No.

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.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003), this Court reversed a decision of the Seventh Circuit that had affirmed a civil judgment and nationwide injunction entered under the Racketeer Influenced and Corrupt Organizations Act (RICO) against various anti-abortion protesters. In reversing, this Court explained (*id.* 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*." On that basis, this Court determined that it "need not address the second question" on which certiorari had been granted, namely "whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964." *Ibid.*

The questions presented are:

1. Whether the Seventh Circuit, on remand, disregarded this Court's mandate by holding that "all" of the predicate acts supporting the jury's finding of a RICO violation were *not* reversed, that the "judgment that petitioners violated RICO" was *not* necessarily reversed, and that the "injunction issued by the District Court" might *not* need to be vacated.

2. Whether the Seventh Circuit correctly held, in conflict with decisions of the Sixth and Ninth Circuits, that the Hobbs Act, 18 U.S.C. § 1951(a), can be read to punish acts or threats of physical violence against "any person or property" in a manner that "in any way or degree * * * affects commerce," even if such acts or threats of violence are wholly unconnected to either extortion or robbery.

3. Whether this Court should again grant certiorari to resolve the deep and important intercircuit conflict over whether injunctive relief is available in a private civil action for treble damages brought under RICO, 18 U.S.C. § 1964(c).

RULE 14.1(b) AND 29.6 STATEMENT

Respondent National Organization for Women, Inc. (NOW), is a party to this action on behalf of itself as well as its women members and all other women whose freedom to use the services of women's health centers in the United States that provide abortions has been or will be interfered with by unlawful activities of the petitioners. Other respondents here (plaintiffs below) are the Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., which appear on their own behalf as well as on behalf of a class of all women's health centers in the United States at which abortions are performed. Operation Rescue, a defendant below, is a respondent under S. Ct. Rule 12.6.

Petitioner Pro-Life Action League, Inc., has no parent corporation and does not issue stock to the public.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes and Rule:

TABLE OF AUTHORITIES—Continued

Page(s)

Miscellaneous:

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals denying rehearing (App., *infra*, 1a-24a) is reported at 396 F.3d 807. The previous order of the court of appeals on remand (App., *infra*, 25a-29a) from this Court is unreported. The earlier opinion of the court of appeals (App., *infra*, 30a-61a), which this Court reversed, is reported at 267 F.3d 687. The district court's opinion disposing of the motion to dismiss the third amended complaint (App., *infra*, 62a-140a) is reported at 897 F. Supp. 1047. The district court's opinion denying post-trial motions and entering an injunction (App., *infra*, 141a-174a) is unreported.

JURISDICTION

The court of appeals entered its order on remand on February 26, 2004, and denied rehearing on January 28, 2005. App., *infra*, 1a, 25a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This Court's jurisdiction to review the first issue presented is also invoked under 28 U.S.C. § 1651.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Hobbs Act, 18 U.S.C. § 1951, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq*., are set forth at App., *infra*, 175a-177a.

STATEMENT

This truly is a case of "déjà vu all over again." More than two years ago, this Court issued its second decision in this long-running litigation involving the controversial use of civil RICO against individuals and organizations engaged in vigorous protests against abortion clinics. *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003) (*Scheidler II*); *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994) (*Scheidler I*). In *Scheidler II*, the Court to all appearances brought this case to an end by holding that the

political protesters' mere interference with others' property or liberty interests, without any showing of wrongful "obtaining" of another's "property," does not constitute extortion in violation of the Hobbs Act. The Court therefore reversed the judgment of RICO liability, which had rested on 121 purported predicate acts, including violations (and attempted violations) of the Hobbs Act, the Travel Act, and state extortion law. 537 U.S. at 397. The Court explained that its "determination with respect to extortion under the Hobbs Act" "renders insufficient the other bases or predicate acts of racketeering supporting the jury's conclusion that petitioners violated RICO." *Ibid.* "Because *all* of the predicate acts supporting the jury's finding of a RICO violation *must be reversed*," the Court instructed, "the *judgment* that petitioners violated RICO *must also be reversed*" and the injunction "*must necessarily be vacated*." *Id.* at 411 (emphasis added).

On remand, a panel has ruled that, notwithstanding this Court's directives, "all" of the predicate acts supporting the jury's finding of a RICO violation were *not* reversed, the RICO judgment was *not* necessarily reversed, and the injunction issued by the district court might *not* need to be vacated after all. The panel also concluded, for good measure, that the Hobbs Act might well criminalize the protesters' activities. Accordingly, the panel remanded the case to the district court to determine whether four predicate acts that the panel viewed as unaffected by this Court's decision could provide a basis for maintaining a RICO injunction against the protesters. App., *infra*, 7a-8a, 15a-16a, 28a-29a. Further review is warranted to bring the Seventh Circuit into compliance with this Court's mandate as well as to resolve significant conflicts on several of the issues presented.

A. Factual and Procedural Background

1. Petitioners Joseph Scheidler, Andrew Scholberg, and Timothy Murphy are individuals who oppose abortion on moral and religious grounds. Petitioner Pro-Life Action League, Inc. (PLAL), is a nonprofit Illinois corporation. Respondents the

National Organization for Women, Inc. (NOW), Delaware Women's Health Organization, Inc. (DWHO), and Summit Women's Health Organization, Inc. (Summit) are, respectively, a national nonprofit organization that supports the legal availability of abortion and two affiliated clinics that perform abortions.

Some 19 years ago, respondents initiated this lawsuit against petitioners and various other individuals and entities.[1] Respondents asserted claims on behalf of two putative nationwide classes: all women's health centers at which abortions are performed (represented by DWHO and Summit); and non-NOW members whose freedom to use the services of such abortion clinics has been or will be interfered with by the unlawful activities of petitioners (represented by NOW). NOW also claimed organizational standing to advance similar claims for its own members. Respondents alleged, among other things, violations of RICO and of state law.

In their RICO claims, respondents alleged that petitioners and Operation Rescue had formed a loose association-in-fact of individuals and groups known as the Pro-Life Action Network (PLAN), united by a common ideological purpose of opposing abortion. They further alleged that PLAN was a RICO "enterprise" and that petitioners, by engaging in protests aimed at closing abortion clinics, had directly or indirectly participated in the conduct of PLAN's activities through a "pattern" of "racketeering activity" (18 U.S.C. § 1962(c)) that included acts of "extortion" in violation of the Hobbs Act, 18 U.S.C. § 1951. Respondents requested treble damages, costs, attorneys' fees, and (under the antitrust laws but not under RICO) an injunction.

In 1991, the district court dismissed the complaint for failure to state a valid claim, 765 F. Supp. 937, and the Seventh Circuit affirmed, 968 F.2d 612 (1992). In upholding the

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[1] Except for Operation Rescue, all of the other individuals and entities ceased to be defendants before trial. See also page ii, *supra*. References to "respondents" throughout this brief do not include Operation Rescue.

dismissal of the RICO claims, the court of appeals held that RICO does not apply to defendants who commit "non-economic crimes * * * in furtherance of non-economic motives." *Id.* at 629. This Court granted certiorari on the "economic motive" issue, 508 U.S. 971 (1993), and reversed, 510 U.S. 249 (1994).

2. Following remand to the trial court, respondents filed a third amended complaint. For the first time, they requested injunctive relief under RICO. In 1995, the trial court dismissed the claims against certain defendants, but not the remaining RICO claims against petitioners. App., *infra*, 140a. The court also held that respondents, as private parties, could obtain injunctive relief in a treble-damages action brought under RICO, 18 U.S.C. § 1964(c). App., *infra*, 119a-122a.

3. The case was tried from March 4 to April 20, 1998. Evidence was presented concerning numerous incidents spanning the nationwide conduct of petitioners and thousands of other abortion protesters over a 15-year period. App., *infra*, 33a ("hundreds of acts"). The jury returned a verdict for respondents on their RICO claim under Section 1962(c).

The jury found, among other things, that petitioners and Operation Rescue or unnamed persons "associated with PLAN" had committed 121 predicate acts under RICO: 21 "[a]cts or threats involving extortion against a[] patient, prospective patient, doctor, nurse, or clinic employee" in violation of the Hobbs Act, 18 U.S.C. § 1951; 25 violations of state extortion law (defined in essentially the same way as Hobbs Act extortion); 25 acts of conspiracy to violate federal or state extortion law; 23 extortion-related violations of the Travel Act, see 18 U.S.C. §§ 1952(b), 1961(1)(A); 23 attempts to violate the Travel Act; and 4 acts or threats of physical violence to any person or property in violation of the Hobbs Act, 18 U.S.C. § 1951.[2]

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[2] The jury instructions defined "property" broadly for purposes of all of the Hobbs Act counts to include "anything of value, including a woman's right to seek services from a clinic, the right of the doctors, nurses, or other clinic staff to perform their jobs, and the right of the clinics to

The jury awarded $31,455.64 to DWHO in damages and $54,471.28 to Summit; pursuant to RICO, the damages were trebled. The court later denied post-trial motions and entered a broad nationwide injunction regulating petitioners' future protest activities at abortion clinics. App., *infra*, 141a-174a.

4. The Seventh Circuit affirmed. App., *infra*, 30a-61a. In holding that injunctive relief is available to a private litigant suing under RICO, the court openly disagreed with the Ninth Circuit. *Id*. at 35a-43a. The court also rejected petitioners' arguments that they could not have violated the Hobbs Act because, among other things, they had not "obtained" any "property" of the clinics, the doctors who worked there, or the clinics' customers. *Id*. at 58a-59a. The court asserted that the clinics' "intangible property * * * right to conduct a business" was "'property' under the Hobbs Act" and "[a] loss to, or interference with the rights of, the victim is all that is required." *Id*. at 59a (internal quotations omitted).

B. This Court's Decision in *Scheidler II*

This Court reversed, holding that petitioners' actions did not constitute extortion within the meaning of the Hobbs Act because petitioners had not wrongfully "obtained" any "property" as required by 18 U.S.C. § 1951(b)(2). 537 U.S. at 402. The Court noted that the Hobbs Act drew its definition of extortion from the Penal Code of New York and the Field Code, a 19th-century model penal code. *Id.* at 403. Under New York law, "obtaining" property required both a deprivation and an acquisition of property. *Id.* at 403-04. The Court rejected the argument that "merely interfering with or depriving someone of property is sufficient to constitute extortion." *Id.* at 405.

A contrary holding, the Court emphasized, would impermissibly extend the Hobbs Act to the separate crime of coercion, which "involves the use of force or threat of force to re-

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provide medical services free from wrongful threats, violence, coercion, and fear." App., *infra*, 182a. The relevant jury instructions, as well as the special verdict form, are reprinted at App., *infra*, 178a-195a.

strict another's freedom of action." 537 U.S. at 405. New York law had clearly established coercion as a separate and lesser offense from extortion, and the legislative history of the Hobbs Act showed that Congress "deci[ded] * * * to omit coercion" from the scope of the Hobbs Act. *Id.* at 406, 408. That decision – along with the rule of lenity – required reading the statute not to cover activity that would merely have constituted coercion. *Id.* at 409.[3]

The Court then rejected all of the other predicate acts that had served as the basis for the RICO violation and the nationwide injunction. The Court ruled that the state-law extortion counts were legally defective, as were the 46 violations and attempted violations of the Travel Act. 537 U.S. at 409-10. The Court concluded that "*all* of the predicate acts supporting the jury's finding of a RICO violation must be reversed," and that, therefore, the RICO "judgment * * * must also be reversed" and the injunction "must necessarily be vacated." *Id.* at 411 (emphasis added). With no legal basis for a RICO injunction, the Court stated that it "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." *Ibid.*

C. The Seventh Circuit's Decision on Remand

1. One year after this Court's decision, the court of appeals on remand entered an unpublished order. App., *infra*, 25a-29a. The Seventh Circuit panel held that this Court's decision left undisturbed four predicate acts found by the jury – those involving "acts or threats of physical violence to any person or property" in purported violation of the Hobbs Act. In the panel's view, this Court could not "have found these four predicate acts insufficient to support the district court's injunction," because the

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[3] The Court set forth the definition of coercion under New York law at 537 U.S. at 405 n.10. Coercion included the wrongful use of "violence" or "threat[s]" of violence against "any other person" or "his property," if such actions were undertaken "with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing." New York Penal Law § 530 (1909).

only question the Court accepted for review with respect to the Hobbs Act was "'whether petitioners committed extortion within the meaning of the Hobbs Act.'" App., *infra*, 28a (quoting 537 U.S. at 397).

