Nos. 04-1244, 04-1352

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.

OPERATION RESCUE,

Petitioner,

v.

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

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

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

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

D. COLETTE WILSON
1880 S. Redwood Street
Escondido, CA 92025
(760) 737-7181

ALAN UNTEREINER*
ROY T. ENGLERT, JR.
KATHRYN S. ZECCA
NOAH MESSING
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

Counsel for Petitioners

REPLY BRIEF FOR SCHEIDLER PETITIONERS

This case presents three questions of law concerning the meaning of the Hobbs Act, RICO, and the mandate in *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003). To the extent that facts matter in the proper resolution of these questions, they are facts concerning the litigation history of this case – not facts about the 15 years of political protests for which this RICO lawsuit sought to impose liability.

Nevertheless, respondents – echoed by most of their *amici* – open their brief with a long, inflammatory account of disputed evidence presented at trial. Resp. Br. 2-8. As we said about this tactic in our merits reply brief in *Scheidler II*:

> The assumption underlying this recitation is that every single bad act over the course of 15 years of anti-abortion protests that was referred to at trial was perpetrated by a "PLAN member." Even if that were true (and it is not), and even if these incidents happened the way respondents portray them (and they did not), the critical point is that there is *no basis whatsoever* for concluding that the *jury credited or relied* on respondents' litany.
>
> The jury in this case found that *only four* "[a]cts or *threats* of physical violence" to a "person *or property*" had occurred. [01-1118] J.A. 144 (emphasis added). There is no way of knowing, because respondents vigorously opposed greater 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" ([01-1118] J.A. 136) (emphasis added)). The remaining "crimes" that respondents repeatedly cite – which, according to the jury's findings, did *not* involve acts or even threats of physical violence – consisted of "extortion" as that offense was sweepingly defined in the jury instructions.

01-1118 Scheidler Reply Br. 1 (merits stage). And *Scheidler II* invalidates as contrary to law at least 117 of the 121 predicate

"crimes" found by the jury – which respondents even today falsely describe as involving "violent actions" (Resp. Br. 9).

Thus, respondents' suggestion (Resp. Br. 8) that petitioners engaged in a "reign of terror" has no support in the verdict. More to the point, as we next show, respondents' arguments on the legal questions presented have no support in the law.[1]

I. THE SEVENTH CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S CLEAR MANDATE

The following clear directive appeared in *Scheidler II* (537 U.S. at 411 (emphasis added in part)):

> Because ***all*** *of the predicate acts* supporting the jury's finding of a RICO violation ***must be reversed***, *the* ***judgment*** that petitioners violated RICO ***must*** *also* ***be reversed***. Without an underlying RICO violation, the ***injunction*** issued by the District Court ***must*** *necessarily* ***be vacated***. We therefore need not address the second question presented – whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964.

Remarkably, the Seventh Circuit panel quoted only the final part of this three-part directive (the portion requiring the injunction to be vacated, see 04-1244 Pet. App. 4a); it made no mention of this Court's other clear holdings that "*all* of the predicate acts supporting the jury's finding of a RICO violation must be reversed" and that the "judgment" must be "reversed."

Worse yet, the panel stated that this Court's opinion had "nothing at all to say about" (04-1244 Pet. App. 7a), and "makes no mention of" (*id.* at 5a), the four violence-only predicate acts. But this Court said, unambiguously, that "*all* of the predicate acts supporting the jury's finding of a RICO violation must be reversed." 537 U.S. at 411 (emphasis altered). The Court "further *h[e]ld* that our determination with respect to extortion un-

---

[1] Respondents ask this Court (Resp. Br. 19-20) to dismiss the petitions as improvidently granted. But respondents offer no reason for that extraordinary outcome that they did not already advance at the petition stage. Compare Br. in Opp. 3, 12-13, 19-22, 24-25, 27-30 with 04-1244 Reply Br. 6-10.

der the Hobbs Act renders insufficient *the other bases or predicate acts of racketeering* supporting the jury's conclusion that petitioners violated RICO." *Id*. at 397 (emphasis added).

At the petition stage, respondents ignored or sought to rewrite this Court's clear command. See 04-1244 Reply Br. 2 (petition stage); Br. in Opp. 10. In their merits brief, however, they finally have removed their heads from the sand and (breaking ranks with the Seventh Circuit) have addressed the precise terms of this Court's remand instructions. "[T]he single sentence at the end of the Court's opinion," they now say, "***was mistaken***" and therefore properly ignored. Resp. Br. 15 (emphasis added). But the lower courts are not free to ignore allegedly mistaken remand instructions from this Court.

