Nos. 01-1118, 01-1119

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC., *Petitioners*,
v.
NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL., *Respondents.*

OPERATION RESCUE, *Petitioner,*
v.
NATIONAL ORGANIZATION FOR WOMEN, ET AL., *Respondents.*

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

BRIEF FOR THE CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* SUPPORTING THE PETITIONERS

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QUESTION PRESENTED

The *amicus curiae* will address the following question:

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

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BRIEF FOR THE CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

INTEREST OF THE *AMICUS*

Concerned Women for America ("CWA") has over 500,000 members in all 50 states and is the largest public policy women's organization in the United States. CWA supports traditional values, encourages policies that strengthen families, and advocates virtues that are central to America's cultural health and welfare.

CWA is actively engaged in education and the development of public policies that are consistent with its philosophy. Therefore, CWA is profoundly committed to the rights of individual citizens and organizations to exercise the freedoms of speech, association, and assembly protected by the First Amendment. CWA believes that the decision of the lower court poses a significant threat to those rights.[1]

The issues at stake in this case are of direct concern to *amicus* and its members. The Seventh Circuit's decision demonstrates that civil RICO, combined with a dangerously expansive definition of Hobbs Act extortion, permits—indeed, requires—courts to mete out Draconian punishment for minor offenses occurring within the

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, their members and their counsel made a monetary contribution to the preparation and submission of this brief. Counsel for all parties have consented to the filing of all *amicus* briefs.

context of political protest, thereby chilling protected speech. RICO thus becomes a crushing political weapon in the hands of those who would strive to stifle the voices of others with whom they disagree.

STATEMENT

Petitioners are individuals and organizations that oppose abortion. Respondents are organizations that promote and/or perform abortions. Respondents allege that the Petitioners violated the Racketeering Influenced Corrupt Organizations Act ("RICO") 18 U.S.C. § 1962, when they engaged in the predicate acts of extortion under the Hobbs Act, 18 U.S.C. § 1951.

Hobbs Act extortion is well defined, requiring the extortionist to *obtain* property. Notwithstanding the clear requirement that a defendant "obtain" property from a victim, the lower court instructed the jury that the *obtaining* element is met if a plaintiff has "give[n] up" any "property right"—"whether or not the extortion provided an economic benefit to [defendants]." Tr. 4987. In recent years, similar instructions regarding extortion have been given in RICO cases involving political protest. *Feminist Women's Health Center*, W. D. Wa. C86-161-Z;[2] *Northeast*

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[2] The Roberts/Codispoti jury was instructed that extortion involved activity "causing the plaintiffs to part with property or some valuable right." *Feminist Women's Health Center v. Roberts*, W. D. Wa. 86-161-Z; Docket No. 576; *Feminist Women's Health Center v. Codispoti,* 63 F.3d 863 (9th Cir. 1995), Excerpt of Record 240-41.

Women's Center, Inc. v. McMonagle, 868 F.2d 1342, (3d Cir.), *cert. denied* 493 U.S. 901 (1989).[3]

This judicial expansion of Hobbs Act extortion is not merely a technical change. In shifting from a requirement that a defendant "get" property from the victim to the lesser requirement that a victim merely give up property; the court radically expanded traditional requirements for extortion. The expanded definition of extortion transforms the Hobbs Act from a statute that was enacted to penalize crimes of acquisition to a statute, which criminalizes political protest.

SUMMARY OF ARGUMENT

The trial court awarded judgment based on a definition of Hobbs Act extortion that is contrary to the plain wording of 18 U.S.C. § 1951. The application of the Hobbs Act to non-acquisitive activities is inconsistent with basic principles of statutory construction, including the plain meaning rule, the common law meaning rule, and the principle of lenity.

In the First Amendment area, the court has a duty to construe a statute to avoid constitutional difficulties. The Seventh Circuit's opinion wholly disregards the requirement that a Hobbs Act defendant "obtain" property in order to commit the crime of extortion. The Seventh Circuit's re-writing of the Hobbs Act

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[3] The District Court in *McMonagle* similarly charged the jury with "to part with" language. No. 88-2317 Pet. For Cert., *McMonagle v. Northeast Women's Center, Inc.*, App. at 88.

poses a serious threat to the First Amendment rights of free speech, association, and assembly.