The panel concluded that it was possible that the four supposedly surviving predicate acts might be "sufficient to support the nationwide injunction," and remanded that issue to the district court. App., *infra*, 28a. The panel did not explain how its remand instructions could be reconciled with this Court's statements that the injunction "must necessarily be vacated" and that the underlying RICO judgment "must also be reversed." 537 U.S. at 411. On remand, the panel noted, the district court "may need to determine whether the phrase 'commits or threatens physical violence to any person or property' constitutes an independent ground for violating the Hobbs Act or, rather relates back to the grounds of robbery or extortion." App., *infra*, 29a.

2. Petitioners sought panel and en banc rehearing, arguing, among other things, that the order on remand was squarely at odds with this Court's unambiguous mandate in *Scheidler II*, that this Court *did* resolve the legality of the four Hobbs Act predicates, and that, in the alternative, the panel should decide whether the Hobbs Act reaches freestanding acts or threats of violence to property or persons, unconnected to extortion or robbery (an issue that was briefed to the same panel in the prior appeal). But cf. App., *infra*, 6a (suggesting, incorrectly, that petitioners were seeking rehearing on the ground that the panel's remand order had "implicit[ly] resol[ved]" the Hobbs Act issue). No appellate court in the 58 years since the Hobbs Act was enacted, petitioners explained, has interpreted the statute as punishing freestanding acts or threats of violence to persons or property – and the Ninth Circuit has categorically rejected this reading as "fatally flawed" and utterly "without merit." *United States* v. *Yankowski*, 184 F.3d 1071, 1073-74 (1999). Petitioners also requested en banc consideration of this issue, noting that, if the panel decided that the Hobbs Act punishes freestanding acts or threats of violence, that would

place it in direct conflict with the Ninth Circuit. Finally, petitioners sought en banc consideration of the panel's prior holding, in conflict with other circuits, that injunctive relief is available to private parties under RICO.

3. On January 28, 2005, panel and en banc rehearing were denied over three dissenting votes. App., *infra*, 1a-24a. The panel offered no further explanation concerning how its remand order could be reconciled with this Court's remand instructions in *Scheidler II*. The panel stated that it had "nothing to add on that point to what we have already written," except to reiterate that this Court could not have reached these four counts because "they were not included in the petitions for *certiorari*." App., *infra*, 7a. Instead, the new opinion primarily addressed "whether the acts or threats of violence language in the Hobbs Act may serve as an independent predicate act under RICO." *Id*. at 7a-8a. Although the panel purported not to resolve that issue conclusively ("for reasons of judicial economy and restraint"), it nonetheless devoted ten full pages to addressing – and criticizing – many of the arguments made in the rehearing petition for why the Hobbs Act cannot and should not be read to punish freestanding acts or threats of violence. *Id.* at 6a-15a.

Among other things, the panel suggested that the language of the Hobbs Act is ambiguous (App., *infra*, 8a):

> Whoever in any way or degree [1] obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or [2] attempts or conspires so to do, or [3] commits or threatens physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section* shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a) (emphasis added). "[T]here are two possible interpretations" of the third clause, the panel stated, and "[t]he choice between [them] * * * is not obvious." App., *infra*, 8a. Rejecting petitioners' argument, the panel stated that, "[g]rammatically, the text can be read either way without undue

strain." *Ibid.* Later in its opinion, the panel went even further, suggesting that reading the third clause as punishing freestanding acts or threats of violence would be to "take it at face value." *Id.* at 15a.[4]

Next, the panel observed that "there is no decisional law that sheds light on which of the two readings is to be preferred." App., *infra*, 8a. Yet the panel then quoted a sentence from *Stirone* v. *United States*, 361 U.S. 212 (1960), which observed that the Hobbs Act "speaks in broad language, manifesting a purpose to *use all the constitutional power Congress has* to punish interference with interstate commerce by extortion, robbery *or physical violence*." *Id.* at 215 (emphasis added). According to the panel, the quoted sentence "suggests that the Court saw three distinct types of predicate acts in the statute." App., *infra*, 8a. The panel later acknowledged that "the Sixth and Ninth Circuits have both" squarely held that the Hobbs Act does *not* reach freestanding acts or threats of violence. App., *infra*, 11a (citing *United States* v. *Franks*, 511 F.2d 25 (6th Cir. 1975), and *United States* v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999)). But the panel claimed a conflict between those decisions and the unpublished opinion in *United States* v. *Milton*, 1998 WL 468812 (4th Cir. Aug. 4, 1998).

Finally, the panel turned to the "legislative history." App., *infra*,15a. The panel acknowledged that the Hobbs Act, as enacted in 1946, "*explicitly linked* the 'acts of physical violence' clause to the prohibition on robbery and extortion." *Ibid.* (emphasis added). Indeed, the Hobbs Act as enacted could hardly have been clearer on this point:

> SEC 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or

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[4] The panel also suggested that limiting criminal liability under the Hobbs Act to acts or threats of physical violence "in furtherance of a plan or purpose to do anything in violation of" Section 1951 would violate the "well-worn canon of statutory interpretation under which a court should avoid making one part of a statute meaningless." App., *infra*,14a. The panel brushed aside or ignored petitioners' contrary arguments.

> commodity in commerce, by robbery or extortion, shall be guilty of a felony.
>
> SEC 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.
>
> SEC 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.
>
> SEC 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose *to do anything in violation of section 2* shall be guilty of a felony.

Pub. L. No. 486, 60 Stat. 420 (1946) (emphasis added). According to the panel, however, when Congress in 1948 approved a general revision and codification of the entirety of Title 18, it may have altered the Hobbs Act by expanding it to cover freestanding acts or threats of violence. Although the panel acknowledged that the 1948 "revisions were intended to be formal, stylistic changes," it went on to suggest that "it is not beyond the realm of possibility that the revisers may have made certain substantive changes, either advertently or inadvertently." App., *infra*,15a.

Despite its detailed discussion of the Hobbs Act's meaning, the panel insisted that "it would be imprudent to resolve this problem of statutory interpretation at this stage" (19 years into this litigation) and therefore – "for reasons of judicial economy and restraint" – it "prefer[red] a wait-and-see approach." App., *infra*, 6a-7a, 15a-16a. The panel also said it might be unnecessary for the district court to resolve the Hobbs Act issue. *Id*. at 7a-8a, 16a. "[O]nly if the district court concludes that some form of injunctive relief would be justified based on the four remaining predicate acts found by the jury," the panel said, will that court "have to confront" the Hobbs Act question. *Id*. at 7a.

4. Judge Manion, joined by Judge Kanne, dissented from the denial of rehearing en banc. App., *infra*,17a-24a.[5] In the dissenters' view, the panel's decision "directly conflicts with the Supreme Court's opinion," "rests on an impermissible reading of the Hobbs Act, and unnecessarily revives a case that is already more than eighteen years old." App., *infra*,19a. The dissenters pointed out that the panel's conclusion that certain RICO predicates and the injunction might remain tenable was flatly inconsistent with *Scheidler II*'s unambiguous language and with this Court's conclusion that it need not address the availability of private RICO injunctions.

Moreover, even if "the panel's remand order could be labeled a reasonable interpretation of the Supreme Court's opinion, the four predicate acts of violence to persons or property cannot, as a matter of law, constitute a violation of the Hobbs Act." App., *infra*, 21a. "Clearly," the dissenters explained, "under the Hobbs Act, physical violence to any person or property is confined to furthering robbery or extortion. It does not stand alone as a separate violation." *Id.* at 23a-24a. This straightforward reading explains why this Court's conclusion that petitioners had not committed extortion within the meaning of the Hobbs Act ended the case: "the Supreme Court's holding that there was no extortion means that no Hobbs Act violation possibly exists." *Id.* at 24a. Finally, the dissenters faulted the panel for purporting not to decide the Hobbs Act issue while simultaneously criticizing petitioners' arguments. *Id*. at 23a.

REASONS FOR GRANTING THE PETITION

As this case returns to the Court, it presents three issues that satisfy the traditional criteria for this Court's review. First, the case involves a lower court's flagrant disregard of this Court's unambiguous mandate in *Scheidler II*. Second, it raises a significant question about the meaning of the Hobbs Act (an issue on which the Seventh Circuit's ruling is irreconcilable with

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[5] Chief Judge Flaum also voted to grant rehearing en banc, but he did not join the dissenting opinion.

decisions of the Sixth and Ninth Circuits). Third, the panel's decision has resuscitated the important and recurring issue of the availability of private injunctive relief under RICO, a question on which this Court previously granted certiorari. Each of these issues provides an independent reason for a grant of certiorari, and the first two warrant summary reversal.

I. Certiorari Or Mandamus Is Warranted Because The Seventh Circuit's Decision Is Contrary To This Court's Clear Mandate

In reversing the Seventh Circuit's decision, this Court unambiguously stated (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.

In direct contradiction, the Seventh Circuit has now decided that "all" of the predicate acts supporting the jury's finding of a RICO violation were *not* reversed, that the "judgment that petitioners violated RICO" was *not* necessarily reversed, and that the injunction might *not* need to be vacated after all.

A. This extraordinary conclusion warrants review – and summary reversal – because, as the dissenting judges below observed it "directly conflicts" with this Court's instructions. App., *infra*, 19a (dissenting opinion); *id.* at 17a ("I believe that the Supreme Court meant what it said"). Neither can the panel's decision be reconciled with this Court's description of its holding: "We further *hold* that our determination with respect to extortion under the Hobbs Act *renders insufficient the other bases or predicate acts of racketeering* supporting the jury's conclusion that petitioners violated RICO." 537 U.S. at 397 (emphasis added). The Seventh Circuit also disregarded this

Court's decision *not* to address the question concerning the availability of private RICO injunctions on which review had been granted. That decision necessarily rested on a determination that the underlying RICO judgment was no longer valid.

The panel simply was not free to conclude that "the other bases or predicate acts" might be sufficient, after all, to support the injunction (which necessarily rested on the jury's invalidated "conclusion that [petitioners] violated RICO"). See App., *infra*, 17a-19a (dissenting opinion); *id.* at 20a (this Court's "unequivocal holding negates any reasonable inference that those four predicate acts remain an issue"). As this Court long ago explained, a court of appeals

> is bound by the [Supreme Court's] decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal * * * or by a writ of mandamus to execute the mandate of this court.

In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895) (citations omitted); see also *Baltimore & Ohio R.R.* v. *United States*, 279 U.S. 781, 784-85 (1929). Because the panel failed to follow this Court's mandate, summary reversal is warranted. See *id.* at 785 ("It is well understood that this court has power to do all that is necessary to give effect [to] its judgments.").[6]

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[6] As *Sanford* and *Baltimore & Ohio R.R.* indicate, when an order issued by a lower court that takes the form of an appealable order fails to comply with this Court's mandate, "the aggrieved parties may file the ordinary petition for certiorari." R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE 585 (8th ed. 2002). Because the present case was "in the court of appeals," it clearly falls within the Court's certiorari jurisdiction under 28 U.S.C. § 1254(1). See *Hohn* v.

As the dissenting judges correctly noted below, if there was any ambiguity in this Court's opinion (and there is none), the proper course for respondents would have been "to seek rehearing from the Supreme Court." App., *infra*, 21a (dissenting opinion). Cf. *Parks* v. *Simpson Timber Co.*, 389 U.S. 909 (1967); *Union Trust Co.* v. *Eastern Air Lines, Inc.*, 350 U.S. 962 (1956). This they failed to do – no doubt because they knew what the answer would be.