That is particularly true where a party has not petitioned this Court for rehearing to correct the alleged mistake. Respondents say (at 19) that nothing in this Court's rules or decisions required them to seek "rehearing on an issue not presented and not decided." But, by acknowledging the critical remand instruction in this Court's opinion and calling it "mistaken," respondents admit that the "issue" they wish the lower court to ignore *was* decided – albeit without the level of substantive discussion respondents believe it deserved, and in a way respondents think procedurally irregular. Asking this Court to correct such perceived mistakes is exactly the function of a rehearing petition, *not* of further litigation in a lower court. See 04-1244 Pet. Br. 14-15.[2]

Beyond that, respondents recycle flawed points made in their brief in opposition, the panel's opinion, or both. Respondents argue (at 12-13) that the Seventh Circuit was justified in ignoring the terms of this Court's mandate because *Scheidler II*

---

[2] This Court in other cases has "ma[d]e minor changes in its prior opinion to correct certain inaccuracies or omissions brought to light by a petition for rehearing, or to permit the lower court to pass on other issues left undecided by the Court." R. STERN ET AL., SUPREME COURT PRACTICE 729 & n.27 (8th ed. 2002) (citing multiple cases); *e.g.*, *Swenson* v. *Stidham*, 410 U.S. 904, 904 (1973); *Parks* v. *Simpson Timber*, 389 U.S. 909, 909 (1967).

includes no discussion of the argument – which respondents pressed at the petition stage of *Scheidler II* but abandoned at the merits stage – that the Hobbs Act punishes acts or threats of violence that are unconnected to either robbery or extortion.[3] The critical issue, however, is not whether the Court's opinion sufficiently analyzes this issue by respondents' lights, but *whether the opinion disposes of these four claims* – and it clearly and plainly does.

Next, respondents claim (at 13-14) that this Court could not have disposed of "*all* of the predicate acts supporting the jury's finding of a RICO violation" (537 U.S. at 411 (emphasis added)) because their violence-only theory was not "fairly included" in the questions presented in *Scheidler II*. This argument is wrong for multiple reasons. First, as explained in our opening brief (at 15 & n.6), the legality of the four counts in question *was* raised by the petitions in *Scheidler II.* Second, respondents are wrong in suggesting that this Court cannot decide matters that fall outside of the questions presented. The Court has discretion to "consider additional questions" *not* presented in the petition "if necessary to properly dispose of the case." R. STERN ET AL., SUPREME COURT PRACTICE 416 (8th ed. 2002) (internal quotations omitted); see, *e.g.*, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 246 n.12 (1981). By resolving the legality of "all" of the RICO predicate acts in this case, this Court ensured that this decades-old litigation would finally come to an end, and was able "properly [to] dispose of" the RICO injunction issue it had granted by avoiding a decision on it. Indeed, as as we showed (04-1244 Pet. Br. 17), this Court in *Scheidler II undeniably* went beyond the scope of its grant of certiorari – by resolving the legality of the Travel Act and state-law counts.

---

[3] Respondents contend that "[a]t no point" did they either "say or imply" that all of the Hobbs Act predicates (including the four violence-only charges) hinged on extortion. Not so. See 04-1352 Pet. Br. 11 n.8. For strategic reasons, respondents chose to argue at the merits stage of *Scheidler II* that "*all* of the acts that supported the jury's finding as to Hobbs Act violations *also* supported its findings as to state law [extortion] violations." 01-1118 Resp. Merits Br. 35 (emphasis added). See also 04-1244 Pet. Br. 16-17.

Respondents contend that acceptance of our arguments "would require every respondent to raise in this Court every conceivable alternative ground to support the lower court's judgment," thus unleashing a tsunami of "needless litigation in this Court." Resp. Br. 18. As we explained in our reply at the petition stage (at 5-6), that is just not so. Our position has implications *only* for those cases in which lower courts proceed on the basis that this Court did not really mean what it plainly said.

Respondents also cannot explain away the lower court's noncompliance with this Court's holding that "the injunction issued by the District Court must necessarily be vacated." 537 U.S. at 411. Respondents say (at 17) that "the Seventh Circuit's opinion effectively directs the District Court to set aside the original injunction," but the panel's initial order (which is reprinted in and made part of the opinion on rehearing) says the opposite: it directs the district court to "determine whether the four predicate acts * * * are sufficient to support the nationwide injunction that it imposed." 04-1244 Pet. App. 5a. In denying rehearing, the panel suggested for the first time that the four violence-only predicates "could support a *more narrow* injunction." *Id*. at 6a (emphasis added). But the panel did not completely foreclose the possibility that the district court would continue the nationwide injunction; instead, as respondents noted at the petition stage, the panel merely "expressed some skepticism" about that possibility (Br. in Opp. 29). See 04-1244 Pet. App. 16a. In any event, given this Court's unambiguous directive, there is no basis on which *any* injunction could be issued.

II. THE HOBBS ACT DOES NOT MAKE ACTS OR THREATS OF VIOLENCE UNCONNECTED TO ROBBERY OR EXTORTION A FEDERAL CRIME

1. Respondents' principal argument is that the "plain language" of Section 1951(a) shows that a "violation of this section" includes "in any way or degree obstruct[ing], delay[ing], or affect[ing] commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951(a). That argument confuses the Hobbs Act's *jurisdictional element* with its sub-

stantive proscriptions. It does not violate the Hobbs Act "to obstruct commerce" (Resp. Br. 22), which is respondents' skewed shorthand for the full jurisdictional element, any more that it violates the Hobbs Act "in any way or degree * * * [to] delay[],or affect commerce or the movement of any article or commodity in commerce." Rather, the violation occurs if commerce is obstructed or affected, or an article or commodity in commerce is delayed, "*by robbery or extortion*." Respondents' reading (and that of their *amici*) ignores the parallelism of the verbs used in each of Section 1951(a)'s subparts – "Whoever [1] obstructs, delays, or affects * * * or [2] attempts or conspires * * * or [3] commits or threatens" – as well as other structural evidence in that provision. See 04-1244 Pet. Br. 21-23. Beyond that, if obstructing, delaying or affecting commerce without more were enough to violate the Hobbs Act, there would have been no need for Congress to specify that doing so "by robbery or extortion" was *also* a crime.

