*, 418 F.2d at 1076)), the core property right that is given up by the victim *and obtained* by the defendant in those cases is the exclusive right to control the conduct of the business's operations. *United States* v. *Santoni*, 585 F.2d 667, 673 (4th Cir. 1978) (finding that the "property extorted was the right of [the victim] to make a business decision [*i.e.*, to whom to award a subcontract] free from outside pressure wrongfully imposed"), cert. denied, 440 U.S. 910 (1979); *United States* v. *Franks*, 511 F.2d 25, 32 n.8 (6th Cir.) (finding that a defendant, who "coerc[ed] a businessman into changing his establishments from non-union to union, or risk being bombed," extorted the businessman "of his 'property' interest of an economic advantage, of using non-union labor, or of operating his business"), cert. denied, 422 U.S. 1042 (1975); accord *Arena*, 180 F.3d at 394; *McMonagle*, 868 F.2d at 1350; *Zemek*, 634 F.2d at 1174.

4. It is irrelevant under the Hobbs Act whether the defendant is motivated by an economic purpose, as the lower courts that have addressed the issue have correctly recognized.[12] The text of the Hobbs Act contains no requirement of an economic motive. Cf. *NOW* v. *Scheidler*, 510 U.S. at 257 ("[n]owhere [in the text of RICO] is there any indication that an economic motive is required"). As explained, when a person uses force or threats to compel a business to cede control over what goods or services the business will offer, the defendant obtains the victim's property by acquiring the power to decide how the business will be conducted. That conclusion holds true whether or not the defendant has a profit-making objective.[13]

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[12] *United States* v. *Lewis*, 797 F.2d at 364 ("The extortionist * * * does not have to intend to receive the funds demanded. Thus, the defendant would have violated § 1951 if, for example, he had simply demanded that Johnson & Johnson burn $1 million in cash."); *United States* v. *Cerilli*, 603 F.2d 415, 420 (3d Cir. 1979) (affirming extortion conviction where defendant demanded money be paid to political party), cert. denied, 444 U.S. 1043 (1980); *United States* v. *Starks*, 515 F.2d 112, 124 (3d Cir. 1975) ("There is no exception to the Hobbs Act which permits extortion for [a religious] purpose."); accord *United States* v. *Arena*, 180 F.3d at 394; *McMonagle*, 868 F.2d at 1350.

[13] Petitioners Scheidler et al. (01-1118 Pet. 23) cite commentary that asserts that pre-Hobbs Act New York law required the taking of property for a financial benefit. C. Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, 1994 Sup. Ct. Rev. 129, 140. The only authority cited for that proposition, however, is a New York decision holding that, in the labor context, a defendant could not be convicted of extortion to achieve legitimate labor goals unless he was attempting to obtain "a financial benefit for himself * * * and was not attempting in good faith to advance the cause of unionism." *People* v. *Adelstein*, 195 N.Y.S.2d 27, 28 (App. Div. 1959), aff'd, 169 N.E.2d 425 (N.Y. 1960). The need to show financial benefit in the labor extortion context arises because of the general rule that pressure for legitimate labor ends is not extortion. See *Enmons*, 410 U.S. at 406 n.16 (discussing New York law, including *Adelstein*, and stating "[i]n short, when the objectives of the picketing changed from

A contrary conclusion would allow a defendant to hijack legitimate businesses by wrongful acts of violence, threats, or fear simply because the defendant had a non-economic objective. That result would defeat the government's strong interest in protecting interstate commerce under the Hobbs Act by prosecuting extortionists who are motivated by causes other than financial gain. For instance, an economic motive requirement would immunize a defendant from prosecution under the Hobbs Act even though the defendant threatened acts of murder against a bank that loaned money to foreign nations whose policies the defendant opposed, against a retail store that sold products to which the defendant objected, or against any other business that used its land or other valuable property for a purpose that the defendant found unpalatable.

Those acts have deleterious effects on interstate commerce, whether or not the defendant directs the use of such property for his own financial gain. To exempt such conduct from the Hobbs Act would retreat from the Act's purpose to "protect the right of citizens of this country to market their products without any interference from lawless bandits." *Evans*, 504 U.S. at 263 (quoting 91 Cong. Rec. 11,912 (1945) (remarks of Rep. Jennings)) see also *United States* v. *Gambino*, 566 F.2d at 418 (The Hobbs Act "does not favor beatings as a means of controlling markets."). In sum, when the defendant uses wrongful force or threats to wrest control over the victim's business decisions, the defendant obtains that property interest.