B. In any event, the reasons the panel gave for refusing to follow this Court's mandate do not withstand scrutiny. According to the panel, the *Scheidler II* "opinion did not address the legal implications of the remaining four acts of physical violence. Indeed, any reader will see that the Court had nothing at all to say about them, for the understandable reason that they were not included in the petitions for *certiorari*." App., *infra*, 7a. Citing this Court's Rule 14.1(a) and its "general refusal to decide issues outside the question presented," the panel declared itself unwilling to "presume that in this case [the Court] went beyond the scope of its grant of certiorari * * * to hold *sub silentio* that the four acts or threats of physical violence found by the jury cannot support the injunction." App., *infra*, 28a.

That reasoning is flawed at every turn. To begin with, as just explained, there is nothing "*sub silentio*" about this Court's

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United States, 524 U.S. 236, 241-42 (1998). There is thus no jurisdictional impediment to bringing the Seventh Circuit into compliance with the mandate of *Scheidler II* by granting certiorari and reversing the court of appeals' judgment. See *Perkins* v. *Fourniquet*, 55 U.S. 328, 330 (1852). In an abundance of caution, however, petitioners also request (in the alternative) that the Court, if necessary, construe this petition as one for a writ of mandamus under 28 U.S.C. § 1651. See *United States* v. *Fossatt*, 62 U.S. 445, 446 (1858) ("And if the court does not proceed to execute the mandate, or disobeys and mistakes its meaning, the party aggrieved may, by motion for a mandamus, at any time, bring the errors or omissions of the inferior court before this court for correction."); STERN ET AL., SUPREME COURT PRACTICE, *supra*, at 585 ("One function of the writ of mandamus is to force a lower court to comply with the mandate of an appellate court.").

opinion or the instructions and holding quoted above. To the contrary, the Court was quite explicit in invalidating *all* of the predicate acts, as well as the RICO judgment and the injunction. There is no ambiguity in this Court's statement that "all" – not "some" or "most" – of the RICO predicates had to be reversed. 537 U.S. at 411. And there is neither need nor reason to "presume" that this Court did not mean exactly what it said.

Equally mistaken was the panel's suggestion that the four acts of violence were *not* included in the petitions for certiorari. On the contrary, both of the petitions for certiorari expressly referred to the four predicate acts involving "acts or threats of physical violence to any person or property in violation of the Hobbs Act." 01-1118 Pet. 5 n.3; see also 01-1119 Pet. 3-4 & nn.3-5. Indeed, the significance and status of these four predicate acts were debated by the parties at the petition stage, with respondents arguing that this Court should deny review of the Hobbs Act question because the jury found "4 violations of the Hobbs Act through acts or threats of physical violence," those predicate acts were "unchallenged" in the Supreme Court, and the case therefore was "an inappropriate vehicle for determining whether the Seventh Circuit's construction of the Hobbs Act was correct." 01-1118 and 01-1119 Br. in Opp. 5, 15. In response, petitioners argued, among other things, that "*all* of the other predicate acts found by the jury" required "a showing of either 'robbery' (not alleged here) or 'extortion,'" because the Hobbs Act by its plain terms criminalizes acts or threats of violence *only* if they are committed "in furtherance of a plan or purpose" to violate Section 1951. 01-1118 Cert. Reply Br. 7-8 & n.11 (emphasis added) (citing *United States* v. *Yankowski*, 184 F.3d 1071, 1073-74 (9th Cir. 1999)); accord 01-1119 Cert. Reply Br. 7 & n.13. Moreover, the Seventh Circuit's overbroad definition of "property" – which petitioners cited as a principal reason for granting review of the Hobbs Act issue (01-1118 Pet. 17-19) – applied with equal force to the four predicates involving acts or threats of violence against "property" or persons. Thus, petitioners took the position that these four

predicate acts *were* "fairly included" (S. Ct. Rule 14.1(a)) within the Hobbs Act question presented.

This Court granted review of the Hobbs Act question over respondents' objections, see 535 U.S. 1016 (2002). At the merits stage, respondents shifted gears and made a strategic decision to *ignore* these four Hobbs Act predicates. Thus, although respondents included a detailed argument that the RICO judgment was valid and should be upheld "even apart from the Hobbs Act predicates," they pointedly did *not* argue that the judgment could stand because the jury found four Hobbs Act violations not involving extortion. 01-1118 and 01-1119 Resp. Merits Br. 33-35; App., *infra*, 21a (dissent). Indeed, respondents went further in order to address the jury's failure to specify which two or more of the 121 predicate acts constituted the requisite "pattern" of racketeering activity. Faced with that problem, respondents argued that the RICO judgment could stand "even apart from the Hobbs Act predicates" because "*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" (so that "the jury unquestionably would have found a pattern if only state extortion were at issue"). 01-1118 and 01-1119 Resp. Merits Br. 35. That argument, of course, *presupposed* that the four acts or threats of violence *were in fact related to extortion*.

Respondents' strategy helps explain why the Court in *Scheidler II* saw no need to state expressly that its resolution of the extortion issue also rendered the four violence counts legally insufficient. The Court quite properly would have assumed that the issue was simply no longer in dispute. See App., *infra*, 21a (dissent) (because respondents at merits stage "did not argue that the four predicate acts of violence * * * independently justified the jury's verdict, * * * the Supreme Court found no need to expressly address that question").

Moreover, even if the Hobbs Act question cannot be read as "fairly including" the four predicates at issue, the panel was wrong to rest on a presumption that this Court did not go

"beyond the scope of its grant of certiorari." App., *infra*, 28a. It is *undeniable* that this Court *did* go beyond the scope of its grant of certiorari in *Scheidler II* – by resolving the legality of the state-law extortion counts. Notably, the validity of the state-law extortion counts was raised as a *separate* issue in Operation Rescue's petition for certiorari, but the Court did not grant that issue. See 01-1119 Cert. Pet. i; 535 U.S. 1016 (2002) (order limiting grant of certiorari). The Court nonetheless reached and resolved that issue, holding that the state-law extortion counts were legally defective.

Nor is this surprising. As the panel acknowledged (App., *infra*, 28a), this Court's usual practice of deciding only the issues presented and those issues "fairly included" therein (S. Ct. Rule 14.1(a)) is not a "jurisdictional or absolute" limit on the Court's authority but rather a rule of discretion. See R. STERN ET AL., *supra*, at 422. Beyond that, it is well settled that the Court "may consider additional questions" *not* presented in the petition "if necessary to *properly dispose* of the case." *Id.* at 416 (internal quotations omitted) (emphasis added); see, *e.g.*, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 246 n.12 (1981). Thus, the Court was perfectly free to decide that it should address the state-law extortion counts, even though they were outside the scope of the questions presented, because doing so would allow this Court properly to dispose of the RICO injunction issue by avoiding a decision on it. The Seventh Circuit should have conformed to what this Court *did*, not operated on presumptions about what this Court did *not* do.

II. The Court Should Decide Whether The Hobbs Act Punishes Acts Or Threats Of Violence To Property Or Persons, Unconnected To Either Extortion Or Robbery

In response to the rehearing petition, the panel has issued a published decision that strongly suggests, in direct conflict with decisions of the Sixth and Ninth Circuits, that the Hobbs Act makes it a felony punishable by up to 20 years in federal prison for any person to threaten (or commit) physical violence against any "property" (or "person") in a manner that "in any

way or degree * * * affects commerce" – even if such threats or acts of violence are wholly unconnected with robbery or extortion. Although the panel insisted that it was not actually resolving what it acknowledged is an "important question" of federal criminal law (App., *infra*, 6a), it proceeded to criticize virtually all the arguments advanced against this sweeping interpretation. The panel achieved the worst of all worlds by prejudging the outcome on remand yet prolonging already-protracted litigation by pretending to leave the district court with the first take on the issue.

Worse yet, the effect of the panel's analysis is to give credence to a far-reaching theory of liability broader in certain respects than even the expansive definition previously adopted by the same panel, which this Court rejected as "well beyond" the "outer boundaries" of Hobbs Act liability. *Scheidler II*, 537 U.S. at 402. The panel's decision creates conflicts with decisions of this Court and other courts of appeals, addresses an important and recurring issue, and is wrong.

A. *The Conflicts.* According to the panel, the circuits are in conflict over whether the Hobbs Act reaches freestanding acts or threats of violence against property or people, unconnected to either robbery or extortion. App., *infra*, 11a-12a. And it is true that both the Sixth and Ninth Circuit have rejected that interpretation as inconsistent with plain language of the Hobbs Act. See *id.* at 11a (citing *United States* v. *Franks*, 511 F.2d 25 (6th Cir. 1975), and *United States* v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999)). On the other hand, the panel suggested that the Fourth Circuit reached the opposite result in *United States* v. *Milton*, 1998 WL 468812 (Aug. 4, 1998). App., *infra*,12a; but see pages 24-25, *infra*. The panel expressed basic agreement with the supposed position of the Fourth Circuit, stating that the Sixth and Ninth Circuit approach "threatens to leave * * * an entire clause in the statute" with "no meaningful function to perform" (App., *infra*, 15a) and the Fourth Circuit's supposed reading takes the statutory text "at face value" and is "the result

one reaches looking at the statute as whole." *Id.* at 14a-15. Thus, the panel either created or exacerbated a circuit conflict.[7]

The panel's opinion is also at odds, in at least three respects, with this Court's decisions. *First*, it conflicts with *United States* v. *Enmons*, 410 U.S. 396 (1973), which reversed the Hobbs Act convictions of labor union officials and members who had engaged in acts of violence and destruction of property during a campaign to induce an employer to agree to a union contract. Although the defendants had fired high-power rifles at the employer's facility, and even blown up a company transformer, this Court ruled that they had *not* violated the Hobbs Act. The Court reasoned that there was no "obtaining of property of another" through "wrongful" means (18 U.S.C. § 1951(b)(2)) – part of the definition of "extortion" – because the defendants had acted to further "legitimate union objectives, such as higher wages in return for genuine services." 410 U.S. at 400.

If the Seventh Circuit is correct, however, then the conduct in *Enmons* violated the Hobbs Act after all. If the "physical violence" clause of the Hobbs Act is freestanding, and need not

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[7] The Hobbs Act question in this case also presents the Court with an opportunity to resolve other conflicts in the lower courts – specifically, conflicts over the meaning of "property" under the Hobbs Act. In *Scheidler II*, this Court, having concluded that there was no "obtaining" (or attempted obtaining), observed that there was no need to delineate precisely the "outer boundaries of extortion liability under the Hobbs Act." 537 U.S. at 402. In particular, the Court explained, it was unnecessary to address whether the term "property" in the Hobbs Act includes the three components mentioned in the jury instructions. See note 2, *supra*. But that avoided issue is clearly present in this case, and necessarily underlies any holding that freestanding acts or threats of violence to "property" are indeed covered. As we explained in our previous petition, the Seventh Circuit's definition of "property" for purposes of the Hobbs Act conflicts with the position taken by other circuits. See 01-1118 Pet. 17-20. Compare *Town of West Hartford* v. *Operation Rescue*, 915 F.2d 92, 101 (2d Cir. 1990) and *Libertad* v. *Welch*, 53 F.3d 428, 436-37 (1st Cir. 1995) with App., *infra*, 59a (citing *United States* v. *Anderson*, 716 F.2d 446, 450 (7th Cir. 1983)).

have any connection to extortion or robbery, then it would not include "wrongful" "obtaining" as an element and the Hobbs Act would apply with full force to acts or threats of violence occurring during labor protests. Nor can there be any doubt that the acts of physical violence that were proven in *Enmons* "in any way or degree * * * affect[ed] commerce" (18 U.S.C. § 1951(a)). Thus, if the panel is correct, then the convictions in *Enmons* should have been sustained. Yet this Court, in *Enmons*, noted that in "nearly three decades that have passed since the enactment of the Hobbs Act, no reported case" had upheld the use of the Hobbs Act against violence occurring on the picket line – even though during this period "the Nation has witnessed countless economic strikes, often unfortunately punctuated by violence." 410 U.S. at 408-10. And this Court categorically rejected the government's "broad" reading of the Hobbs Act as punishing "[t]he worker who threw a punch on a picket line" by "20 years' imprisonment and a $10,000 fine" as contrary to the rule of lenity and "an unprecedented incursion into the criminal jurisdiction of the States." *Id.* at 410. So, too, here.