ARGUMENT

I. THE HOBBS ACT DOES NOT APPLY TO ACTIVITIES IN WHICH NEITHER THE DEFENDANT NOR A RELATED THIRD PARTY "OBTAINS" PROPERTY

Liability under the Hobbs Act requires that the defendant or a related third party wrongfully "obtain" property from another. In interpreting this statute, the Court must look at the elements of the traditional common law offense of extortion and the statutory and interpretive case law, all of which provide that "obtaining" property is a required element of this crime.

A. The Plain Meaning of the Word "Obtain" in The Hobbs Act Demands The Acquiring of Property.

18 U.S.C. § 1951 (b) (2) defines extortion as "obtaining" of property from another.[4] That words are to be given their ordinary meaning is the fundamental rule of statutory interpretation. *Russello v. United States,* 464 U.S. 16, 21 (1983). The ordinary meaning of "obtain" is "to get a hold of by effort"[5] and "to come

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[4] Section 1951 (b) (2) provides:

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." (emphasis added).

[5] Black's Law Dictionary defines "obtain" as: "To get hold of by effort; to get possession of; to procure; to acquire, in any way." BLACK'S LAW DICTIONARY 1078 (6th ed. 1990).

into possession or enjoyment of (something) by one's own effort, or by request[.]"[6] Where there is no ambiguity in the words chosen by the legislature, there is no room for construction. *United States. v. Dotterweich*, 320 U.S. 277, 286 (1943) ("Congress cannot be deemed to have intended to punish anyone who is not 'plainly and unmistakably' within the confines of the statutes." (citations omitted). *See, also, United States v. Wiltberger,* 5 Wheat. 76, 95-96 (1820). Moreover, in interpreting a criminal statute, the Court must strictly construe all language, resolving any ambiguity in favor of lenity. *United States v. Chestnut,* 394 F. Supp. 581, 591 (S.D.N.Y. 1975) (holding that the narrow construction of criminal statute meets "least drastic means" test).

B. Common Law Extortion Required that the Defendant "Get" Property.

At common law, extortion was an offense committed by a public official who took money "by colour of his office." Common law required both a giving up of property by the victim and a "getting" of property by the perpetrator to complete the crime of extortion. Note, *Protestors, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms,* 75 Notre Dame L. Rev. 691, 705-706 (1999). This Court has made it

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[6] The Oxford English Dictionary defines "obtain" as: "To come into the possession or enjoyment of (something) by one's own effort, or by request; …hence, generally, to acquire, get." OXFORD ENGLISH DICTIONARY Vol. 10, 669-670 (2d ed. 1989).

clear that "extortion" in 18 U.S.C. § 1951 was a common-law term, which should be interpreted by reference to common law. *Evans v. United States,* 504 U.S. 255 (1992).

Though Congress expanded the common-law definition of extortion to include acts by *private* individuals under limited circumstances, the requirement that the extortionist "receive" property has been a necessary element of the crime throughout history.[7] Congress has not expanded the "obtaining" element of extortion. Therefore, the traditional common law element of "getting" or "receiving" property controls the interpretation of the Hobbs Act "obtaining" element.

C. The Legislative History of the Hobbs Act Dictates that the "Getting" of Property is a Necessary Element for Extortion.

Congress, in enacting the Hobbs Act and in defining "extortion," took the relevant language from the New York Penal Law.[8] Accordingly, in interpreting the Hobbs Act, this Court

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[7] 11 Hen. 7, ch. 23 (1494) ("**receive**. . .by Color or their Office"); 33 Hen. 8, ch. 39 (1541) ("**receive** or take") ("**receive** and take"); 2 & 3 Edw. 6, ch. 6 (1548) ("exact, **receive** or take"); 4 & 5 Phil. & M., ch. 3 (1557) ("exact, levy, **receive or take**") 21 Hen. 77, ch. 6 (1529) ("take, **receive** or demand"); 23 Hen. 8, ch. 9 (1531) ("ask, demand, take or **receive");** 27 Eliz. ch. 6 (1585) ("**receive**, take or have"); 31 Eliz. ch. 6 § 2 (1589) ("have, **receive** or take"); 2 Jac., ch 5 (1604) ("take, **receive** or make benefit to his own use") (emphasis added)