5. Petitioners argue (01-1118 Pet. 15; 01-1119 Pet. 20) that the court of appeals dispensed with the "obtaining" element by concluding that "an extortionist can violate the Hobbs Act without either seeking or receiving money *or anything else*." 01-1118 Pet. App. 29a (emphasis added).

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legitimate labor ends to personal payoffs, then the actions became extortionate"); cf. *United States* v. *Green*, *supra*.

The Hobbs Act does, of course, require an "obtaining of property" or an attempt to do so. But that requirement is satisfied when, as in this case, a defendant threatens violence in order to force a victim to abandon his business or to cease selling a product or service. In those instances, the defendant obtains the victim's exclusive right to decide the use or disposition of business assets, a right that is itself property.

Petitioners suggest (01-1118 Pet. 17 & n.8) that certain intangible property rights are "incapable" of being "obtained." That argument, however, conflicts with the ordinary meaning of the word "obtain" to mean "acquire." Note 11, *supra*. The argument also runs counter to this Court's recognition that the intangible right to "control" is something that may be "obtained."[14] Petitioners' contention, if accepted, also would threaten unjustifiably to exempt from the Hobbs Act wrongful acts of violence to seize control over any number of valuable intangible property rights, such as confidential business information, trade secrets, patents, trademarks, and copyrights. See pp. 19-20, *supra* (discussing *Carpenter*, 484 U.S. at 26-27). There is no basis for so limiting the statute.

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[14] *E.g. Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 54 (1975) (shareholder disclosed plans for company were he to "obtain control" of the company); *Perez* v. *United States*, 402 U.S. 146, 155 (1971) (loan sharking "is one way by which the underworld *obtains control* of legitimate businesses") (emphasis added); *United States* v. *Nardello*, 393 U.S. 286, 295 n.13 (1969) ("Extortion is typically employed by organized crime to enforce usurious loans, infiltrate legitimate businesses, and *obtain control* of labor unions.") (emphasis added); *United States* v. *National City Lines, Inc.*, 337 U.S. 78, 79 (1949) (describing conspiracy to "obtain control" of local transportation companies); see also *Perrin* v. *United States*, 444 U.S 37, 48 (1979) (bribery is "widely used in highly organized criminal efforts to infiltrate and *gain control* of legitimate businesses") (emphasis added).

**C. The Application Of The Hobbs Act In This Case Would Not Produce Unwarranted Expansion Of Liability**

1. Petitioners contend (01-1118 Pet. 19-20 and 01-1119 Pet. 21) that recognizing liability here would exceed the limits placed on the statute in *United States* v. *Enmons*, 410 U.S. 396 (1973). *Enmons* held that the use of violence by striking union members, who damaged an employer's utility transformer in an effort to obtain higher wages, was not "wrongful" under the Hobbs Act because the Act was not intended to "proscribe[] the use of force to achieve legitimate collective-bargaining demands." *Id.* at 408. In petitioners' view, the *Enmons* defendants would be liable under the analysis necessary to impose liability here. They reason that under such an analysis, the *Enmons* defendants "obtained" the employer's property by damaging the transformer when they lacked any lawful claim to do so.

That contention lacks merit. Extortion requires the victim's "*consent*, induced by wrongful" acts. 18 U.S.C. 1951(b)(2) (emphasis added); see *Evans*, 504 U.S. at 255. Simple destruction of property, uncoupled with a demand that the victim "consent" to relinquish property, is therefore not extortion. In addition, under *Enmons*, 410 U.S. at 399-410, even violent activity (which is ordinarily punishable under state law) is not "wrongful" within the meaning of the Hobbs Act if it is undertaken to further legitimate labor objectives; the Hobbs Act therefore would not apply even if the defendants had "obtained" property.