Second, the panel's decision is inconsistent with the logic of *Scheidler II*. As the panel acknowledged, the holding of *Scheidler II* rested on a determination that "Congress used the Penal Code of New York as a model for the [Hobbs] Act" and made a deliberate "decision to include extortion as a violation of the Hobbs Act *and omit coercion*." App., *infra*, 9a (emphasis added). See 537 U.S. at 403, 405-06; *id.* at 409 (distinction between coercion and extortion "controls these cases"). Moreover, as the panel also acknowledged (App., *infra*, 9a, 10a), the crime of coercion under New York law included acts or threats of "violence" against "other person[s]" or "property," unconnected to either extortion or robbery. See note 3, *supra*. It follows that freestanding acts or threats of violence – which constitute coercion under New York law – *cannot* be covered by the Hobbs Act without "eliminat[ing] the recognized distinction between extortion and the separate crime of coercion" and violating Congress's intent. 537 U.S. at 405-08. Thus, the panel was wrong to say that this Court's reasoning concerning

Congress's exclusion of coercion "offers at best a subtle indication, and at worst is not helpful at all." App., *infra*, 9a. In fact, *Scheidler II*'s reasoning is dispositive.

There are other inconsistencies with *Scheidler II* as well. The panel's statement that a single sentence in *Stirone* v. *United States*, 361 U.S. 212 (1960), which involved a prosecution for extortion, "suggests that the Court saw three distinct types of predicate acts in the statute" (App., *infra*, 9a) ignores this Court's clarification, in *Scheidler II*, that the sentence in question did *not* adopt a broad interpretation of the substantive provisions of the Hobbs Act but rather related only to the commerce clause element. See 537 U.S. at 408; but see *id*. at 417 (Stevens, J., dissenting). Even before *Scheidler II*, the Ninth Circuit had correctly rejected the panel's reading of this sentence in *Stirone*. *Yankowski*, 184 F.3d at 1074 ("The government's contention that this single statement * * *, taken out of context, should be used * * * to reject the clear and express provisions of the Hobbs Act is without merit.").

Inexplicably, the panel also ignored this Court's teaching, in *Scheidler II*, that the rule of lenity informs the interpretation of the substantive terms of the Hobbs Act. 537 U.S. at 408-09. The panel mistakenly suggested that the rule of lenity applies only if one of the two interpretations threatened to federalize traditional state crimes. App., *infra*, 12a (incorrectly stating that our "rule of lenity * * * argument is premised on the doomsday scenario they foresee if the Act is read to permit three independent predicate acts"). In fact, the rule of lenity requires courts to choose the narrower of two reasonable interpretations, even if neither reading threatens to federalize traditional state crimes. See, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 148-49 (1994).

As if that were not enough, the panel's decision is difficult to square with the reasons given by Justices Ginsburg and Breyer for concurring in *Scheidler II*. See 537 U.S. at 411-12 (concurring opinion). As Justice Ginsburg explained, the Court was "rightly reluctant" to "extend * * * further" the "domain" of RICO – a statute that "imposes severe criminal penalties and

hefty civil liability" and that "has already 'evolv[ed] into something quite different from the original conception of its enactors'" – "by endorsing the expansive definition of 'extortion' adopted by the Seventh Circuit." *Ibid.* (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 500 (1985)). Yet the panel's endorsement of the "freestanding" reading accomplishes the same undesirable expansion of RICO.

Third, the panel's treatment of "the 1948 revision and codification of Title 18 of the U.S. Code" – which adopted the current language of Section 1951 – is contrary to a long line of this Court's decisions. App., *infra*, 15a. According to the panel, although "these revisions were intended to be formal, stylistic changes," Congress "may have made certain substantive changes, either advertently *or inadvertently*." *Ibid.* (emphasis added). But this Court has long recognized the principle that it "will *not* be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention *be clearly expressed*." *United States* v. *Ryder*, 110 U.S. 729, 740 (1884) (emphasis added). And this Court has repeatedly applied that principle to the 1948 revisions themselves. See, *e.g.*, *Muniz* v. *Hoffman*, 422 U.S. 454, 468-70 (1975); *United States* v. *Cook*, 384 U.S. 257, 260 (1966). This Court's decisions thus establish that no substantive change in the law was brought about by the 1948 revisions – unless the detailed Reviser's Notes clearly indicate that "a substantive change in the law was contemplated." *Muniz*, 422 U.S. at 474. And, contrary to the panel's suggestion, this Court's cases do not allow any assumption that Congress made substantive changes "inadvertently." App., *infra*, 15a. Finally, the Reviser's Notes, which are reprinted in the U.S. Code Annotated, show that the changes to Section 1951 were not intended to be substantive at all. See 18 U.S.C. App. (Revisers' Notes), at 2591-92 (1948).[8]

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[8] The settled principles governing the construction of changes in language made by the 1948 revisions were clearly set forth in an article cited by the panel's own opinion (at App., *infra*, 15a). See Barron, *The Judicial Code: 1948 Revision*, 8 F.R.D. 439, 441 (1948-1949) ("There

B. *The Issue Is Important and Recurring*. "Over the past 20 years, the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction * * *." *Evans* v. *United States*, 504 U.S. 255, 290 (1992) (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting). Although several federal statutes criminalize extortion, "[p]rosecutors prefer" the Hobbs Act because "it carries a twenty year maximum sentence." Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 816 (1988). The Hobbs Act is also commonly invoked as a predicate act of racketeering in criminal prosecutions and private civil actions brought under RICO.

Because the Hobbs Act is so often used, an expansion of its scope has wide-ranging implications. In the past decade, RICO has repeatedly been used against abortion protesters, with mixed success. See, *e.g.*, *Palmetto State Med. Ctr., Inc.* v. *Operation Lifeline*, 117 F.3d 142 (4th Cir. 1997); *Feminist Women's Health Ctr.* v. *Codispoti*, 63 F.3d 863 (9th Cir. 1995); *Libertad* v. *Welch*, 53 F.3d 428 (1st Cir. 1995). There is no reason why, if the Seventh Circuit's latest interpretation of the Hobbs Act is correct, RICO actions based on predicate Hobbs Act offenses could not also be pursued against social protesters of all stripes, including those demonstrating for civil rights, environmental causes, or animal rights. It could also be applied to labor protests if acts or threats of violence (against persons *or* property) occur.[9]

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was no purpose on the part of the Revision staff to effect any change in existing law."); *id*. at 445-48 (discussing special rules governing judicial construction of 1948 Act).

[9] Contrary to the panel's suggestion, the practical impact of its far-reaching construction of the Hobbs Act is not mitigated because of Congress's inclusion of a jurisdictional element that "limits" the Hobbs Act's applicability to acts or threats of violence that "*in any way or degree* * * * affect[] commerce" (18 U.S.C. § 1951(a) (emphasis added)). App., *infra*, 12a (omitting italicized language). As explained above, a restrictive construction of the jurisdictional element of the Hobbs Act is inconsistent with this Court's teachings in both *Stirone* and *Scheidler II*.

C. *The Panel's Decision Is Wrong.* Any suggestion that the Hobbs Act punishes freestanding acts or threats of violence against property or persons is mistaken. By its plain terms, Section 1951 makes it a crime to "commit[] or threaten[] physical violence to any person or property" *only* if such acts or threats are committed "in furtherance of a plan or purpose to do anything in violation of this section." 18 U.S.C. § 1951(a). In other words, acts or threats of violence are proscribed by the Hobbs Act only if done in furtherance of a plan to commit (or attempt to commit) robbery or extortion.

Any doubt about the text's plain meaning is eliminated if one looks at the text of the Hobbs Act as enacted in 1946. See pages 9-10, *supra*. As even the panel was constrained to admit (App., *infra*, 15a), the text of the 1946 Act "explicitly" and unambiguously requires a connection between the forbidden acts or threats of violence and either robbery or extortion. As explained above, the panel was wrong to impute to the drafters of the 1948 revision an intent to make a substantive change.

The panel made other serious missteps on the merits. Contrary to the panel's suggestion (App., *infra*, 12a), the Fourth Circuit, in *United States* v. *Milton*, 1998 WL 468812 (Aug. 4, 1998), did *not* interpret the Hobbs Act as reaching freestanding acts or threats of violence. *Milton* involved a Hobbs Act conviction based on "a violent robbery." *Id*. at *1. Accordingly, the Fourth Circuit had no occasion to address the "freestanding" theory. Moreover, the only issue raised on appeal in *Milton* was whether the government had presented sufficient evidence that the defendant's robbery affected interstate commerce.[10]

See also 18 U.S.C. § 1951(b)(3) (defining "commerce" broadly).

[10] Contrary to the panel's suggestion (App., *infra*, 12a), it is not possible fairly to interpret as an endorsement of the "freestanding" theory the *Milton* court's passing statement (in dictum) that "[t]here are two essential elements" of a Hobbs Act conviction: interference with interstate commerce, and a crime of robbery, extortion or violence. See *United States* v. *Bailey*, 990 F.2d 119, 125 (4th Cir.1993) (quoting *Stirone* v. *United States*, 361 U.S. 212, 218, 80 S. Ct. 270, 4 L. Ed.2d 252

Equally flawed was the panel's speculation that the snippet of language torn from *Milton* "likely * * * was expressing agreement with the position of the government, though * * * it is impossible to know." App., *infra*, 12a. In fact, the United States' brief in *Milton* in no way mentioned or endorsed the "freestanding" theory. See Br. of Appellee, *United States* v. *Milton*, No. 96-4851 (4th Cir. filed Aug. 19, 1992) (addressing issues of robbery's jurisdictional nexus to interstate commerce and sentencing disparity). That should come as no surprise, because the Hobbs Act conviction in that case involved a robbery.

Nor was the panel correct in stating that "[i]t appears to us that the United States may still be taking that position with respect to the scope of the Hobbs Act for purposes of criminal prosecutions, though we cannot be sure without requesting the views of the Solicitor General." App., *infra*, 12a. The Justice Department has *rejected* the "freestanding" reading:

> The statutory prohibition of "physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section" *is confined to violence for the purpose of committing robbery or extortion*.

U.S. DEPT. OF JUSTICE, CRIMINAL RESOURCE MANUAL § 2402 (1997) (emphasis added) (citing *United States* v. *Franks*, 511 F.2d 25, 31 (6th Cir. 1975)) <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02402.htm>.

The panel was also wrong to suggest that limiting criminal liability under the Hobbs Act to acts or threats of physical violence "in furtherance of a plan or purpose to do anything in violation of" Section 1951 (18 U.S.C. § 1951(a)) would violate the "well-worn canon of statutory interpretation under which a

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(1960))." *Milton*, 1998 WL 468812, at *1. What *Bailey* actually says is that the "two essential elements of the Hobbs Act crime" that were identified in *Stirone* were "interference with commerce, *and extortion*." *Bailey*, 990 F.2d at 125 (emphasis added) (quoting *Stirone*, 361 U.S. at 218). The *Milton* panel's inaccurate paraphrase in an unpublished opinion hardly counts as endorsement of the "freestanding" theory.

court should avoid making one part of statute meaningless." App., *infra*,14a. That analysis is soundly refuted by the language of the 1946 Act, which (as even the panel conceded) required that acts or threats of violence be connected to either robbery or extortion. See pages 9-10, *supra*.

