No. 01-1118

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

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REPLY BRIEF FOR PETITIONERS

This case presents three important and recurring issues of federal law on which the circuits are sharply divided. Respondents seek to distract the Court from these issues of law by dwelling on disputed evidence presented at trial that has little to do with the questions presented and – for all we know – was not even the basis for the jury's determination of liability. When they get around to addressing the factors governing whether this Court's review is warranted, respondents have nothing even remotely persuasive to say. The petition should be granted.

I. Respondents' Inflammatory and Misleading "Facts"

Respondents open their brief (at 2-5) with a jury speech: a long litany of bad acts supposedly committed by unidentified abortion protesters over the 15-year period covered by this case. That recitation is riddled with inaccuracies.[1] More to the point, the jury in this case found that *only four* "[a]cts or *threats* of physical violence" to a "person *or property*" had occurred. Pet. App. 160a (emphasis added). There is no way of knowing, because respondents vigorously opposed every effort to require specificity in the jury's findings, whether those four unidentified incidents by unidentified protesters involved acts of violence against people or only threats of violence against "property" (broadly defined as "anything of value" (*id*. at 150a)). Compare Opp. 15 (falsely stating that petitioners were "found liable for scores of * * * violent acts"), 28 (same).

All of the remaining "crimes" respondents make so much of – which, according to the jury's findings, did *not* involve acts or threats of physical violence – consisted of "extortion" as that offense was improperly defined in the jury instructions.[2] At

[1] For example, there is not one iota of evidence to support respondents' scurrilous assertion (Opp. 2) that the "Petitioners" in this case – Joseph Scheidler, Andrew Scholberg, Timothy Murphy, the Pro-Life Action League, Inc. (or co-petitioner Operation Rescue) – "beat a * * * patient" in Los Angeles, "threw" a clinic employee in New Jersey "to the sidewalk," or did any of the other acts of violence attributed to them on pages 2-3 of the brief.

[2] Respondents suggest that petitioners had "links to arson and murder" (Opp.

respondents' insistence, the instructions permitted the jury to find an act of "extortion" if it concluded that someone "associated with PLAN" had used either "actual *or threatened* force, violence, *or fear*" (including "fear of wrongful economic injury") to cause the clinics or patients to "give up a property right" (including the "right to seek medical services"). Pet. App. 149a-151a (emphasis added). The instructions also authorized the jury to conclude that "the act of blockading" a clinic through nonviolent sit-ins "constituted a threat." *Id*. at 151a.[3]

In any event, respondents' catalogue of bad acts is irrelevant to the legal issues presented. It has nothing to do with the first and third issues presented. Nor is it relevant to whether the jury instructions, and the Seventh Circuit, applied a legally sound definition of "extortion."[4]

II. The RICO/Injunction Issue

A. *The Conflict*. As we showed (Pet. 6-10), the decision below conflicts with the Ninth Circuit's decision in *Wollersheim* (and with later cases in that circuit). Respondents argue, however, that "there is no circuit split" because *Wollersheim* involved a preliminary injunction. Opp. 7. That would come as

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5 n.3), but, as they well know, those inflammatory allegations were dismissed before trial for lack of evidence (Pet. 4) and the jury was properly instructed that "[t]here is no claim in this case" that "the defendants themselves are responsible for any of those acts." Pet. App. 146a. See also *id* at 159a.

[3]Although they deny it in this Court (Opp. 28 n.30), respondents exploited this broad definition at trial by repeatedly urging the jury to find acts of extortion based on ordinary sit-ins at clinics that interfered (if only for a "few hours") with the freedom of patients to receive services. Tr. 5008; see also Tr. 4986-87, 5005 (arguing that sit-ins that "render a clinic inaccessible to women" are "enough to prove extortion"), 5008 (arguing that sit-ins that obstructed access to clinics by their very nature involve the use of "force").