As we emphasized in our opening brief (at 20), Section 1951(a) proscribes acts or threats of "physical violence to any person or property" only if they are done "in furtherance of a plan or purpose *to do anything in violation of this section*." (Respondents are noticeably reluctant to quote – rather than offer their own paraphrase of – the words we have italicized.) The highlighted language, we showed, refers back to the first of the three subparts within Section 1951(a) – which contains the primary proscription against acts of extortion or robbery that satisfy the jurisdictional element. In like manner, the second subpart within Section 1951(a) also refers back to the primary offenses of robbery and extortion in the first subpart. See also 04-1352 Pet. Br. 12-14; Br. of Alabama *et al.* ("States' Br."), at 7-8. Moreover, any doubt about Section 1951(a)'s meaning is dispelled if one examines the language of the Hobbs Act as enacted in 1946. See 04-1244 Pet. Br. 21; AFL-CIO Br. 7-9. As even the panel below acknowledged, the 1946 statute "explicitly linked the 'acts of physical violence' clause to the prohibition on robbery and extortion." 04-1244 Pet. App. 15a. Respondents do not dispute this critical fact. Resp. Br. 31.

Accordingly, respondents must show that Congress altered – and significantly expanded – the scope of the Hobbs Act in 1948 when it revised the statute as part of an overall revision and recodification of Title 18. But this Court ordinarily declines to interpret revisions or recodifications of statutes as bringing about changes of substance unless an intention by Congress to make a substantive change is *clearly expressed*. See 04-1244 Pet. Br. 23-24 (citing multiple cases); U.S. Br. 16-18. As respondents admit, the Reviser's Notes "say[] that Congress did *not* mean to make substantive changes in the Hobbs Act in * * * 1948." Resp. Br. 30 (emphasis added).

Respondents contend, however, that the Reviser's Notes "cannot take precedence over the literal language of the statute" and observe that this Court has occasionally concluded that Reviser's Notes contain a mistake. Resp. Br. 30 (citing *United States* v. *Wells*, 519 U.S. 482 (1997), and *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U.S. 523 (1967)). Those cases, however, involve strong *textual* evidence of *change*, which the Reviser's Notes inexplicably overlooked. See *Wells*, 519 U.S. at 497 (involving consolidation of 10 provisions that lacked a materiality element and 3 provisions that contained a materiality element into a single provision lacking the element); *Tashire*, 386 U.S. at 531-33 & n.11 (involving the restoration of a phrase with an established legal meaning to the interpleader statute). There is nothing remotely like that in the text of the 1948 Act. A comparison of the 1946 and post-revision versions shows that the revisers, as their notes state, simply sought to avoid repetition of terms such as "whoever" and "shall be guilty of a felony" by combining into a single sentence what used to be four separate sentences (in four separate statutory sections), and by collapsing conspiracies and attempts into a single phrase in the second subpart of the section. See 04-1244 Pet. Br. 21-22 (quoting both statutes). Thus, the usual rules for interpreting revisions and codifications apply with full force here, and doom respondents' position.

Respondents claim "there are other instances where the legislative history says that there are only stylistic changes, but

Congress included important substantive alterations as well" – citing certain 1948 changes to the Judicial Code. Resp. Br. 30 n.5 (citing Barron, *The Judicial Code*, 8 F.R.D. 439 (1948-49)). But, as the cited article makes clear, the "few such changes, substantive in nature," made in 1948 to the Judicial Code were all "carefully outlined in the Reviser's Notes, and fully considered by the Judiciary Committees of both houses." 8 F.R.D. at 441.

2. At various points, respondents suggest a second – but equally implausible – reading of the Hobbs Act. The statute, they say, "prohibits three separate activities," namely, "interfere[nce] with interstate commerce" by three distinct means: "1) robbery (and attempts and conspiracies to commit robbery), or 2) extortion (and attempts and conspiracies to commit extortion), or 3) physical violence and threats of physical violence (that are part of a plan to obstruct interstate commerce)." Resp. Br. 10-11; *id.* at 22. Unlike respondents' first interpretation, this rendition of the statute (which requires a reshuffling of the elements of the first two subparts of Section 1951(a)) does not criminalize the mere act of "in any way or degree obstruct[ing], delay[ing], or affect[ing] commerce" (18 U.S.C. § 1951(a)). Otherwise, there would be four categories of crimes, not three.