For all of these reasons (and still others more suitable for a merits brief than a petition), and because of its inconsistency with *Scheidler II*, *Enmons*, and this Court's cases interpreting the 1948 revisions to Title 18, the panel's decision is wrong.[11]

III. This Court Should Grant Review Again To Resolve The Circuit Split Over Whether Injunctive Relief Is Available In A Private RICO Action

Almost three years ago, this Court in *Scheidler II* granted certiorari to decide the following question: "Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under [RICO], 18 U.S.C. § 1964(c)." 01-1118 Pet. i. In reversing on the merits, this Court concluded that it "need not address" this question "[b]ecause all of the predicate acts supporting the jury's finding of a RICO violation" and the liability judgment itself "must be reversed" and the injunction "vacated." 537 U.S. at 411.

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[11] The panel's heavy reliance (App., *infra*, 8a, 13a) on Bradley, *NOW v. Scheidler: RICO Meets The First Amendment*, 1994 SUP. CT. REV. 129 (1994), was misplaced. That article antedates this Court's decision in *Scheidler II*, which establishes that Congress did not intend to punish conduct that would qualify as coercion under New York law. It also suffers from multiple flaws, including: (1) its failure to analyze the language of the Hobbs Act as enacted, which refutes the "freestanding" reading and disproves the article's argument about Congress's intent; (2) its failure to address (much less explain) how the "freestanding" reading can be reconciled with *Enmons*; and (3) its reliance on a passage from a 1945 House Report that referred to a *different* title from what would become the Hobbs Act in a larger, omnibus bill – a title that was never enacted. See Bradley, 1994 SUP. CT. REV. at 143 n.78.

Under the opinion on remand, the issue remains alive after all. And the conflict in the circuits has persisted and spawned additional confusion in the lower courts. See, *e.g.*, *In re Managed Care Litigation*, 298 F. Supp. 2d 1259, 1282-83 (S.D. Fla. 2003); *Motorola Credit Corp.* v. *Uzan*, 202 F. Supp. 2d 239, 243-44 (S.D.N.Y. 2002), remanded, 322 F.3d 130 (2d Cir. 2003). As we explained in our prior petition for a writ of certiorari, the issue is both important and recurring. Moreover, the Seventh Circuit's decision is manifestly incorrect (a conclusion endorsed by the Solicitor General's merits brief in *Scheidler II*).

A. As we demonstrated in our previous petition for a writ of certiorari (01-1118 Pet. 6-10), the Seventh Circuit's earlier opinion squarely conflicts with the Ninth Circuit's decision in *Religious Technology Ctr.* v. *Wollersheim*, 796 F.2d 1076 (1986), cert. denied, 479 U.S. 1103 (1987). Although respondents, in unsuccessfully opposing certiorari, argued that there was no circuit split because *Wollersheim* involved a preliminary injunction (Opp. 7), we explained that this argument was wrong, refuted by the Ninth Circuit's analysis and by subsequent Ninth Circuit cases, inconsistent with the Seventh Circuit's own analysis, and contrary to representations made by respondents' counsel during oral argument in the Seventh Circuit. See 01-1118 Pet. 6-10; 01-1118 Pet. Reply Br. 2-3 & n.5.

B. In becoming the first federal appellate court to uphold the availability of injunctive relief in this setting, the Seventh Circuit in 2001 suggested in multiple ways that the intercircuit conflict it was creating should not raise concerns because judicial opinion about the availability of injunctive relief was divided, and because *Wollersheim* reflected an outmoded method of statutory interpretation, rested on errors, or had been superseded by later decisions of this Court. These efforts to mask the extent of the panel's radical departure from settled law are worth highlighting because of their striking similarity to the panel's most recent decision. In both instances, the panel went to great lengths to reach a particular outcome and characterize it as

supported by the decisions of other circuits and of this Court when in fact exactly the opposite was true.

First, the panel's prior opinion sought to disguise the extent of its departure from settled law by suggesting that "other courts of appeals * * * have addressed the point in *dicta* [and] are split." App., *infra*, 35a. In fact, every other circuit that had discussed the issue of injunctive relief for private parties had agreed with the Ninth Circuit. Contrary to the panel's suggestion (*ibid.*), the Eighth Circuit in *Bennett* v. *Berg*, 710 F.2d 1361, 1364 n.5 (en banc), cert. denied, 464 U.S. 1008 (1983), did not endorse the availability of private injunctions but rather expressly reserved the issue. Neither did the First Circuit reach the issue in *Lincoln House, Inc.* v. *Dupre*, 903 F.2d 845, 848 (1990). In similar fashion, as explained above, the panel's most recent opinion incorrectly suggests that (1) the Fourth Circuit has interpreted the Hobbs Act as punishing freestanding acts or threats of violence, and (2) the United States government may still be pressing that interpretation today. The panel's previous holding concerning the availability of injunctive relief in private RICO actions – like the reading of the Hobbs Act it now suggests is the most plausible – is, in fact, wholly unprecedented in the appellate courts.

Second, the panel was wrong in 2001 to suggest that *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), undermines "any rationale * * * that the courts of appeals may have followed in earlier years." App., *infra*, 38a. That case has no relevance to *Wollersheim* – which may explain why respondents never cited *Steel Co.* in their briefs in the court of appeals or in this Court (and made no effort to defend the panel's reliance on it at either the petition or merits stages).[12]

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[12] *Steel Co.* involved the citizen-suit provision of the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046(a)(1), which authorizes civil penalties and injunctive relief. The statute also contains a provision stating that district courts "shall have jurisdiction in actions brought under subsection [11046(a)]." 42 U.S.C. § 11046(c). In *Steel Co.*, this Court rejected the argument that, because Section

Third, the panel wrongly suggested that "Supreme Court decisions since the 1986 *Wollersheim* opinion" demonstrate that "the approach of the Ninth Circuit" – and in particular its reliance on legislative history – "no longer conforms to the Court's present jurisprudence." App., *infra*, 35a. In fact, the Ninth Circuit's decision rested principally on the *text and structure* of RICO – as well as on the crucial fact, brushed aside by the panel (*id.* at 42a), that Congress modeled Section 1964(c) on virtually identical provisions in the Sherman and Clayton Acts (provisions that, at the time RICO was enacted, had been authoritatively interpreted by this Court as *not* authorizing injunctive relief). See 796 F.2d at 1081-84, 1087. Moreover, the predecessor provision in the Clayton Act coexists with a separate provision in that statute that expressly authorizes private injunctive relief (a provision that has no equivalent in RICO and that was proposed, but rejected, as a RICO amendment).[13]

Just as the panel's earlier opinion seeks to brush aside this powerful evidence of RICO's meaning by labeling it "legislative history," the panel's most recent opinion refers to the *language of the Hobbs Act as enacted* as "legislative history" evidence. App., *infra*, 15a. It does so by treating the 1948 recodification of the whole of Title 18 as the crucial statute, even while acknowledging that the 1948 "revisions were intended to be formal, stylistic changes." App., *infra*, 15a. The panel then speculated that "it is not beyond the realm of possibility that the revisers

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11046(c) refers to "jurisdiction," it follows that "all of the elements of a cause of action under" Section 11046(a)(1) implicate the court's subject-matter jurisdiction. 523 U.S. at 90.

[13] Contrary to the panel's suggestion, this Court often has looked to legislative history for guidance in interpreting RICO. See, *e.g.*, *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 164 (2001); *Rotella* v. *Wood*, 528 U.S. 549, 557 (2000); *Holmes* v. *SIPC*, 503 U.S. 258, 267 (1992). Indeed, the Court has "repeatedly" relied on the fact that "Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act." *Holmes*, 503 U.S. at 267 (case citations omitted); *Agency Holding Corp.* v. *Malley-Duff & Assocs.*, 483 U.S. 143, 150-51 (1987).

may have made certain substantive changes, either advertently or inadvertently." *Ibid.* As explained above, that analysis is contrary to a long line of this Court's decisions and it ignores Congress's clear intent that the 1948 recodification *not* result in any substantive changes unless the Revisers' Notes say so specifically (which they do not for the Hobbs Act). And nothing in this Court's decision in *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 125 S. Ct. 460 (2004) (see App., *infra*, 8a-9a, 14a-15a), remotely supports such an approach to statutory interpretation.

C. The possibility that the district court, on remand, will elect not to uphold the injunction (in the original or modified form) is not a good reason to deny review of this issue. In light of this Court's decision in *Scheidler II,* petitioners should not be required to litigate that issue (in the district court and perhaps in yet another appeal to the Seventh Circuit) in this 19-year-old litigation. Moreover, the issue has already been fully briefed and argued in this Court, and the Court presumably would not have avoided its resolution if it had thought there was a possibility that an injunction could remain intact on remand.

CONCLUSION

The petition for a writ of certiorari should be granted.

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MARCH 2005

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APPENDICES

APPENDIX A

United States Court of Appeals,
Seventh Circuit.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al., Plaintiffs-Appellees,
v.
Joseph M. SCHEIDLER, et al.,
Defendants-Appellants.

No. 99-3076, 99-3336, 99-3891, 99-3892, 01-2050.

Jan. 28, 2005.

Appeals from the United States District Court
for the Northern District of Illinois,
Eastern Division. No. 86 C 7888 – David H. Coar, Judge.

On Petitions for Rehearing and Rehearing En Banc.[*]

Before ROVNER, WOOD and EVANS, *Circuit Judges*.

WOOD, *Circuit Judge*. On February 26, 2004, this court issued an order responding to the remand of this case from the Supreme Court of the United States. See *Nat'l Org. for Women, Inc.* v. *Scheidler*, 2004 WL 375995 (7th Cir. Feb. 26, 2004), on remand from *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 397 (2003) (*NOW II*). In that order, we acknowledged the issues that were resolved by the Supreme Court, and we identified one question that remains in the case. The defendants

[*] After a vote, a majority of the judges in regular active service did not wish to hear this case *en banc*. Chief Judge Flaum, Judge Manion and Judge Kanne voted to grant rehearing *en banc*. Judge Ripple took no part in consideration or decision of this case.

then filed petitions for rehearing and rehearing *en banc* from that order. This opinion responds to those petitions.

I

For the convenience of all, we begin by reproducing the relevant text of the unpublished order that we issued on that date:

> In 1986, the National Organization for Women (NOW) and two health clinics that perform abortions ("plaintiffs") filed this class action alleging that defendants, a coalition of antiabortion groups called the Pro-Life Action Network (PLAN), Joseph Scheidler, and other individuals and organizations that oppose abortion, engaged in conduct amounting to a pattern of extortion in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (RICO). A more detailed account of the facts and the lengthy procedural history of this litigation is provided in the Supreme Court's first opinion in this case, *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994) (*NOW I*), and in our prior decisions, *National Organization for Women, Inc.* v. *Scheidler*, 267 F.3d 687 (7th Cir. 2001), and *National Organization for Women, Inc.* v. *Scheidler*, 986 F.2d 612 (7th Cir. 1992).
>
> After the Supreme Court in *NOW I* remanded the case, the district court conducted a seven-week trial, at which the plaintiffs introduced evidence of hundreds of acts committed by the defendants or others acting in concert with PLAN which, the plaintiffs contended, constituted predicate acts under RICO. In response to special interrogatories, the jury found that the defendants or others associated with PLAN committed 21 violations of federal extortion law (the Hobbs Act, 18 U.S.C. § 1951), 25 violations of state extortion law, 25 instances of attempting or conspiring to commit either federal or state extortion, 23 violations of the Travel Act, 18 U.S.C. § 1952, 23 instances of attempting to violate the Travel Act, and four "acts or

threats of physical violence to any person or property." On this basis, the jury awarded damages to the two named clinics, and the district court issued a permanent nationwide injunction prohibiting the defendants from conducting blockades, trespassing, damaging property, or committing acts of violence at the class clinics. The defendants appealed a number of issues relating to the conduct of the trial and the issuance of the injunction. We affirmed the district court's judgment in all respects. *Scheidler*, 267 F.3d at 693.