[4] The main purpose of this exercise appears to be to persuade this Court that petitioners are "terrorists" who should be judged under different standards than apply to every other litigant. Opp. 15, 22. Unfortunately, respondent NOW has resorted to such tactics before. See *Amicus* Br. Catholic Conf. of Ill. *et al.*, at 4-5 (quoting Chicago NOW press release condemning peaceful prayer vigil led by Cardinal George in front of a Chicago clinic as "an act of aggression" that will perpetuate or encourage "violence" and "terrorism").

news to the Seventh Circuit, which acknowledged the conflict with the Ninth Circuit, described *Wollersheim* as holding "that private parties cannot seek injunctions under RICO" (Pet. App. 6a), and devoted many pages to explaining why the panel "cannot agree with the Ninth Circuit" (*id*. at 12a). Accord Pet. App. 88a-89a (district court's understanding of *Wollersheim*).[5]

Although the injunction in *Wollersheim* was preliminary, the court's extended analysis answered the broader question "whether civil RICO permits a private party to secure *injunctive* relief." 796 F.2d 1076, 1081 (1986) (emphasis added). The court held that "Congress did not intend to give private RICO plaintiffs *any* right to injunctive relief." *Id*. at 1088 (emphasis added). The Ninth Circuit has repeatedly acknowledged this holding. See OR Reply Br. 4 (citing cases). The Ninth Circuit (and district courts in that jurisdiction) have routinely applied *Wollersheim* in cases involving *permanent* injunctive relief.[6]

Respondents argue that this Court should wait until more circuits have taken sides before bringing uniformity to federal law. But the availability of private injunctive relief is a ripe issue. *Wollersheim* was decided more than 15 years ago. Other circuits have indicated their strong agreement with the Ninth Circuit's analysis and conclusion. Many district courts have followed *Wollersheim*. See OR Pet. 11 & n.17. *Wollersheim* and the opinion below set forth detailed and conflicting analyses of the issue. As respondents point out (Opp. 13), the issue has been

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[5] Respondents never argued below that *Wollersheim* was distinguishable. They argued that it was wrong and should not be followed by the Seventh Circuit. See Resp. C.A. Br. 41-44. Worse yet, after Judge Rovner pointed out during oral argument that "the Fifth and Ninth Circuits have *held* there's no private right to injunctive relief," and other circuits "seem to doubt that it's available" (Oral Arg. Tr. 38 (emphasis added)), respondents' counsel took issue with the precise categorization of decisions but admitted: "*There's no question* the *Wollersheim* Court" so held. *Id*. at 41 (emphasis added).

[6] See, *e.g.*, *Oregon Laborers-Employers Health & Welfare Trust Fund* v. *Philip Morris Inc*., 185 F.3d 957, 966-68 (9th Cir. 1999), cert. denied, 528 U.S. 1075 (2000); *In re Nat'l Mortgage Equity Corp. Pool Certificates Sec. Litig*., 682 F. Supp. 1073 (C.D. Cal. 1987); *Feminist Women's Health Ctr.* v. *Roberts*, 1989 WL 56017, at *12 (W.D. Wash. May 5, 1989).

the subject of scholarly analysis. Nor is there any realistic possibility that the Seventh or Ninth Circuit will change its mind. See Pet. 10. The conflict is all the more intolerable because the nationwide injunction in this case applies even in the Ninth Circuit, where it is legally unauthorized. Pet. 9-10.

B. *Importance and Recurring Nature*. The issue has arisen frequently and has the potential to arise in *any* of the hundreds of private civil RICO actions filed each year. SEE ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2001, table C-2, at 46 (791 civil RICO actions filed in federal district courts in year ending Mar. 31, 2001, only 4 by government plaintiffs). Respondents suggest (Opp. 9 n.10, 15) that RICO's "future application" to abortion protesters is "unlikely" because the FACE Act independently proscribes obstruction of clinic entrances, but that is no answer. Civil RICO actions against abortion protesters account for only a small fraction of the hundreds of civil RICO cases. The panel's decision in this case will ensure that the issue will be raised with *greater* frequency in the future.

C. *The Merits*. Respondents' many pages of effort (Opp. 9-14) to prop up the Seventh Circuit's holding do little more than rehash the reasons cited by the court below. Tellingly, respondents make no effort to defend two cornerstones of the Seventh Circuit's analysis: its unfounded criticism of *Wollersheim* (Pet. 10-11) and its misplaced reliance on *Steel Co.* (Pet. 13-14). They also fail to come to grips with the evidence we identify in the text and structure of the statute. See Pet. 13; *Amicus* Br. of State of Alabama, at 4-6 (discussing this evidence). And they have nothing persuasive to say in response to our showing (Pet. 11-13) that Section 1964(c) was not only engrafted onto the rest of Section 1964 (and should be understood in light of that fact) but also expressly modeled after provisions in the antitrust laws that *do not authorize injunctive relief*. Along with the textual evidence, those two considerations amply "explain why the government * * * can use the permanent injunctive remedies in § 1964(a) while" private parties cannot. Opp. 10. Respondents' suggestion (Opp. 10) that we conceded in 1993 that injunctive relief is available is refuted by the very language they quote.