The first flaw in this argument is that the three subparts of Section 1951(a) do *not* simply describe alternative means by which a person may "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951(a). Instead, the second subpart provides for the independent crimes of attempt and conspiracy, and through the phrase "so to do" ties back not to a mere jurisdictional element but to the predicate crime of obstructing, delaying, or affecting commerce "by robbery or extortion." Nor is the third subpart an adverbial clause that modifies the jurisdictional element. Instead, it begins with verbs and defines its own offense: "Whoever * * * 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 * * * or imprisoned * * *." 18 U.S.C. § 1951(a). The "in furtherance" clause does not make acts or threats of physical

violence a means by which the jurisdictional element is satisfied. See States' Br. 7-8 (respondents' "circular formulation" makes it a crime to commit or threaten violence to any person or property in furtherance of a plan or purpose to commit or threaten violence to any person or property).

Had Congress wished to write the statute respondents imagine, it would provided:

> 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 [by attempting or conspiring] so to do, or [by committing or threatening] physical violence to any person or property * * * shall be fined * * * or imprisoned * * *.

Respondents' reading thus requires the conversion of the last two subparts of Section 1951(a) into prepositional phrases and the deletion of the "in furtherance" clause (which is wholly unnecessary under respondents' reformulated statute).[4]

3. Respondents argue (at 11, 23-27) that reading the Hobbs Act as we propose would render Section 1951(a)'s third subpart meaningless. As demonstrated in our opening brief, however,

---

[4] Throughout their brief, respondents repeatedly use paraphrasing and shorthand phrases that are inaccurate as a substitute for the actual language of Section 1951(a). Thus, they refer to violence "occurring *during the commission of* extortion or robbery" (Resp. Br. 33 (emphasis added)), when in fact the statute refers to violence "in furtherance of a plan or purpose to do anything in violation of this section." 18 U.S.C. § 1951(a). They also refer to the "in furtherance" clause as "violence and threats of violence (that are *part of a plan* to *obstruct* interstate commerce)." Resp. Br. 11 (emphasis added); see also *id*. at 22, 24. And, as noted above, they repeatedly use the shorthand "obstruct commerce" for the jurisdictional element, which also contains far more expansive language. Respondents even take the liberty of reformulating the wording of Section 1951(a) and then placing the invented language in quotation marks. Resp. Br. 35-36 (stating that Hobbs Act prohibits "extortion or robbery or physical violence and threats of violence that 'furthers a plan to obstruct' interstate commerce"); *id*. at 33 (statute reaches violence that is "'part of a plan or purpose'" to affect commerce); *id*. at 34 ("a defendant must commit the act of violence 'in furtherance of a plan or purpose to . . . obstruct, delay, or affect commerce'").

that is not so. See 04-1244 Pet. Br. 33-36; see also 04-1352 Pet. Br. 13 n.9; U.S. Br. 11-12. Under our reading, the third subpart retains independent meaning in multiple respects: it covers violence during preparatory conduct in furtherance of a "purpose" to commit robbery or extortion that would not qualify as an "attempt" under New York's limited definition of attempts; it covers certain acts of subordinate "enforcers"; and it covers acts or threats of violence during the perpetrator's efforts to escape detection or arrest *after* the crime of attempted robbery has been completed. Indeed, the panel below acknowledged that the third clause reached "a tiny set of academic hypotheticals" (04-1244 Pet. App. 14a), which is all it takes to refute respondents' surplusage argument. In any event, it is indisputable that the Hobbs Act as enacted in 1946 "explicitly linked the 'acts of physical violence' clause to the prohibition on robbery and extortion." *Id*. at 15a. Thus, the 1946 Congress did not think this provision was surplusage. The Seventh Circuit had no business substituting its intuition that "it seems unlikely that Congress included the 'violence' language" to capture a narrow set of circumstances (*id*. at 14a) for the irrefutable evidence that Congress did have *some* separate purpose in mind in 1946 when it proscribed acts of threats of "violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 [*i.e.*, to commit robbery or extortion]." Pub. L. No. 486, ch 537, § 5, 60 Stat. 420 (1946).

4. Respondents also suggest (at 29) that, if the third subpart of the Hobbs Act means what we say, then Congress would have used the phrase "so to do" at the end of that provision (as it did at the end of the second subpart). But that phrase has a different referent when used in the second subpart (where it is preceded only by, and thus *must* refer back to, the first subpart) than it would if used in the third subpart (where it could be read to refer back to the second subpart, or even to earlier words in the third subpart itself). In contrast, the phrase Congress actually used – "to do anything in violation of this section" – links the acts or threats of violence back to the first subpart making robbery or extortion that affects commerce a crime.

5. In addition to their textual arguments, respondents seek support for their position in the concise title of the Hobbs Act as revised in 1948: "Interference with commerce by threats or violence." The shortened title, they maintain, "clearly states the scope of the Act." Resp. Br. 28. That is plainly untrue. The 1948 concise title cannot be taken as a guide to the Act's precise scope since, as this Court made clear in *Scheidler II*, the Hobbs Act does *not* reach coercion (which may involve "threats" that interfere with or affect commerce). Beyond that, the Hobbs Act punishes conspiracies to commit robbery or extortion even where no actual violence or threats have occurred. Thus, the most that can be said is that the 1948 title is a rough shorthand for the Hobbs Act's robbery and extortion crimes – which, except for official extortion, involve violence or threats of some kind. It is no accident that the Court consults the title of a statute only as a last resort when the text is completely lacking in clarity. *Brotherhood of R.R. Trainmen* v. *Baltimore & O. R.R.*, 331 U.S. 519, 529-30 (1947) (titles are "of use only when they shed light on some ambiguous word or phrase"); see also U.S. Br.13 n.1. But that is not the situation here. On the contrary, the Hobbs Act's text forecloses respondents' position.