The defendants then filed a petition for a writ of certiorari with the United States Supreme Court, which the Court granted with respect to two of the three questions presented by the petition. *Scheidler* v. *Nat'l Org. for Women, Inc.*, 535 U.S. 1016 (2002). The Court limited its grant of certiorari to the following questions:

> 1. Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under [RICO].
>
> 2. 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 the wrongful use of actual or threatened force, violence, or fear" – 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.

Pet. for Writ of Cert., 2002 WL 32134867 (U.S. Jan. 28, 2002) (No. 01-1118) (internal citation omitted). In its opinion, the Court explained that it granted certiorari to

determine "whether petitioners committed extortion within the meaning of the Hobbs Act" and "whether respondents, as private litigants, may obtain injunctive relief in a civil action" under RICO. *NOW II*, 537 U.S. at 397. The Court held that "petitioners did not commit extortion because they did not 'obtain' property from respondents as required by the Hobbs Act," and this determination "renders insufficient the other bases or predicate acts of racketeering supporting the jury's conclusion that petitioners violated RICO." *Id.* It therefore "reverse[d] without reaching the question of the availability of private injunctive relief under § 1964(c) of RICO," *id*., and held that "[w]ithout an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated," *id.* at 411.

On remand to this court, the parties submitted Statements of Position pursuant to Circuit Rule 54. Plaintiffs argue that, although the Court in *NOW II* disposed of the 117 extortion-based predicate acts under RICO, the defendants did not petition for a writ of certiorari on the four predicate acts involving "acts or threats of physical violence to any person or "property" and, accordingly, the Court did not decide whether these acts alone could support the district court's injunction. In response, defendants contend that the Hobbs Act does not outlaw "physical violence" apart from extortion and robbery, and therefore the Supreme Court's holding that the defendants did not commit extortion precludes a finding that the four acts or threats of violence might independently support the injunction. We remand to the district court to address this issue – which never before in this litigation has been the subject of full briefing or judicial consideration – in the first instance.

Although "[a]n order limiting the grant of certiorari does not operate as a jurisdictional bar," *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 246 (1981), the Supreme Court has consistently adhered to its Rule 14.1(a), which provides that "[o]nly the questions set out in the petition, or fairly

included therein, will be considered by the Court." See *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184 (2002); *Glover* v. *U.S.*, 531 U.S. 198, 205 (2001). Given the Court's general refusal to decide issues outside the questions presented by a petition for a writ of certiorari, see, *e.g.*, *Lopez* v. *Davis*, 531 U.S. 230, 244 n. 6 (2001); *West* v. *Gibson*, 527 U.S. 212, 233 (1999); *Nynex Corp.* v. *Discon, Inc.*, 525 U.S. 128, 140 (1998), we will not presume that in this case it went beyond the scope of its grant of certiorari, which it characterized as "whether petitioners committed extortion within the meaning of the Hobbs Act," to hold *sub silentio* that the four acts or threats of physical violence found by the jury cannot support the injunction. We note that the Courts' opinion in *NOW II* makes no mention of these four predicate acts, and the parties' briefs before the Court reference these acts only in passing in footnotes. To conclude that the Court found these four predicate acts insufficient to support the district court's injunction would therefore require that we find both that the Court went beyond the scope of its grant of certiorari, and that it did so with respect to an issue not briefed by the parties and not discussed in its opinion. We decline to draw such a conclusion.

Instead, we remand to the district court to determine whether the four predicate acts involving "acts or threats of physical violence to any person or property" are sufficient to support the nationwide injunction that it imposed. See *Glover*, 531 U.S. at 205 ("As a general rule . . . we do not decide issues outside the questions presented by the petition for certiorari. Whether these issues remain open, and if so whether they have merit, are questions for the Court of Appeals or the District Court to consider and determine in the first instance." (citing Sup.Ct.R. 14.1(a))). As part of this inquiry, the court may find it necessary to interpret the language of the Hobbs Act, which provides that "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce,

> by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a). Specifically, the court may need to determine whether the phrase "commits or threatens physical violence to any person or property" constitutes an independent ground for violating the Hobbs Act or, rather relates back to the grounds of robbery or extortion. In the alternative, the court may conclude that the proper interpretation of § 1951(a) is immaterial, if it decides that the four acts or threats of physical violence found by the jury are not sufficient standing alone to support the nationwide injunction. As the parties' Circuit Rule 54 submissions offer only a preliminary discussion of these issues, and neither this court nor the district court has addressed them previously, we consider it best to remand the case to the district court.

The February 26 order, in summary, thus concludes that one narrow question has yet to be resolved in the case. The Court did not have before it, and thus made no ruling on, the question whether four more predicate acts involving "acts or threats of physical violence to any person or property" could support a more narrow injunction. We concluded that the better part of wisdom was to remand that limited question to the district court.

II

The petitions for rehearing take issue with two aspects of our decision on remand: first, our finding that one issue remains in the case that needs to be tied up, and second, what the defendants believe is our implicit resolution of an important question of statutory interpretation regarding the scope of the Hobbs Act. Despite the arguments the dissenting judges have presented, we continue to believe that the Court's opinion left open the issue we identified. We take this opportunity to underscore the fact that we have not, at this point, ruled either

implicitly or explicitly on the Hobbs Act issue, for reasons of judicial economy and restraint. As we explain below, there is no need for this court to decide a question that may not even be pertinent to the case once the district court has looked at the points that remain on remand.

As we noted in the order reproduced above, the Supreme Court's opinion did not address the legal implications of the remaining four acts of physical violence. Indeed, any reader will see that the Court had nothing at all to say about them, for the understandable reason that they were not included in the petitions for *certiorari*. We have nothing to add on that point to what we have already written. With respect to the Hobbs Act dispute, which we describe in a moment, it seemed possible (perhaps even likely) that the district court might come to the conclusion that the four acts of physical violence are not sufficient standing alone to justify any injunction at all. It is not even clear whether the acts of violence were sufficiently well defined to justify any injunctive relief. Moreover, it is too late in the day for the plaintiffs to try to prove an entitlement to damages associated with those violations. They had their chance to do so when the case was tried in the district court, and there is nothing in the Supreme Court's opinion that would justify re-opening the original judgment on this point. The only remaining question, to repeat, is whether a different injunction, tailored to the violations found, would be appropriate. See, *e.g.*, *Missouri* v. *Jenkins*, 515 U.S. 70, 89 (1995). The district court is in the best position to decide what to do in these circumstances, given its extensive familiarity with the voluminous record in this case. This is not, however, an invitation either to the court or to the parties to re-open that record. If there is anything at all that is to be done, it must be based on the record that has already been built.

If and only if the district court concludes that some form of injunctive relief would be justified based on the four remaining predicate acts found by the jury, that court will have to confront a more complex legal issue, namely, whether the acts or threats

of violence language in the Hobbs Act may serve as an independent predicate act under RICO. The relevant part of the Hobbs Act reads as follows:

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

18 U.S.C. § 1951(a) (emphasis added). As the defendants' petitions for rehearing and plaintiffs' answer demonstrate, there are two possible interpretations of this language. "First it may simply forbid committing or threatening violence in furtherance of a plan to obstruct commerce by robbery or extortion." Craig M. Bradley, *NOW* v. *Scheidler: RICO Meets the First Amendment*, 1994 SUP. CT. REV. 129, 142-43 (1994). We will refer to this as the "two-way" interpretation, where the two acts are robbery and extortion. "The other possible reading . . . forbids threatening or committing physical violence in furtherance of a plan to 'obstruct, delay, or affect commerce' (other than through robbery or extortion)." *Id.* at 143. Under the latter reading, the Hobbs Act identifies three different ways in which illegal interference with interstate commerce may occur: (1) by robbery, (2) by extortion, or (3) by physical violence. We will refer to this as the "three-way" interpretation.

The choice between these two competing interpretations is not obvious. Grammatically, the text can be read either way without undue strain. Moreover, there is no decisional law that throws light on which of the two readings is to be preferred. The Supreme Court has had no occasion to address the question. The Court has, however, had pertinent things to say about the scope of the Hobbs Act, and it has recently reaffirmed the utility of taking a "holistic" approach to questions of statutory interpretation, see *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 125

S. Ct. 460, 466-67 (2004). With that in mind, we take a closer look at this issue.

In *Stirone* v. *United States*, 361 U.S. 212 (1960), the Supreme Court described the Hobbs Act as follows: the "Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress had to punish interference with interstate commerce by extortion, robbery or physical violence." *Id.* at 215. This phraseology suggests that the Court saw three distinct types of predicate acts in the statute. See also *United States* v. *Peterson*, 236 F.3d 848, 851 (7th Cir. 2001); *United States* v. *Carmichael*, 232 F.3d 510, 516 (6th Cir. 2000); *United States* v. *Rodriguez*, 218 F.3d 1243, 1244 (11th Cir. 2000). None of these cases, however, squarely confronted the question whether an act of physical violence constitutes a distinct kind of predicate act – a point that the Ninth Circuit underscored in *United States* v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999), which held that *Stirone* did not resolve the issue and went on to adopt the two-way reading of the statute.

In their petition for rehearing, the defendants identify language in the Supreme Court's opinion in *NOW II* that, they argue, indicates that the Court itself has now opted for the two-way interpretation. But the passage to which they point offers at best a subtle indication, and at worst it is not helpful at all. In the course of discussing the legislative history of the Hobbs Act, the Court noted that Congress used the Penal Code of New York as a model for the Act. *NOW II* at 403. It emphasized that the New York Penal Code distinguished "between extortion and the separate crime of coercion," which "involved the use of force or threat of force to restrict another's freedom of action." *Id.* at 405. "With this distinction between extortion and coercion clearly drawn in New York law prior to 1946," the Court explained, "Congress's decision to include extortion as a violation of the Hobbs Act and omit coercion is significant assistance to our interpretation of the breadth of the extortion provision." *Id.* at 406. The Court acknowledged that "coercion and extortion certainly overlap to the extent that extortion

necessarily involves the use of coercive conduct to obtain property," but nonetheless it stressed that "there has been and continues to be a recognized difference between the two crimes, and we find it evident that this distinction was not lost on Congress." *Id.* at 407-08 (internal citations omitted). In drawing this conclusion and in declining to subsume the crime of coercion into the Hobbs Act's reference to "extortion," the Court quoted *McNally* v. *United States*, 483 U.S. 350 (1987), for the proposition that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *NOW II*, 537 U.S. at 409 (quoting *McNally*, 483 U.S. at 359-60); see also *Leocal* v. *Ashcroft*, 125 S. Ct. 377, 384 n. 8 (2004). It thus concluded that "[i]f the distinction between extortion and coercion, which we find controls these cases, is to be abandoned, such a significant expansion of the law's coverage must come from Congress, and not from the courts." 537 U.S. at 409.

This discussion, however, addressed the question whether the definition of extortion was elastic enough to encompass the acts of coercion whereby the defendants and their allies were attempting to block women from clinics where abortions were performed. The focus was on the deprivation of the women's right to obtain the services they desired and whether that amounted to "extortion." It is true that the New York Penal Code defined coercion to include certain acts or threats of violence against persons or property, see *NOW II*, 537 U.S. at 406 n. 10 (quoting from New York Penal Code § 530 (1909)). It is also true that the Court concluded that Congress affirmatively chose not to list "coercion" as a separate ground for Hobbs Act liability. Nonetheless, the Court was not addressing the analytically distinct question whether the conduct at issue could be considered as acts of violence that obstructed, delayed, or affected interstate commerce, or that obstructed, delayed, or affected the movement of articles or commodities in commerce. Had it done so, one might have expected some discussion of cases like *United States* v. *Morrison*, 529 U.S. 598

(2000) (holding in part that the Violence Against Women Act could not be sustained as a regulation of activity affecting interstate commerce) and *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (upholding in part an injunction protecting access to abortion clinics entered pursuant to state law); see also 18 U.S.C. § 248 (freedom of access to clinics), upheld in *United States* v. *Wilson*, 154 F.3d 658 (7th Cir. 1998). No such discussion appears, for the simple reason that the issue was not before the Court.