[8] 89 Cong. Rec. 3227 (1943) (Statement of Hobbs) ("There are two definitions [extortion and robbery] set forth in the bill, both of which are based on the New York law." *See also* 91 Cong. Rec. 11,906 (1945) (Statements of Hobbs and Robison). The New York Penal Law § 552 (1881) defined extortion as: "Extortion is the obtaining of property from

should give controlling weight to the New York Penal Law and those cases construing it at the time the Hobbs Act was passed.

Under New York law, as under the common law, the question of whether extortion occurred turned on whether the defendant intended to receive or procure money or property. Other motivations did not suffice. In the Commentary to Chapter IV, Section 584 (Larceny), the Field Code Commissioners appropriately observed:

> Four of the crimes affecting property require to be somewhat carefully distinguished; robbery, larceny, extortion and embezzlement. The leading distinctions between these, in the view taken by the commissioners may be briefly stated thus: All four include the criminal acquisition of the property of another.
>
> New York Field Code, Ch. 4 § 584 (1865) (emphasis added).

Courts in New York consistently held that extortion required a "getting" of property or money to the extortionist, not merely a deprivation to the victim. In *People v. Ryan,* 232 N.Y. 234, 133 N.E. 572, 573 (1921), a prosecution for blackmail (one element of which was "the intent … to extort or gain any money or other property"), the court held that a threat to injure a business without an accompanying intent to "gain money or property" did not fall

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another, with his consent, induced by wrongful use of force or fear, or under color of official right."

within the statute.[9] *See also People v. Squillante,* 18 Misc. 2d 561, 564, 185 N. Y. S.2d 357, 361 (1959) (holding in an extortion case that "'obtaining of property from another' imports not only that he give up something but that the obtainer receive something"). No New York case interpreting the extortion statute at the time the Hobbs Act was passed ever suggested that the "obtain" element of extortion could be met without a "getting" of property by the extortionist.

Congress adopted the Hobbs Act in 1946. During the four decades following the enactment of the Hobbs Act, this nation has experienced intense, divisive, and passionate political protest, involving most notably the struggle for civil rights for black Americans and protests against United States involvement in Viet Nam. Despite the fact that the targets of these protests were often private businesses (for example, segregated lunch counters and manufacturers of napalm), not a single reported case suggests that the federal extortion statute could be applied to political protest.[10]

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[9] In discussing the elements of the crime, the Court noted: "If it were simply the foolish act of an elderly woman, moved by anger, spite or revenge, without any intent to procure or extort money, there would be no crime of blackmail." *People v. Ryan*, 133 N. E. 572, 573 (1921).

[10] In *United States v. Green*, 350 U.S. 415 (1956), the Supreme Court held that Hobbs Act extortion applied to instances in which the perpetrator deprived his victim of property for the benefit of a related third party, rather than for himself. Even under this slightly expanded application, however, extortion remained a crime of acquisition.

This Court has previously refused to apply the Hobbs Act even to violent activities occurring during a labor strike for higher wages, because such activity does not squarely meet the requirements of the Hobbs Act. *United States v. Enmons,* 410 U.S. 396 (1973). The Court held that the defendants in *Enmons* did not violate the Hobbs Act, because they neither intended nor acted to *wrongfully* enrich themselves or others, when they sought higher wages for work actually performed.

D. The Lower Court Erred in Expanding the Hobbs Act to Non-Acquisitive Political Protest.

The first time any court interpreted the Hobbs Act as requiring only a deprivation to the victim and not a corresponding gain to the perpetrator (or related third party) was in *Northeast Women's Center, Inc. v. McMonagle,* 868 F.2d 1342 (3d Cir. 1989), *cert. denied,* 493 U.S. 901 (1989).[11] The plaintiffs in *McMonagle* sued abortion protestors under RICO, alleging predicate acts of extortion. The Third Circuit, without addressing the definition of "obtaining" and with no analysis of the meaning and history of the "obtaining" requirement, held that Hobbs Act extortion, and thus RICO, applied to circumstances in which neither the perpetrator, nor a related third party "got" the property of which the victim was deprived.