6. None of respondents' remaining arguments in defense of their reading of the Hobbs Act has any substance.

a. Respondents maintain that in one sentence in *Stirone* v. *United States*, 361 U.S. 212 (1960), this Court "expressly recognized" that the Hobbs Act "prohibits * * * violence and threats of violence (that are part of a plan to obstruct commerce)." Resp. Br. 22. That reading of *Stirone* is wrong for multiple reasons we have identified (04-1244 Pet. Br. 9, 32-33; accord U.S. Br. 9) – which respondents ignore.

Indeed, as we explained in our opening brief (at 28-30), respondents' position is inconsistent with two of this Court's decisions involving the Hobbs Act. Respondents' reading would effectively reverse the *outcome* in *United States* v. *Enmons*, 410 U.S. 396 (1973), by making conduct a crime that the Court in *Enmons* said was not, and is also inconsistent with the reasoning

of *Scheidler II*, which held that the Hobbs Act does not reach the crime of coercion under New York law (which includes acts or threats of violence). Accord U.S. Br. 9 (respondents' position "would effectively overrule" both cases and make their holdings "a dead letter"); AFL-CIO Br. 13-15. Respondents' only answer is to point out that neither *Enmons* nor *Scheidler II* expressly analyzed or directly ruled on the "violence-only" theory. That is true but hardly responsive to our arguments.[5]

b. Respondents argue that, "[f]or years, the United States government relied on" the "violence-only" interpretation "in bringing prosecutions under the [Hobbs] Act." Resp. Br. 22-23. False. As the Solicitor General's brief explains, "[i]t has long been the view of the United States that the Hobbs Act criminalizes physical violence only when that conduct is in furtherance of an intended robbery or extortion." U.S. Br. 2; see also *id.* at 18. That view is reflected as early as 1946 in a letter of the Attorney General and was echoed in "official policy statements that guided criminal prosecutions by the United States under the Hobbs Act" published in 1965, 1984, and 1997. U.S. Br. 18-19 & 7a; see also 04-1244 Pet. Br. 23. The prosecutions in *Yankowski* and *Franks* represent the "only two reported attempts by federal prosecutors" to invoke a violence-only reading in five decades – and in both cases "the court of appeals summarily rejected the prosecutor's novel reading of the Act." U.S. Br. 19.

c. As we showed in our opening brief (at 25-27 & n.10), the legislative history of the Hobbs Act – and its predecessor, the Anti-Racketeering Act of 1934 – confirms Congress's intent to target only robbery and extortion and to exclude the crime of coercion from the statute (see *Scheidler II*, 537 U.S. at 403, 405-06; U.S. Br. 15-16). Indeed, in both 1934 and 1946 Congress declined to create the very crime the Seventh Circuit suggested Congress added, in revising and recodifying all of Title 18, in

---

[5] Respondents say (at 33-34) that reading the Hobbs Act to reach freestanding acts or threats of violence would serve to protect the instrumentalities of interstate commerce. But other criminal statutes already provide such protection. See 18 U.S.C. § 2232b(g)(5)(B) (citing many such provisions).

1948. See 04-1244 Pet. Br. 26-27; see also U.S. Br. 13-16. Respondents say that the legislative history *of the 1948 Act* contains no evidence that Congress wished to prohibit "violence and threats of violence * * * only if occurring during the commission of extortion or robbery." Resp. Br. 31-32. But the history of the largely nonsubstantive 1948 recodification is not where one would expect to find such evidence, nor is there evidence in the 1948 legislative history affirmatively supporting respondents' view. The legislative history of Congress's *substantive* consideration of this statute cannot be dismissed so easily.[6]

7. Even if respondents' two alternative readings of the Hobbs Act were plausible (and they are not), the rule of lenity would strongly favor reading the statute as not reaching freestanding acts or threats of violence. 04-1244 Pet. Br. 27-28; U.S. Br. 19; *Enmons*, 410 U.S. at 409-11. As we explained in our opening brief (at 30-32 & nn.12-13), there are a host of other persuasive reasons why respondents' reading should be rejected: it would render superfluous a wide array of other federal criminal provisions (including those in the FACE Act), substantially expand RICO, and federalize virtually all violent crime. See also States' Br. 11-20. Beyond that, when combined with RICO's broad concepts of enterprise liability, respondents' reading of the Hobbs Act based on perceived threats of violence

---

[6] Respondents say that Congress approved the violence-only reading by passing a 1994 statute, Pub. L. 103-322, § 330016(L), 108 Stat. 1796, 2147 (Sept. 13, 1994), which "changed some of the language of subsection (a), but not any other sections of" the Hobbs Act, at a time when Congress "knew that the Hobbs Act was being used against violence and threats of violence, apart from extortion and robbery." Resp. Br. 30-31. The 1994 provision, however, was aimed at correcting "misleading and outmoded fine amounts" throughout Title 18 and, toward that end, replaced the phrase "not more than $10,000" after the word "fined" with the phrase "under this title" in Section 1951(a) *and in 101 other provisions of Title 18*. No meaningful inference can be drawn from Congress's inaction in such a statute with regard to the substantive provisions of any of the 102 affected statutes. In any event, there was no evidence in 1994 that the Hobbs Act "was being used" to prosecute freestanding acts of violence. Both the Sixth Circuit's decision in *Franks* and the United States' official publications rejected this use. See U.S. Br. 18.