Finally, respondents say that there is "no practical need" to decide whether RICO authorizes private injunctive relief because federal courts can always grant such relief in the exercise of their "inherent powers." Opp. 14-15. But federal courts may not invoke their "inherent powers" to grant remedies Congress has withheld. *Melkonyan* v. *Sullivan*, 501 U.S. 89, 101 (1991); *Alexander* v. *Sandoval*, 532 U.S.275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.").[7]

III. The Hobbs Act Issue

A. *The Conflict*. 1. *Enmons*. We showed in our petition (at 19-20) that *Enmons* would have come out the opposite way if the Seventh Circuit's expansive definition of "property" and "obtaining" were correct. Respondents do not even attempt to refute this conflict in principle between *Enmons* and the decision below. Instead, they principally argue (Opp. 21-22) that the lower courts have been reluctant to extend *Enmons* beyond the union context. They also fault us for supposedly suggesting that "the 'property' to which the Court *was referring*" in *Enmons* included the company buildings and transformer, and not just the wages. Opp. 22 (emphasis added). But we never suggested this. On the contrary, our argument is that the Court in *Enmons limited itself* to consideration of the wages because that was the only "property" that the defendants were seeking to "obtain."

2. Respondents fare no better in their efforts to explain away the conflicts in the circuits we have identified relating to the definitions of "property" and "obtaining." Pet. 16-19.

a. "Obtaining." The Ninth Circuit in *Panaro* ruled that extortion under the Hobbs Act "does not occur when a victim is merely forced to part with property." 266 F.3d 939, 947 (2001). "Rather," the court explained, "there must be an 'obtaining': someone – either the extortioner or a third party – must receive

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[7] *Bell* v. *Hood*, 327 U.S. 678 (1946), provides no support for respondents' argument. As explained in the petitioners' and the government's merits briefs in *Barnes* v. *Gorman*, No. 01-682, the principle recognized in *Bell* is limited to *compensatory* relief for plaintiffs who otherwise would be left without any remedy. No. 01-682 Pet. Br. 27-29; No. 01-682 U.S. Br. 12-16.

the property of which the victim is deprived." *Id.* at 947-48. In *Nedley*, the Third Circuit reached the same conclusion in a Hobbs Act case involving "robbery" (which also involves "obtaining" of "property"). Pet. 16-17. These holdings are squarely at odds with the decision below. See Pet. App. 29a.

Respondents contend, incorrectly, that the analysis in *Panaro* is dictum. Opp. 20. The relevant language in *Panaro* is found in a portion of the opinion that upholds the extortion convictions of several defendants under the Hobbs Act against sufficiency challenges. In rejecting the defendants' arguments, the Ninth Circuit analyzed the meaning of "extortion" (including the element of "obtaining") and applied that analysis to the facts shown at trial. It went out of its way to emphasize the "importan[ce]" to its decision of the fact that the defendants had "sought not only to put [the victim] out of business, but actually *to get his business interests for themselves*." 266 F.3d at 948 (emphasis added). District judges in the Ninth Circuit and panels of that court will not be free to disregard *Panaro*.[8]

Respondents also contend that *Nedley* and other cases involving robbery under the Hobbs Act are "inapposite" because robbery "covers only '*personal* property.'" Opp. 20 n.25 (emphasis added) (quoting § 1951(b)(1)). But the fact that the definition of "robbery" includes only a subset of the property covered by extortion does not affect the scope of "obtaining."

b. "Property." As respondents are acutely aware (Opp. 20 n.23), the claims of the respondent *clinics* and *women* rest on different theories of "property." We identified (Pet. 17-20) a circuit conflict (and an inconsistency with *McNally*) with respect to the latter theory only. Other circuits disagree with the Seventh Circuit's holding that "property" includes "the class women's rights to seek medical services from the clinics." Pet. App. 29a. In the Second Circuit, those rights do not qualify as "property" because the Hobbs Act is restricted to "valuable