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[11] Arguably, *United States v. Anderson,* 716 F.2d 446 (7th Cir. 1983) expanded extortion to non-acquisitive crimes, but the opinion contains little discussion of facts or analysis of law.

Other courts quickly seized on the holding in *McMonagle* in adopting this radical departure from the traditional definition of extortion. *Feminist Women's Health Center v. Roberts*, W. D. Wa. 86-161-Z; Docket No. 576 (reversed on *res judicata* grounds, 63 F.3d 863 (9th Cir. 1995)). *United States v. Arena,* 180 F.3d 380 (2d Cir. 1999) *cert. denied,* 531 U.S. 811 (2000); *Libertad v. Welch,* 53 F.3d 428 (1st Cir. 1995).

Each of these cases involved abortion protestors. One may entertain little doubt that the intent of this litigation was to chill the free speech rights of the pro-life movement. The fact that each court so readily adopted an expanded definition of the "obtaining" element of extortion in these cases against political protest by abortion opponents could hardly be a coincidence.[12]

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[12] For example, in *McMonagle,* the Third *Circuit* ignored controlling precedent in its own circuit in order to apply the Hobbs Act and RICO to anti-abortion protestors. In *United States v. Nedley* 255 F.2d 350 (3d Cir. 1958) and in *United States v. Sweeney*, 262 F.2d 272 (3d Cir. 1959) the court of appeals had held that extortion was a larceny-type offense requiring a taking. Yet, the Court in *McMonagle* did not distinguish or overrule its holdings in *Nedley* or *Sweeney.* Shortly after the Second Circuit decided *United States v. Arena,* 180 F.3d 380 (2d Cir. 1999) *cert. denied,* 531 U.S. 811 (2000) in which the court upheld application of the Hobbs Act to abortion protestors, the same court decided *United States v. Jackson,* 180 F.3d 55 (2d Cir. 1999). In the latter case, which involved a scheme to reveal an alleged relationship between celebrity Bill Cosby and his alleged daughter, the Court narrowly applied the Hobbs Act, after analyzing the common law and New York Law, and determined that the Hobbs Act did not apply unless the defendant's attempt to "obtain" something was "wrongful." One critic has noted that the only readily apparent distinction between *Arena* and *Jackson* is that one involved a celebrity while the other involved anti-abortion protestors. Note,

The desire to crush the free speech rights of one's political opponents is an overwhelming one, and one which can be adequately checked only by a judiciary committed to the protection of free speech rights of those of all political persuasions.

Congress intended to limit the application of the Hobbs Act to those who wrongfully gain property from another. This Court has strictly discerned and enforced that intent. The petitioners' actions do not fit within the parameters of the Hobbs Act. They were not business competitors of the respondents. They did not attempt to "get" the respondents' abortion business, nor did they intend that the respondents' abortion business be directed to a related third party. On the contrary, the protestors desired that the respondents (and all other abortion providers) cease performing abortions. Neither the protestors, nor related third parties stood to gain an economic benefit by their actions of engaging in sit-ins and demonstrations.[13]

The petitioners likewise did not attempt to "get" either tangible or intangible property from any woman interested in having an abortion. An "intangible right" is not the same as "intangible property." *McNally v. United States*, 483 U.S. 350, 352 (1987) (holding that the intangible right of honest government is not a

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Protestors, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms, 75 Notre Dame L. Rev. 691, 738 (1999).

[13] In fact, it is unclear what "extortionate acts" the jury found in the instant case. *See, Appendix G* to No. 01-1118 Pet. for Cert.

property right protected by the mail fraud statute). The fact that abortion is legal does not convert this intangible "right" into "property"—let alone property that is susceptible to being "obtained" by an extortionist.