to property, for example, could place a wide array of labor and political protesters at risk of being sued under civil RICO by their economic or political adversaries.[7]

Respondents disagree (at 34) that these ill effects are to be feared, explaining that the Hobbs Act "has existed for 57 years" without these problems surfacing. But, until the Seventh Circuit's unprecedented decision in this case, no appellate court had ever endorsed the reading of the Hobbs Act urged by respondents (and two circuits had rejected it). Equally meritless is respondents' contention (at 34) that the statute's "crucial jurisdictional limit" will mitigate the ill effects. As this Court has made clear, the Hobbs Act's jurisdictional element has a very broad reach. 04-1244 Pet. Br. 32-33; 18 U.S.C. § 1951(a) ("in any way or degree" affecting commerce).[8]

III. RICO DOES NOT AUTHORIZE PRIVATE PLAINTIFFS TO SEEK INJUNCTIVE RELIEF

1. *The Antitrust Models for Section 1964(c)*. Respondents do not deny what this Court has repeatedly recognized: Section 1964(c) was modeled on Section 4 of the Clayton Act, which in turn was modeled on Section 7 of the Sherman Act. 04-1244 Pet. Br. 37-38. Nor do they dispute that the relevant language of these three provisions is in every material respect identical. These antitrust models were clearly understood, when RICO was enacted, as *not* authorizing private injunctive relief.

Respondents nevertheless contend (at 42-43) that the same language carries a different meaning in Section 1964(c) because

---

[7] Respondents and their *amici* spill much ink arguing that the First Amendment does not protect violence, and attributing to us a contrary argument. But our opening brief makes no such argument. See 04-1244 Pet. Br. 31-32.

[8] Respondents also contend (at 35) that their reading would not transform acts or threats of violence occurring on the picket line into federal felonies (thus effectively reversing *Enmons*) because 18 U.S.C. § 1951(c) provides that the statute "shall not be construed to repeal, modify or affect" various labor statutes. Contrary to respondents' unstated assumption, however, those labor statutes simply do not protect acts or threats of violence by strikers. See *United States* v. *Green*, 350 U.S. 415, 420 (1956).

of differences between the language of Section 1964(a) of RICO and the corresponding jurisdictional provisions of the Sherman Act (15 U.S.C. § 4) and the Clayton Act (15 U.S.C. § 25). Compare 04-1244 Pet. Br. 5a with *id.* at 6a, 7a. Specifically, respondents note that, whereas each of the antitrust provisions contains two components separated by a semicolon (the first vesting equitable jurisdiction in the district courts; the second authorizing the United States to "institute proceedings * * * to prevent and restrain * * * violations"), Congress elected in RICO to put those components into separate subsections (§§ 1964(a) and (b)). Although they describe this as a "crucial difference[]" (Resp. Br. 42), respondents identify no reason why the choice of a semicolon over a separate subsection heading should qualify as such, and it is difficult to imagine why it should. Accord U.S. Br. 25; see also *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 490 n.8 (1985) (declining to treat a "minor departure in wording" in RICO from its antitrust model as "indicat[ing] a fundamental departure in meaning").

The salient fact is that Sections 1964(a) and (b) are modeled after the Sherman Act's grant of authority for an exclusive public equitable action. Thus, RICO's sponsor, Senator McClellan, introduced Section 1964(a) and (b) by specifically invoking antitrust cases brought by the United States. 115 Cong. Rec. 9567-9568 (1969). And as this Court has recognized, "[t]he civil remedies in the bill passed by the Senate, S. 30, were *limited* to injunctive actions by the United States and became §§ 1964(a), [and] (b)." *Sedima*, 473 U.S. at 486 (emphasis added). Although Congress later added an express treble damages remedy for private parties in Section 1964(c) that was modeled after Section 4 of Clayton Act, *Sedima*, 473 U.S. at 487-88, Congress has never passed a RICO counterpart to Section 16 of the Clayton Act, which provides that private parties "shall be entitled to sue for and have injunctive relief." 15 U.S.C. § 26.

Respondents also make much of the fact that the Sherman and Clayton Act provisions state that "it shall be the *duty*" of the Attorney General to "institute proceedings in equity to prevent and restrain" violations (15 U.S.C. § 25(a) (emphasis added)),

whereas Section 1964(b) states that the Attorney General "*may* institute proceedings under this section." 18 U.S.C. § 1964(b) (emphasis added). See Resp. Br. 43. But there is no real difference between those formulations; the Attorney General's "duty" has always operated in practice as discretion to institute injunctive proceedings if he or she thinks them warranted. Moreover, any conceivable difference in the Attorney General's enforcement discretion would shed no light on the different question whether *private parties* are authorized to seek injunctive relief.