The Sixth and Ninth Circuits have both had occasion to address the question how the Hobbs Act should be interpreted. See *United States* v. *Yankowski, supra*, 184 F.3d 1071; *United States* v. *Franks*, 511 F.2d 25 (6th Cir. 1975). They both have concluded that the Act establishes just two RICO predicate acts – robbery and extortion – and that the phrase "or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section" simply modified the words "robbery" and "extortion." In *Yankowski*, the Ninth Circuit considered the question whether an anti-abortion protester who set fire to a clinic roof could be convicted under the Hobbs Act. See 184 F.3d at 1072. The court rejected the three-part reading of the Act, explaining that "the statutory language clearly requires that the violent act pertain to a violation of *this section*, not merely to a violation of 'the law' generally." *Id.* at 1073. On that basis, it concluded that "[a] person may violate the Hobbs Act by committing or threatening a violent act against person or property, but only if it is in furtherance of a plan to interfere with commerce *by extortion or robbery*." *Id.* In support of that interpretation, the court relied on the language of the predecessor to the Hobbs Act, the Anti-Racketeering Act of 1934, which it described as providing that "[a]ny person who, in connection with or in any degree affecting trade or commerce (a) commits or attempts extortion of money, or (b) obtains property through extortion, or (c) 'commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate

sections (a) or (b),' or (d) conspires with respect to (a), (b), or (c)... shall be imprisoned or fined." *Id.* at 1073 n. 5. The Sixth Circuit came to essentially the same result in *Franks, supra*.

Notably, in both *Yankowski* and *Franks* the government had argued unsuccessfully that the statute described three independent predicate acts. It appears to us that the United States may still be taking that position with respect to the scope of the Hobbs Act for purposes of criminal prosecutions, though we cannot be sure without requesting the views of the Solicitor General. We note, however, that in an unpublished opinion, the Fourth Circuit stated that "[t]here are two essential elements of a Hobbs Act conviction: interference with interstate commerce, and a crime of robbery, extortion or violence." *United States* v. *Milton*, 153 F.3d 724, 1998 WL 468812, at *1 (4th Cir. Aug. 4, 1998). It seems likely that this court was expressing agreement with the position of the government, though once again, it is impossible to know.

The defendants also invoke the rule of lenity mentioned by the Supreme Court in *NOW II* and *Leocal* in support of the two-way interpretation. But this argument is premised on the doomsday scenario they foresee if the Act is read to permit three independent predicate acts. They predict that under the three-way interpretation, "the traditional state-law offenses of malicious destruction of property, reckless endangerment, and even assault would be Hobbs Act violation punishable by 20 years in federal prison." Operation Rescue adds that this would make the Hobbs Act a "breath-takingly broad general federal anti-violence statute" and it would raise "obvious constitutional problems" under the Supreme Court's Commerce Clause jurisprudence. In our view, these predictions greatly overstate the case. The Hobbs Act itself contains a jurisdictional element that limits its application to anyone who "obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951(a); see also *Jones* v. *United States*, 529 U.S. 848 (2000) (adopting a narrow interpretation of the federal arson statute, 18 U.S.C. § 844(i), to avoid

constitutional problems). We are satisfied that we have a normal question of statutory interpretation before us and that the sky is not likely to fall whichever way it is resolved.

The plaintiffs argue that the "plain" text of § 1951 favors their position. They adopt the reasoning offered by Professor Bradley:

> [The Hobbs Act] may simply forbid committing or threatening violence in furtherance of a plan to obstruct commerce by robbery or extortion. But this interpretation makes no sense! Robbery and extortion frequently involve the commission (robbery) or threat (extortion) of violence, though "extortion" covers other threats as well. Moreover, the "robbery and extortion" clauses also forbid "attempts" and conspiracies. Thus, under this reading, the "physical violence" clause would be less inclusive, and hence would add nothing, to the preceding "robbery" and "extortion" clauses. One who commits violence in furtherance of a plan to commit robbery or extortion has either committed, attempted, or conspired to commit robbery or extortion and thus has violated the first clause, rendering the third clause nugatory.

Bradley, *supra*, at 142-43. At a minimum, it is hard to argue with the proposition that any reading of the Hobbs Act ought to take into account the statute as a whole. That means that the language of § 1951(a) should be understood in light of the definitions provided by § 1951(b). In the latter subsection, the Act defines "robbery" and "extortion" so that they already cover all acts of physical violence that are undertaken in furtherance of the respective offense. "Robbery" is defined in part as "the unlawful taking or obtaining of personal property from the person . . . against his will, by means of *actual or threatened force, or violence, or fear of injury*, immediate or future, to his person or property." 18 U.S.C. § 1951(b)(1) (emphasis added). Likewise, "extortion" is defined as "the obtaining of property from another, with his consent, induced by wrongful use of

actual or threatened force, violence, or fear, or under color of official right." *Id.* at § 1951(b)(2) (emphasis added).

Recognizing the well-worn canon of statutory interpretation under which a court should avoid making one part of a statute meaningless, the defendants have tried to think of cases in which the "physical violence" clause would cover individuals who were acting in furtherance of a plan to commit robbery or extortion, but whose acts do not already fall within the definitions of robbery, extortion, or attempts or conspiracies to rob or extort. Their efforts reveal the difficulty they face in this connection. Anyone who commits physical violence to a person or property in furtherance of a plan of robbery or extortion would almost certainly be found to have attempted one of those crimes, or, if others are involved, to have conspired to commit one or the other. Operation Rescue, for instance, offers the example of the "subordinate 'enforcer' who, while not himself extorting or robbing anything, harms people or property when the extortionist or robber does not obtain the desired payment from the victim." But such a subordinate "enforcer" would fall squarely within the Act's conspiracy language. Another example the defendants offer is the case of one who threatens violence in furtherance of a "personal" plan to rob a bank or to commit extortion, without either conspiring with anyone else or taking enough steps to amount to an attempted crime. It is hard to see how such a remote threat could be in furtherance either of extortion or robbery (defendants' view) or in furtherance of a plan to "obstruct, delay" or otherwise hamper the movement of goods in commerce (plaintiffs' view). It seems unlikely that Congress included the "violence" language to capture such a tiny set of academic hypotheticals.

Even if one were to conclude that the plain language approach favors the interpretation urged by the plaintiffs, there is still legislative history to consider. The defendants argue that the legislative history of the Hobbs Act should be allowed to trump the result one reaches looking at the statute as a whole. Many judges believe that legislative history should be used, if

at all, only to disambiguate language that does not yield to any other mechanism. The Supreme Court's *Koons Buick* decision indicates that legislative history is also appropriate if the plain language leads one to an absurd result. But we see nothing absurd in the three-way interpretation the plaintiffs have urged. To the contrary, it is the approach favored by the defendants that threatens to leave one with an entire clause in the statute that has no meaningful function to perform.

Having said that, we acknowledge that the legislative history indicates that Congress was principally concerned with the effects of robbery and extortion on interstate commerce (though it never affirmatively negated the three-way interpretation, either at the time of the 1948 revision of the Criminal Code or thereafter). See generally *Callanan* v. *United States*, 364 U.S. 587, 591 & n. 5 (1961). Until the 1948 revision and codification of Title 18 of the U.S. Code, the statute explicitly linked the "acts of physical violence" clause to the prohibition on robbery and extortion. See Pub. L. No. 486, 60 Stat. 420 (1946). In 1948, however, the Act assumed its present form. See Pub. L. No. 772, 62 Stat. 793-94 (1948). While these revisions were intended to be formal, stylistic changes, it is not beyond the realm of possibility that the revisers may have made certain substantive changes, either advertently or inadvertently. Compare, for example, the similar fate of the Judicial Code, which was recodified at the same time as the Criminal Code, and which changed in a number of substantive respects as a result. See generally William W. Barron, The Judicial Code, 8 F.R.D. 439 (1948-49). Moreover, the present form of the Act has been in effect for more than 55 years, and the safest approach may be to take it at face value.

III

We continue to believe, as we did when the February 26 order was issued, that it would be imprudent to resolve this problem of statutory interpretation at this stage of the litigation of this particular case. Most importantly, as we indicated at the outset of this opinion, it may be unnecessary to the resolution of

this case. Second, the brief discussion we have included in this opinion demonstrates that the issue is a complex one that deserves not only full briefing and participation by all parties, but also input from the United States, given the effect of any ruling on the scope of the Hobbs Act with or without RICO in the picture. Rather than launch such an ambitious project at the tail end of litigation that has been running for almost twenty years, we prefer a wait-and-see approach.

In closing, we wish to re-emphasize that this remand is not a "green light" to start this old litigation anew. The plaintiffs have lost their bid to have a nationwide injunction based on the 117 acts that the Supreme Court has now decreed do not qualify as "extortion" for purposes of the Hobbs Act and RICO. From what we can tell of the record, it appears that it would be an abuse of discretion for the district court to re-enter any nationwide injunction based only on the four remaining acts of violence found by the jury. Such an injunction would violate the rule requiring courts to tailor injunctive relief to the scope of the violation found. We note as well that the Freedom of Access to Clinic Entrances Act, 18 U.S. § 248, has now been in effect for five more years since the district court first considered the necessity of a nationwide injunction, and experience may require a reassessment of the Act's impact. Finally, it is too late in the day for the plaintiffs to try to seek additional damages relief for acts that they could have addressed at the original trial. The only remaining question is therefore whether any injunction is appropriate to redress the four acts of physical violence that the jury found had taken place and that were not encompassed within the Supreme Court's ruling. This does not open Pandora's Box. It merely resolves the final loose ends in this long-running litigation in a manner that is fair to both sides and that acknowledges the need to resolve all properly presented issues.

The case is REMANDED to the district court for further proceedings consistent with this opinion.

MANION, *Circuit Judge*, joined by KANNE, *Circuit Judge*, dissenting from the denial of petition to rehear en banc. Following more than eighteen years of litigation, a seven-week jury trial, and two trips to the United States Supreme Court, the Supreme Court held in *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003), that "*all* of the predicate acts supporting the jury's finding of a RICO violation *must be reversed*," and that "*[w]ithout an underlying RICO violation*, the injunction issued by the District Court must necessarily be vacated." *Id.* at 410 (emphasis added). Nonetheless, on remand, a panel of this court concluded that not "*all* of the predicate acts" were reversed, but that the jury's finding of four predicate acts or threats of violence remained viable. *National Org. for Women, Inc.* v. *Scheidler*, 2004 WL 375995, at *3 (7th Cir. Feb. 26, 2004). Today on rehearing, the panel reaffirms that remand order, while unnecessarily debating, but not deciding, the scope of the Hobbs Act. Because I believe that the Supreme Court meant what it said, and because, in any event, the underlying four predicate acts of violence cannot, as a matter of law, constitute an independent violation of the Hobbs Act, I dissent from the denial of the petition for rehearing en banc.

The facts and procedural history of this case are provided in detail in the Supreme Court's decision in *Scheidler*. In short, in *Scheidler*, following a seven-week trial, a jury concluded that Scheidler and other individuals and organizations violated the civil provisions of RICO: the jury concluded that the defendants committed 21 violations of the Hobbs Act, 25 violations of state extortion law, 25 instances of attempting or conspiring to commit either federal or state extortion, 23 violations of the Travel Act, 23 instances of attempting to violate the Travel Act, and four acts or threats of physical violence to any person or property.[1] The jury awarded plaintiff, the National Women's

[1] The plaintiffs acknowledge that the "acts or threats of physical violence" predicate acts were based on the Hobbs Act, 18 U.S.C. § 1951(a), and were not state law claims.

Health Organization of Delaware, Inc., $31,455.64, and the National Women's Health Organization of Summit, Inc., $54,471.28, with the damages trebled under RICO. The district court then entered an injunction prohibiting certain illegal protest actions. The defendants appealed to this court and this court affirmed. *National Org. for Women, Inc.* v. *Scheidler*, 267 F.3d 687 (7th Cir. 2001). The Supreme Court granted certiorari "to answer two questions. First, whether petitioners committed extortion within the meaning of the Hobbs Act, 18 U.S.C. § 1951. Second, whether respondents, as private litigants, may obtain injunctive relief in a civil action pursuant to 18 U.S.C. § 1964 of the Racketeer Influenced and Corrupt Organization Act (RICO)." *Id.* at 397.