[8] The language respondents say is dicta was *added by the panel on rehearing*. See 266 F.3d at 943, 948; 241 F.3d 1104, 1109. The relevant passage hardly was "gratuitous" (Opp. 20). Nor are respondents correct (Opp. 21 n.26) that prior Ninth Circuit cases adopted a broader notion of "obtaining."

rights" that are "considered as a source or element of wealth."[9]

Respondents argue that the Second Circuit's decision in *Town of West Hartford* (and the First Circuit's in *Libertad*) are consistent with the opinion below because they recognize that "property" includes the "right to do business." Opp. 19. Again, we are *not* claiming a conflict with respect to the "property" element (as opposed to the "obtaining" element) underlying the *clinics*' claims. Respondents also suggest that the Second Circuit in *Arena* has since expanded the concept of "property" to include the right of "clinics and *patients* * * * *to do business with one another*." Opp. 19 (emphasis added). That is untrue. The only "property" at issue in *Arena* was the *clinic*'s (and *an individual physician*'s) "'right to conduct a business'" free from acts of vandalism. 180 F.3d at 392 (quoting jury instructions).[10]

B. *No Vehicle Problem*. In addition to 21 Hobbs Act extortion violations, the jury found that petitioners had committed a variety of other predicate acts. See Pet. 5 & n.3; Opp. 15-16. But this Court's cases make clear that where, as here, a jury verdict on a single count rests on a number of different legal theories, some of which are legally defective, the judgment must be vacated. See *Griffin* v. *United States*, 502 U.S. 46, 53-56, 59 (1991) (citing *Yates* v. *United States*, 354 U.S. 298 (1957)). The verdict, moreover, does not permit a determination of which predicate acts the jury relied on in finding two acts within the requisite ten-year period or a "pattern" of racketeering activity. Pet. App. 160a. There is also no way of knowing which predicate acts the jury relied on in awarding damages.

In addition, all of the other predicate acts found by the jury

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[9] Respondents spill much ink (Opp. 16-19) countering arguments we did not make: that "intangible" property is categorically outside of the scope of the Hobbs Act (and, relatedly, that "obtaining" requires "physical[] deliver[y]"). There is no need for the Court to address those arguments in this case because the liberty interest of patients is not a "property" right, and the right of clinics and physicians to conduct their business was never "obtained."

[10] Respondents correctly note (Opp. 7) that this Court denied review in *Arena*. But the petitioners in *Arena* failed to allege any conflict and failed to preserve their arguments below. 99-1554 U.S. Br. in Opp. 5-6.

were offenses that involve "extortion" defined in the *same way* as the 21 Hobbs Act "extortion" counts (including the same overbroad and legally erroneous definitions of "property" and "obtaining"). Pet. 5 n.3; Pet. App. 149a-51a.[11] Even the "generic" state law extortion counts were inextricably intertwined with the Hobbs Act definition at issue in this case.[12]

Respondents also suggest that the conflict we identified (Pet. 17-19) over whether a patient's liberty interest in receiving services from a clinic qualifies as "property" has "no practical significance" because the "judgment * * * would still stand even if the *patients*' property rights were not extorted." Opp. 20 n.23 (emphasis in original). They are mistaken. It is true that reversal of the decision below for failure to enforce the "obtaining" element would obviate the need to address the "property" element. But the faulty "property" definition supplies an independent basis for reversing the judgment as to NOW and the patient class, whose RICO claims necessarily rested on this theory of "property." See 18 U.S.C. § 1964(c) (standing to assert RICO claim requires injury to "business or property").

C. *Importance and Recurring Nature.* The importance of the Hobbs Act question (see Pet. 20-22) is underscored by the briefs from such divergent groups as the Southern Christian Leadership Conference, the State of Alabama, People for the Ethical Treatment of Animals, and the Illinois Catholic Conference urging the Court to grant review. Environmental groups such as Greenpeace and labor unions have also acknowledged the issue's importance for their activities. See OR Resp. Br. 7-

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[11] The four "acts or threats of physical violence" to persons or property found by the jury (Pet. App. 160a) were also violations of the Hobbs Act, 18 U.S.C. § 1951(a). See Pet. App. 144a. Because the statute reaches only acts or threats of physical violence that are done "in furtherance of a plan or purpose" to violate Section 1951, these counts also required a showing of either "robbery" (not alleged here) or "extortion." See *United States* v. *Yankowski*, 184 F.3d 1071, 1073-74 (9th Cir. 1999).