Nor have respondents accurately disputed our submission that, at the time RICO was enacted, a long line of decisions had clearly established that private injunctive relief was *not* authorized under the precursor Sherman Act provisions. See 04-1244 Pet. Br. 38-39 (citing cases); U.S. Br. 22-24 & n.4 (same). Respondents suggest (at 42) that two of the cases in this line – *Minnesota* v. *Northern Securities*, 194 U.S. 48, 70-71 (1904), and *Paine Lumber Co.* v. *Neal*, 244 U.S. 459 (1917) – turned on the plaintiff's lack of antitrust injury, but that is not true.[9]

Respondents fare no better in seeking to distinguish *Paine Lumber* on the ground that it predated "the merger of law and equity" in 1938. Resp. Br. 43. This Court has repeatedly reaffirmed the holding of that case – including post-merger. See *United States* v. *Cooper Corp.*, 312 U.S. 600, 608 & n.9 (1941). In any event, the merger of law and equity "did not alter sub-

---

[9] See *Northern Securities*, 194 U.S. at 70-71 (Sherman Act does not authorize "original suits in equity instituted by the states or by individuals" but only "those instituted in the name of the United States"); *Paine Lumber*, 244 U.S. at 471 ("a private person cannot maintain a suit for an injunction" under the Sherman Act) (citing *Northern Securities*); see also *General Inv. Co.* v. *Lake Shore & Mich. S. Ry.*, 260 U.S. 261, 286 (1922) (Sherman Act's remedies "were intended to be exclusive" and "consisted *only* of (a) suits for injunctions brought by the United States in the public interest under section 4 * * *; and (b) private actions to recover damages brought under section 7") (citations omitted; emphasis added); *Geddes* v. *Anaconda Copper Mining Co.*, 254 U.S. 590, 593 (1921) ("It is now the settled law that the remedies provided by the Anti-Trust Act of 1890 for enforcing the rights created by it are exclusive and therefore, looking only to that act, a suit [for private injunctive relief] * * * would not now be entertained.").

stantive rights." *Grupo Mexicano* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999). It merely removed one (purely procedural) reason why Congress might have chosen to discuss equitable and legal remedies separately; it did not remove other, non-procedural reasons, such as the important policy rationales animating Congress's decision to assign to the federal government the exclusive authority to seek injunctive relief under the Sherman Act (and RICO). See *Northern Securities*, 194 U.S. at 70-71; *D.R. Wilder Mfg. Co.* v. *Corn Prods. Refining Co.*, 236 U.S. 165, 175-76 (1915); U.S. Br. 27-28.

Respondents point out that this Court occasionally has "rejected the antitrust analogy when analyzing RICO." Resp. Br. 43 (citing *Tafflin* v. *Levitt*, 493 U.S. 455 (1990), and *Sedima*). Those cases, however, are exceptions to the rule. See 04-1244 Pet. Br. 39-40. In *Sedima*, which relied on the antitrust analogy in resolving one issue but not another (473 U.S. at 489-90), there was strong evidence in RICO's legislative history that Congress "sought to avoid" problems that would arise if the specialized "body of precedent" dealing with antitrust standing were imported into RICO in the form of an analogous "racketeering injury" requirement. *Id.* at 498-99. In *Tafflin*, this Court ruled that its traditional, exacting standard for overcoming the presumption in favor of concurrent jurisdiction could not be satisfied by "the Clayton analogy" alone. 493 U.S. at 459-63. Here, in contrast, reliance on the antitrust analogy is particularly fitting: the availability of private injunctive relief under RICO hinges on the meaning of text in Section 1964(c) that is in every material respect identical to the Clayton and Sherman Act provisions from which it was drawn. See *Holmes* v. *SIPC*, 503 U.S. 258, 268 (1992).

2. *Other Arguments Based on RICO's Text and Structure*. Respondents seek to overcome Congress's reliance on antitrust models with established meaning by contending (at 38) that Section 1964(a) "unambiguously" confers on district courts broad equitable jurisdiction. But that hardly answers the critical question *who* may invoke the district court's equitable powers. That question is answered by 18 U.S.C. § 1964(b) (emphasis

added): "*The Attorney General* may institute *proceedings under this section*." Contrary to respondents' suggestion, Section 1964(b)'s unqualified authorization of actions by the government – which respondents quote only selectively (at 40) – is simply *not* equivalent to Section 1964(c)'s far more limited authorization of private litigants who can show an "injur[y]" to their "business or property" to "sue therefor" and recover the specified remedies of treble damages, costs, and attorneys' fees.

Respondents emphasize that Section 1964 nowhere expressly "precludes injunctive relief to private parties." Resp. Br. 38; see also *id*. at 40. But this Court has never imposed such a drafting obligation on Congress. Indeed, this Court *rejected* this very argument in interpreting the language of the Sherman Act on which civil RICO was modeled. See *D.R. Wilder Mfg. Co.*, 236 U.S. at 174-75 (rejecting argument that "there are no words of express exclusion" in the Sherman Act barring individuals from "act[ing] in the enforcement of the statute"); see also *Paine Lumber*, 244 U.S. at 473, 475 (Pitney, J., dissenting) (unsuccessfully arguing that, in absence of words of express limitation, private injunctive relief should be available under Sherman Act); *id*. at 473, 475-76 (unsuccessfully arguing for same result based on inherent judicial authority, historical powers of equity courts, and supposed generality of Section 4's grant of equitable jurisdiction); U.S. Br. 24 & n.5.