II. APPLICATION OF THE HOBBS ACT TO POLITICALLY MOTIVATED ACTIVITY IN WHICH NO ATTEMPT IS MADE TO OBTAIN PROPERTY IS INCOMPATIBLE WITH THE FIRST AMENDMENT

"Public-issue picketing" and political speech occupy the very highest rung in the hierarchy of values protected by the First Amendment. *Carey v. Brown,* 447 U.S. 455, 467 (1980). Boycotts, picketing, demonstrations and other forms of free speech, petition, assembly and association are often coercive and intimidating. These forms of protected speech may result in economic loss to others. Those characteristics do not remove the activities from First Amendment protection. *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886 (1982).

In instances in which illegal activity occurs within the context of political protest, imposition of punishment by a court must be judged "'according to the strictest law'" in order to avoid infringement of First Amendment rights. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 919 (1982) *quoting Scales v. United States,* 367 U.S. 203, 299-300 (1961).

In the instant case, the trial court not only declined to apply the "strictest law" doctrine in instructing the jury; it expanded the

definition of extortion in a manner that would practically assure that free speech rights would be violated.

The Seventh Circuit dispensed with the requirement that a defendant "obtain" property in an extortion (or the attendant RICO) case. Without requiring the obtaining of property, *any* illegal activity, however minor or non-violent, is extortionate, *because* it occurs in the context of political protest.[14] The Seventh Circuit's formulation of the Hobbs Act can be summarized as follows: Even minor, non-violent, wrongful activity (unprotected by the First Amendment, but often present in concerted political protest) in the context of political protest (protected, though inherently coercive[15]) equals extortion, because (according to the Seventh Circuit) the plaintiff need not prove that the defendant obtained anything.

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[14] The RICO statute can and has been used against abortion protestors who engage in "classic" acts of civil disobedience. In *Feminist Women's Health Center v. Roberts, et al.*, W.D. Wa. C86-161Z, the plaintiffs alleged that Hobbs Act extortion occurred when defendant Sharon Codispoti and one other person sat on the steps of a building occupied by several businesses including an abortion clinic. No violence, force, injury, or threat of injury was claimed. Plaintiffs also claimed "extortion" because the anti-abortion picketers parked in the public spaces in front of the clinic. *Feminist Women's Health Center v. Roberts, supra,* Docket No. 402. On appeal, the Ninth Circuit correctly noted that parking in a public place "was not unlawful." *Feminist Women's Health Center v. Codispoti*, 63 F.3d 863, 865 (9th Cir., 1995).

[15] *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-420 (1971) ("The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment").

Shockingly, under this faulty definition of the Hobbs Act (and the resulting expansion of RICO's application) political protesters who engage in an otherwise minor illegality will be dealt with much more harshly, as extortionists and racketeers, than defendants who engage in the same conduct for non-political reasons, or for no reason.[16] Defendants who engage in generic disorder for non-political reasons will be dealt with, if at all, under state criminal laws and civil penalties for trespass, nuisance, malicious mischief, or similar claims. Defendants who engage in identical acts in the context of attempting to persuade a business or an individual to change its course of conduct are subject to crushing criminal and civil liability under RICO. Such defendants are bludgeoned civilly by their political opponents, as in this case, or charged with a major felony in federal court, as in *United States v. Arena*, 180 F.3d 380 (2d Cir. 1999). The lower court's defective definition of extortion thus catapults a minor act of civil disobedience to a major felony.

Such an expansion of the Hobbs Act (and thus the RICO statute) if left in place, will have a profoundly chilling impact on all manner of political protest and on all acts of civil disobedience. It is not easy for a political protestor to see the line between

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[16] The Hobbs Act does not even require that the underlying act be one that is otherwise a criminal offense. The Hobbs Act requires only that a defendant engage in "wrongful" use of force, violence or fear in order to obtain property.

protected and unprotected protest activity. Take, for example, the following comment:

> None of us better not be caught up here. I don't care how old you are, I don't care how sick you are, I don't care how crazy you are, you better not be caught on these streets shopping in these stores until these demands are met.[17]

Is that protected speech or the "wrongful" use of "threatened force"? Is the exhortation to "choose life"[18] protected speech or will it be construed as a "threat" of "violence"? Tr. 5187. Does a sit-in demonstration on the front steps of an office building owned by a tobacco company constitute "use of . . .fear" to "obtain" property?