[12] *All* of the remaining counts, moreover, were hotly disputed in the Seventh Circuit. That court declined to reach petitioners' challenges after it upheld the 21 Hobbs Act "extortion" counts. See Pet. App. 29a-30a.

11. Moreover, as the State of Alabama correctly points out, the meaning of "obtaining" "property" also has important ramifications for the scope of *official* extortion under the Hobbs Act.

D. *The Merits*. Respondents say that "obtaining" property means the same thing as "obtaining the disposal" of it (Opp. 18), but Congress left those words out of the statute. Nor is "obtain" synonymous with "cause to relinquish." Respondents also suggest that the property right petitioners "obtained" was their "agreement to surrender control," but that legal theory (nowhere reflected in the jury instructions) is covered by the independent requirement of "consent." See also *Cleveland* v. *United States*, 531 U.S. 12, 23 (2000) (rejecting argument that intangible right of "control" constitutes "property"). All of respondents' theories do violence to the language of Section 1951, depart from the common law meaning of "extortion," and ignore the rule of lenity. They also work a "sweeping expansion of federal criminal jurisdiction" (*id*. at 24) – especially given that the Hobbs Act covers conspiracies and attempts as well.

IV. The *Claiborne* Issue

The decision below substantially erodes the First Amendment safeguards required by *Claiborne* and conflicts with a decision of the Second Circuit. See Pet. 24-30; OR Pet. 26-30. The profound importance of this issue, previously acknowledged by two Members of this Court (see 510 U.S. at 265), is further underscored by the many *amici* who have voiced concern about this aspect of the Seventh Circuit's decision and urged the Court to review it. See also OR Resp. Br. 11-12.

Respondents say that *Claiborne*'s requirement of particularized findings was "dicta," but that is not how other courts – including the Second Circuit – have read this Court's instructions. Apart from that untenable assertion, respondents merely focus on supposed factual differences in the two cases that have nothing to do with this legal issue. Equally telling, respondents nowhere dispute our showing (Pet. 25, 29 & n.16) that the Seventh Circuit failed to enforce what we called the "second" principle of *Claiborne*: the requirement that any damages awarded be for losses proximately caused by violent conduct (as opposed

to conduct protected by the First Amendment).[13]

There was no way for the district court or the Seventh Circuit to discharge its "special obligation" to ensure that the jury in this case imposed liability for conduct on the part of petitioners that was unprotected by the First Amendment without knowing which acts were the basis for the "predicate acts" found by the jury (or whether petitioners, as opposed to other, unidentified people "associated with PLAN" had engaged in the liability-creating conduct). Pet. 27-28. Nor did Instruction 30 solve the problem, for reasons we have explained (Pet. 28-30). The same is true of the various other instructions cited by respondents.[14] And respondents nullified any protection that might have been afforded by Question 6 and Instruction 12 (see Opp. 26, 28; Pet. App. 160a) by representing to the jury that the "safe harbor" for peaceful protests and sit-ins "without more" did not apply unless a blockade "didn't keep anybody out" of a clinic. Tr. 4987; see also OR Pet. 3 n.3. Given respondents' heavy reliance on petitioners' *speech* as a basis for liability (Pet. 30 n.17; Opp. 1-5), the absence of the requisite safeguards all but assured that the judgment would rest on protected conduct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[13] Respondents suggest that the First Amendment issue in this case is "fact-bound" (Opp. 6), but that is largely untrue. Whether the trial court's refusal to require the jury to make any particularized findings was consistent with the First Amendment is a pure issue of law, as is the question whether the Seventh Circuit properly disregarded the "second" *Claiborne* principle. And the lower courts' analysis of the "first" *Claiborne* principle (see Pet. 25, 28-30) is far less "fact-bound" than were the issues in *Claiborne* itself.

[14] Contrary to respondents' assertions (Opp. 26, 29), the verdict form did not "ensure[] damages were based only on the predicate crimes" and not on other overt acts. Question 9 of the verdict form referred the jury to Instruction 28 "for the definition of proximate cause"; the latter told the jury it could consider "any overt act." Pet. App. 152a, 161a. Equally wrong is respondents' suggestion that the district court made any "findings" under Rule 52(a) that support their arguments. Opp. 27. The language quoted by respondents in support of that assertion is from the jury instruction conference.

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