Respondents do their best (at 43) to try to explain away the fact that the Clayton Act, unlike Section 1964 of RICO, includes a provision (Section 16) *expressly authorizing* private injunctive relief. But Congress's inclusion of that provision in the Clayton Act speaks volumes about the meaning of Section 4 of the Clayton Act, on which Section 1964(a) was expressly modeled. See also U.S. Br. 25-26.

3. *The Legislative History*. Multiple proposals in both the House and the Senate – during RICO's consideration and in succeeding Congresses – would have expressly authorized private injunctive relief. See 04-1244 Pet. Br. 45-48; 04-1352 Pet. Br. 27-29; U.S. Br. 26-27. Respondents take issue (at 44) with the

idea that Congress "rejected" these proposals. Although the House and Senate never took formal votes on these proposed amendments (except for the Senate's vote in 1972), it cannot be disputed that the option of authorizing private injunctive relief was presented again and again in House and Senate committees as well as on the floor, and that both chambers ultimately chose a competing alternative. 04-1244 Pet. Br. 45-47. Under this Court's cases, that is significant. *Id*. at 48 (citing cases).

Respondents also dispute the significance of our showing that Section 1964(c) was "a branch grafted onto the already-completed trunk of the statute." *In re Fredeman Litig.*, 843 F.2d 821, 829 (5th Cir. 1988). But we are not suggesting that Section 1964(c) must "be read in a vacuum, as if § 1964(a) were not part of the statute." Resp. Br. 46. What we *are* saying is that Section 1964(c)'s origin as an add-on provision refutes the Seventh Circuit's premise that Section 1964(c) bears exactly the same relationship to Section 1964(a) as does Section 1964(b). See 04-1244 Pet. Br. 44. That flawed premise also disregards the fact that subsections (a) and (b) originated in a single provision of the Sherman and Clayton Acts.

4. *The Liberal Construction Clause and Inherent Powers*. According to respondents (at 41), this Court in *Reves* v. *Ernst & Young*, 507 U.S. 170 (1993), pointed to RICO's liberal construction clause and underscored "the importance of broadly construing RICO's remedies section." Like the Seventh Circuit (04-1244 Pet. App. 39a-40), however, respondents selectively quote from *Reves*, which *rejected* an argument based on the clause. Respondents also omit this Court's statement that the "purposes Congress had in mind * * * must be gleaned from [RICO] through *the normal means of interpretation*." 507 U.S. at 184 (emphasis added); see also *Holmes*, 503 U.S. at 274.[10]

---

[10] In addition to *Reves*, respondents (at 41) cite five of this Court's cases in support of their argument based on the liberal construction clause. But only one of those cases even mentions the liberal construction clause – and it does not support respondents' position. In *Sedima*, the Court cited the clause only after it had determined that there was "no room in the statutory language for an additional, amorphous 'racketeering injury' requirement." 473 U.S. at 495.

Equally meritless is respondents' invocation (at 40) of federal courts' "inherent powers." *Franklin* v. *Gwinnett County*, 503 U.S. 60 (1992), is of no help to respondents, because it deals with remedial questions in the context of an *implied* right of action (and in any event it authorizes judicial recognition of "appropriate" remedies only, *id.* at 73). In RICO, by contrast, Congress has expressly created a private right of action, specified the remedies available in such an action, and authorized the government to institute other proceedings in which different remedies are available. See *Lane* v. *Peña*, 518 U.S. 187, 197 (1996) (presence of express remedies provision "brings this case outside the 'general rule' * * * discussed in *Franklin*").

Lastly, there is no merit to respondents' reliance (at 40-41) on the "historic equitable" powers of the federal courts. Those background principles did not carry the day in construing the Sherman Act's remedies (see page 18, *supra*), or in *Grupo Mexicano*, and they should not here either. Moreover, this case is readily distinguishable from *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), which turned on the complete absence of any evidence in "either the [statutory] language or the legislative history" of an intent on Congress's part to preclude injunctive relief. And cases such as *Califano* are fundamentally different because they involved arguments that particular statutory provisions categorically barred the federal courts from exercising their traditional equitable authority. But Congress has not precluded the federal courts from exercising their equitable powers in all civil RICO cases; it has simply insisted that those powers be invoked by the federal government only.[11]

CONCLUSION

The judgment of the court of appeals should be reversed.

---

[11] The Court's resolution of this case will not materially diminish the statutory protections available in the future to abortion clinics or their patients. The FACE Act forbids damage or destruction of clinic property and interference with patients or staff through "force or threat of force or by physical obstruction," imposes criminal penalties, and authorizes private suits for damages and for injunctive relief. 18 U.S.C. § 248(a)(1), (a)(3), (c)(1)(B).

Respectfully submitted,

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

D. COLETTE WILSON
1880 S. Redwood Street
Escondido, CA 92025
(760) 737-7181

ALAN UNTEREINER*
ROY T. ENGLERT, JR.
KATHRYN S. ZECCA
NOAH MESSING
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

NOVEMBER 2005