2. Petitioners argue (01-1118 Pet. 23) that analyzing their conduct as extortion conflates that offense with the New York crime of coercion, which occurs when a defendant by wrongful acts "compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he has a legal right to engage." N.Y. Penal Law § 135.60 (McKinney 1997). They suggest that Congress therefore did

not intend to cover their conduct in the Hobbs Act. The same conduct, however, may constitute both coercion and extortion. The two crimes are "parallel" and "are similarly defined," as coercion, "in essence, consists of compelling a person by intimidation to engage or refrain from engaging in certain conduct," while extortion "is compelling a person by intimidation to turn over property." *Ibid.* (practice commentary). Accordingly, threats made to obtain control over how the victim will use his property will often constitute both coercion and extortion.[15]

3. Contrary to petitioners' claim (01-1118 Pet. 23 n.13), finding liability here would not criminalize, as robbery under the Hobbs Act, sit-ins and other protest activity that disrupt businesses. Robbery is defined under the Act as "the unlawful taking or obtaining of personal property from the person or in the presence of another." 18 U.S.C. 1951(b)(1). That definition carries with it the common law requirements of a physical taking and asportation of property. See *United States* v. *Nedley*, 255 F.2d 350, 355-358 (3d Cir. 1958). As aggravated larceny, robbery was also limited at common law to the physical taking of *tangible* personal property. *Bell* v. *United States*, 462 U.S. 356, 360 (1983); 2 W. LaFave & A. Scott, *Substantive Criminal Law* §§ 8.2, 8.4, 8.11 (1986) (LaFave & Scott).

While robbery and extortion both involve the acquisition of property by force, they are different in critical respects. Unlike robbery, extortion is not limited to the physical taking and asportation of personal property from the victim and does not require his presence. LaFave & Scott § 8.12(b). And unlike robbery, extortion requires the "consent" of the victim, albeit induced by wrongful acts of the defendant. 18

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[15] In contrast, because extortion requires that the defendant obtain property, threats made (for example) to compel a person to vote for a certain candidate for public office would constitute coercion, but not extortion, since no property is involved.

U.S.C. 1951(b)(2). Accordingly, a defendant who threatens violence to obtain a victim's consent to release intangible property rights commits extortion, not robbery.[16]

4. Finally, petitioners err in suggesting that the theory of extortion in this case could result in the prosecution of consumer boycotts (01-1118 Pet. 22) or of most social protest activity (01-1119 Pet. 20). The Hobbs Act extends only to the "wrongful use of actual or threatened force, violence, or fear." 18 U.S.C. 1951(b)(2). This case involves the use of violence, force, and property destruction (01-1118 Pet. App. 17a), which is inherently wrongful, *United States* v. *Sturm*, 870 F.2d 769, 773 (1st Cir. 1989); *United States* v. *Zappola*, 677 F.2d 264 (2d Cir.), cert. denied, 459 U.S. 866 (1982), and is covered by the Hobbs Act. The lower courts have recognized that threatening fear of economic loss (which consumer boycotts might involve) is not inherently wrongful under the Hobbs Act and is not covered where the victim has no right to be free from the pressure brought to bear by the defendant. *E.g.*, *Sturm*, 870 F.2d at 773; *Brokerage Concepts, Inc.* v. *U.S. Healthcare, Inc.*, 140 F.3d 494, 522-525 (3d Cir. 1998); see also *United States* v. *Albertson*, 971 F. Supp. 837, 849 (D. Del. 1997) (holding that it was not extortion for defendant to demand $20,000 from land developer in exchange for dropping vehement opposition to land development), aff'd, 156 F.3d 1225 (3d Cir. 1998). Imposing liability for the defendant's use of violence to secure control of the victim's business decisions lies at the core of the Hobbs Act; it does not threaten to punish legitimate protest activity.

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[16] Petitioners also err in arguing (01-1119 Pet. 21) that the court of appeals' decision could lead to the robbery prosecution of a protester who incidentally damages a bystander's glasses or pants. Such conduct would lack both the elements of asportation and the intent to steal.

## CONCLUSION

The judgment of the court of appeals upholding the RICO injunction should be reversed and its holding that petitioners' conduct was covered by the Hobbs Act should be affirmed.

Respectfully submitted.

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## APPENDIX

1. Section 1951, of Title 18, U.S.C., provides in relevant part:

**§ 1951. Interference with commerce by threats or violence**

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

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Colum-

bia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

* * * * *

2. Section 1964, of Title 18, U.S.C., provides in relevant part:

**§ 1964 Civil remedies**

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district

court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.

* * * * *