People who choose to participate in political protest do so because of passionately held beliefs. The beliefs of their opponents are often equally passionate. The use of RICO as a hammer against one's political opponents is nearly irresistible, as is the tendency of the "victims" to create or exaggerate the facts in order to conform to the law. Does anyone doubt that, had RICO been an available political weapon during the 1950's, white business owners would have brought a private racketeering claim against those who engaged in technically illegal sit-ins at segregated lunch counters and other businesses? Is there any doubt that an Alabama jury would have found that the actions of

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[17] *NAACP v. Claiborne Hardware Co*., 458 U.S. 888, 938 (1982) (speech of Charles Evers).

[18] Deuteronomy 30:19.

Dr. King and others in engaging in sit-ins on private property constituted "use of … fear" against business owners and white customers, resulting in losses to the targeted businesses? Does anyone doubt that the targeted business owners would have, intentionally or otherwise, exaggerated their observations and reactions to the illegal protest in order to detonate the ultimate nuclear bomb of litigation—a RICO lawsuit which offers the opportunity to brand one's political opponents "racketeers" as well as to extract treble damages from them?

Consider the holding of the Mississippi court reviewed by this Court in *NAACP v. Claiborne Hardware,* 458 U.S. 886, 895 (1982), that "many" black citizens were "overcome out of sheer fear" to "withhold their trade" from the complaining businesses. The targeted businesses sustained economic losses. Under the expanded definition of "extortion" formulated by the trial court and the Seventh Circuit, would not the participants in the *Claiborne Hardware* boycott today be subject to RICO under an extortion theory?

This threat to civil liberties is exacerbated by the fact that political speech often occurs in concert with others as in the instant case. Under the expanded definition of the Hobbs Act, a prosecutor (or civil RICO plaintiff) can assert extortion or RICO under vicarious liability theories of conspiracy and aiding and abetting, if *any* member of the group engages in *any* illegal

activity. Because a court may infer conspiracy from the facts,[19] a wholly innocent member of a loosely affiliated group of protestors will likely find it impossible to secure a dismissal short of trial, if at all.[20]

No one suggests that a protestor who engages in wrongdoing should not be liable for his or her own criminal conduct.[21] The real question is: Should a political protestor's punishment be *enhanced* because the criminal activity occurred within the scope of a confrontational political protest? Such an enhancement of punishment is antithetical to the fundamental constitutional principle that holds that illegal activity, in the context of political speech, must be subjected to the "strictest law." *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 919 (1982) (citing *Noto v. United States,* 367 U.S. 290, 299 (1960).

The looming specter of a RICO liability will surely cast fear into the hearts of all citizens who choose to publicly and

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[19] *Ianelli v. United States,* 420 U.S. 770, 777 n. 10 (1975).

[20] For example, in *Feminist Women's Health Center v. Roberts,* W. D. Wa. C86-161-Z, 18 defendants were initially named. After a number of parties were dismissed by the court or by the plaintiffs, six parties proceeded to trial. Judgment was entered against three defendants. *Feminist Women's Health Center v. Roberts,* W. D. C86-161Z, Docket # 691, 693. The Ninth Circuit reversed the judgment. *Feminist Women's Health Center v. Codispoti,* 63 F.3d 863 (9th Cir. 1995).

[21] Punishment for criminal conduct within the scope of political protest is, of course, subject to the "precision of regulation" standards demanded by *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1981), (citing *NAACP v. Button,* 371 U.S. 415, 438 (1963)).

vigorously demonstrate their message. Where the protesters' political opponents are both powerful and well financed, as they are in this case, the threat of a ruinous racketeering lawsuit will chill — or freeze — the free speech rights guaranteed by the Constitution. RICO cases are notoriously costly, frustratingly complex, and seemingly endless. One writer has noted that:

> Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit.…[C]ivil RICO has been used for extorsive purposes, giving rise to the very evils that it was designed to combat.
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> Califa, *RICO Threatens Civil Liberties,* 43 Vand. L. Rev. 805, 834 (1990).

In the context of political speech, many protestors will be unwilling to risk the nightmare of a RICO lawsuit,[22] and will be intimidated into limiting their speech to the blandest form, to avoid crossing over a vaguely defined line of "wrongful" activity. All of which is contrary to the "[P]rofound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times v. Sullivan,* 376 U.S. 264, 270 (1964).

III. THE SEVENTH CIRCUIT'S EXPANSION OF THE HOBBS ACT TO NON-ACQUISITIVE CRIMES

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[22] The instant case is now in its fifteenth year of litigation. The defendants in *Feminist Women's Health Center* v. *Codispoti,* 63 F.3d 863, 865, (9th Cir. 1995), endured nearly a decade of litigation. That case was filed in 1986, went to trial in 1989, and was reversed by the Ninth Circuit in 1995. The judgment was reversed because the *same defendants had been sued once before* (in state court in 1983) which resulted in the finding of *res judicata.*

RENDERS IT IDENTICAL TO THE CRIME OF COERCION, WHICH IS NOT A PREDICATE ACT UNDER RICO

Extortion was a crime of acquisition at common law. "Coercion" is a statutory crime with a much broader application. The Model Penal Code distinguishes "extortion" from "coercion" as follows:

> [T]he major difference lies in the purpose and effect of the coercive and extortionate threats. Criminal coercion punishes threats made 'with purpose unlawfully to restrict another's freedom of action to his detriment' while extortion is included within the consolidated offense of theft because it is restricted to one who 'obtains property of another by' threats.
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> Model Penal Code and Commentaries §223.4 cmt. 1, at 203.

The Seventh Circuit's faulty application of the Hobbs Act to non-acquisitive, albeit "wrongful" activity renders the elements for extortion identical to the elements of coercion.[23] Notably, the crime of coercion was not included as one of the "predicate offenses" supporting a RICO claim. This omission cannot be presumed accidental. During the debate on the RICO bill, several Senators,[24] the Department of Justice,[25] and the ACLU[26] expressed

concerns that the language in the earlier version of the bill, which defined racketeering activity as "danger of violence to life, limb or property" was overbroad and would permit suppression of anti-war protest. In response, the original language was replaced with a list of specific federal and state offenses. The crime of "coercion" was not included in the list of predicate offenses, nor was any crime related to trespass or vandalism. The measure passed, with RICO's chief sponsor, John L. McClellan stating that RICO, as revised "offers the first major hope of beginning to eradicate the growing organized criminal influence in legitimate commerce, while posing no real threat to civil liberties."[27]

The Seventh Circuit's decision converts actions that are merely coercive into actions that constitute extortion. The judicial re-

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[23] In *New York v. Balkan*, 656 F. Supp. 536 (E.D. N.Y. 1987), the court rejected the notion that "extortion" under the Hobbs Act means the same thing as "coercion" under the New York Penal Law. This holding is particularly significant because Hobbs Act extortion derived from New York law.

[24] *See* S. Rep. No. 91-617, at 215 (1969) ("[T]he reach of this bill goes beyond organized criminal activity.") (individual views of Sen. Philip A. Hart and Sen. Edward M. Kennedy).

[25] S. Rep. No. 91-617 at 121-122 (1969).

[26] "[O]ffenses of the kind which resulted from the demonstrations in connection with the anti-war protest movement could fall within the definition of pattern of racketeering activity of the bill. . ." Statement of Lawrence Speiser, director of the Washington office of the ACLU. Measures Relating to Organized Crime: Hearings on S. 30 and Related Measures Before the Subcomm. on Crim. Laws and Proc. of the Senate Comm. on the Judiciary, 91st Cong. 475 (1969).

[27] 116 Cong. Rec. 854 at 18,941 (1970).

writing of the Hobbs Act and thus the RICO statute pose the very threat to civil liberties that Congress scrupulously attempted to avoid.

CONCLUSION

The Court should reverse the Judgment of the Seventh Circuit.

Respectfully submitted,

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