On appeal, the Supreme Court first considered whether the defendants committed extortion within the meaning of the Hobbs Act. The Court held that the crime of extortion under the Hobbs Act required the defendants to obtain or to seek to obtain property. The Court then concluded: "Because we find that petitioners did not obtain or attempt to obtain property from respondents, we conclude that there was no basis upon which to find that they committed extortion under the Hobbs Act." *Id.* The Court did not end there, however, because "[t]he jury also found that petitioners had committed extortion under various state-law extortion statutes, a separate RICO predicate offense." *Id.* at 409. Thus, the Court considered whether the verdicts could stand based on the jury's findings of state law extortion. Again, the Court concluded "[b]ecause petitioners did not obtain or attempt to obtain respondents' property, both the state extortion claims and the claim of attempting or conspiring to commit state extortion were fatally flawed." *Id.* at 410. Having disposed of the Hobbs and state extortion predicate acts, the Supreme Court then concluded that "[t]he 23 violations of the Travel Act and 23 acts of attempting to violate the Travel Act also fail. These acts were committed in furtherance of allegedly extortionate conduct. But we have already determined that petitioners did not commit or attempt to commit extortion." *Id.* at 410.

Significantly, the Supreme Court then held: "Because *all* of the predicate acts supporting the jury's findings 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. The judgment of the Court of Appeals is accordingly *Reversed*." *Id.* at 411 (emphasis added). The Supreme Court then entered an order stating "that the judgment of the above court in these cases is reversed with costs, and the cases are remanded to the United States Court of Appeals for the Seventh Circuit for further proceedings in conformity with the opinion of this Court." At that point, we should have closed the case.

But even with the Supreme Court's explicit holding that "*all* of the predicate acts supporting the jury's findings of a RICO violation *must be reversed*," and its directive that "the injunction issued by the District Court *must necessarily be vacated*," our court remanded this case to the district court for further proceedings, namely to determine "whether the four predicate acts involving 'acts or threats of physical violence to any person or property' are sufficient to support the nationwide injunction that it imposed." *Scheidler*, 2004 WL 375995, at *3. The panel reasoned that remand was necessary because the Supreme Court had not granted certiorari on that issue and, therefore, the question remained open. In my view, the order directly conflicts with the Supreme Court's opinion. It also rests on an impermissible reading of the Hobbs Act, and unnecessarily revives a case that is already more than eighteen years old.

Although the Supreme Court did not expressly consider whether the jury's finding of four predicate acts of violence to persons or property could support the jury's verdict on the plaintiffs' RICO claim, the Supreme Court clearly stated that "*all* of the predicate acts supporting the jury's finding of a

RICO violation *must be reversed*." This unequivocal holding negates any reasonable inference that those four predicate acts remain an issue. The panel concludes otherwise by noting that the Supreme Court did not grant certiorari to resolve that issue.

But, the Supreme Court did specifically grant certiorari to consider the question of whether a private litigant in a civil RICO action is entitled to injunctive relief, but then found it unnecessary to address that question because there was no "underlying RICO violation . . . ." *Scheidler*, 537 U.S. at 411. This is significant because if the four threats or acts of violence claims remained viable, as the panel concludes and the plaintiffs argue, there would be an "underlying RICO violation," and it would have been necessary for the Supreme Court to address the second question for which it had granted certiorari. Yet, the Supreme Court expressly stated that because there was no underlying RICO violation, it was unnecessary to consider whether private litigants could obtain injunctive relief under RICO. *Id.* at 411. Thus, the panel's remand order, which allows for the possibility that there is still an "underlying RICO violation," is again inconsistent with the Supreme Court's opinion.

Moreover, although the Supreme Court did not grant certiorari to consider the state law extortion claims or the Travel Act claims, it nonetheless considered the validity of those claims, as they depended entirely on the Supreme Court's resolution of the extortion claims for which it had granted certiorari. *See Scheidler*, 537 U.S. at 410 ("The 23 violations of the Travel Act and 23 acts of attempting to violate the Travel Act also fail. These acts were committed in furtherance of allegedly extortionate conduct. But we have already determined that petitioners did not commit or attempt to commit extortion."); *id*. ("Because petitioners did not obtain or attempt to obtain respondents' property, both the state extortion claims and the claim of attempting or conspiring to commit state extortion were fatally flawed."). Similarly, as discussed below, the four predicate acts of violence to persons or property depend

on the viability of the extortion claims in this case. By holding that the defendants did not commit extortion, it necessarily follows that the four predicate acts also cannot support the RICO verdict. True, the Supreme Court expressly addressed the state law extortion claims and the Travel Act claims, but did not mention the four violence against person or property claims. But that is not surprising given that on appeal before the Supreme Court, the plaintiffs discussed those claims, and specifically argued that "even without the Hobbs Act predicates, the jury's verdict would stand on the 25 state extortion predicates." The plaintiffs, however, did not argue that the four predicate acts of violence against persons or property independently justified the jury's verdict. Therefore, the Supreme Court found no need to expressly address that question. But its holding that "all of the predicate acts supporting the jury's finding of a RICO violation must be reversed . . ." is conclusive.

One could argue that the Supreme Court made a mistake when it stated that "*all* of the predicate acts supporting the jury's finding of a RICO violation *must be reversed*," and that "*[w]ithout an underlying RICO violation*, the injunction issued by the District Court must necessarily be vacated." *Scheidler*, 537 U.S. at 411 (emphasis added). But if so, the appropriate procedure would have been for the plaintiffs to seek rehearing from the Supreme Court. This court cannot ignore the Supreme Court's mandate merely because the Supreme Court might not have meant what it said.

Even assuming that the panel's remand order could be labeled a reasonable interpretation of the Supreme Court's opinion, the four predicate acts of violence to persons or property cannot, as a matter of law, constitute a violation of the Hobbs Act, as the plaintiffs argue. Specifically, the plaintiffs argue that the Hobbs Act make it illegal to interfere with interstate commerce by: (1) robbery, (2) extortion, or (3) physical violence. The plaintiffs' argument is misplaced, as the plain language of the Hobbs Act makes clear.

The Hobbs Act provides:

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

18 U.S.C. § 1951.

The plain language of the Hobbs Act makes clear that it does not make threats of "physical violence to any person or property" illegal. Rather, it prohibits threats of "physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section*." Thus, for the four acts or threats of violence to constitute a violation of the Hobbs Act, they must have been for purposes of obstructing, delaying or affecting commerce "by robbery or extortion." *United States* v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999); *United States* v. *Franks*, 511 F.2d 25 (6th Cir. 1975). Yet, the Supreme Court held that the facts in this case did not support a finding of extortion, as a matter of law. (And the plaintiffs do not make a claim of robbery.) Accordingly, there is no possible Hobbs Act violation and the remaining four predicate acts, like the Travel Act claims, cannot, as a matter of law, support a RICO verdict.[2]

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[2] There is yet another reason that further proceedings on remand are unnecessary. In remanding the Hobbs Act question, the panel on rehearing instructs that "[i]f there is anything at all that is to be done, it must be based on the record that has already been built." Slip op. at 8. However, the record, as it currently exists, fails to establish that the four acts of violence involved interstate commerce. As the panel recognizes, slip op. at 13, the Hobbs Act violation must "affect [ ] commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951(a). In this case, though, the jury did not determine that the four acts or violence affected commerce: The Special Interrogatories and Verdict Form did not ask the jury to decide separately whether each alleged predicate act involved interstate

Nonetheless, on rehearing the panel unnecessarily sets up a debate on the meaning of the Hobbs Act, positing as plausible two different interpretations of the Hobbs Act – what the panel dubs a "two-way" and a "three-way" interpretation. *Scheidler* slip op. at 9. Using the panel's jargon, a "two-way" interpretation of the Hobbs Act allows for only two independent ways to violate the Hobbs Act: 1) Robbery or 2) Extortion. The three-way interpretation, according to the panel, provides for a third: 3) Physical violence to any person or property.

Although the panel refuses to resolve the debate and instead "underscore[s] the fact that we have not, at this point, ruled either implicitly or explicitly on the Hobbs Act issue," slip op. at 7, the panel nonetheless states that "[g]rammatically, the text can be read either way without undue strain," *id.* at 9, and it concludes that "we see nothing absurd in the three-way interpretation the plaintiffs have urged." *Id.* at 16. However, contrary to the panel's conclusion, the three-way interpretation is not plausible given the plain language of the Hobbs Act. As explained above, the "physical violence to any person or property" clause of the Hobbs Act, states in its entirety: "or commits or threatens physical violence to any person or property in furtherance of a plan or purpose *to do anything in violation of this section*, . . ." Thus, the only way "physical violence" constitutes a violation of the Hobbs Act is if it (in addition to satisfying the interstate commerce requirement) is in furtherance of "robbery" or "extortion.["] *Yankowski*, 184 F.3d 1071; *Franks*, 511 F.2d 25. Clearly, under the Hobbs Act, physical violence to any person or property is confined to

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commerce. Rather, Special Interrogatory 8 asked whether "any of the acts that you found in Question 4 above affect[ed] interstate commerce?" The jury answered "yes" to that question, but the jury did not specify which of the acts listed in Interrogatory 4 included eight sub-components, (a)–(h), only one of which involved the acts or threats of physical violence to any person or property, which the remand order indicates remain viable. Because the jury did not specifically conclude that those acts affected interstate commerce, on the record as it stands, no Hobbs Act violation could exist.

furthering robbery or extortion. It does not stand alone as a separate violation. The full court should decide this clear question of law now, instead of presenting competing theories for the district court to resolve on remand.

Although an order for a reversal and remand from the Supreme Court is not the typical case for which *en banc* is appropriate, procedurally that is the only option available to the defendants before this court. Given the age of this case, remanding to the district court unnecessarily wastes additional judicial resources. Granted, it is hard to see how four acts of violence committed nearly twenty years ago – and well before Congress enacted the Freedom of Access to Clinic Entrances Act – would justify an injunction in 2005. It is likely and certainly appropriate that the district court will dispose of the case promptly on that basis. But even that most likely result requires additional resources of the parties and the judicial system. This is unnecessary because the Supreme Court's holding that there was no extortion means that no Hobbs Act violation possibly exists. Moreover, if the district court on remand somehow finds an injunction appropriate, then it will be required to choose between the two legal options the panel presents. The losing side would surely appeal, presenting the pure issue of law that this court would have resolved by now had we considered it en banc.

Absent a writ of mandamus from the United States Supreme Court, *see In re Blodgett*, 502 U.S. 236, 240-41 (1992) (denying a petition for the writ of mandamus directed toward the Ninth Circuit without prejudice, but stating that such relief would be available if the circuit court caused an unwarranted delay in the case's disposition), the defendants face an unnecessary remand. I therefore DISSENT from the denial of rehearing en banc. *Id.*

APPENDIX B

United States Court of Appeals,
Seventh Circuit.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al., Plaintiffs-Appellees,
v.
Joseph M. SCHEIDLER, et al.,
Defendants-Appellants.

Nos. 99-3076, 99-3336, 99-3891, 99-3892, 01-2050.

Submitted Feb. 26, 2003.
Decided Feb. 26, 2004.

On Remand from the Supreme Court of the United States.

Before ROVNER, DIANE P. WOOD, and EVANS, Circuit Judges.

ORDER

This case comes to us on remand from the Supreme Court of the United States.

In 1986, the National Organization for Women (NOW) and two health clinics that perform abortions ("plaintiffs"), filed this class action alleging that defendants, a coalition of antiabortion groups called the Pro-Life Action Network (PLAN), Joseph Scheidler, and other individuals and organizations that oppose abortion, engaged in conduct amounting to a pattern of extortion in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (RICO). A more detailed account of the facts and the lengthy procedural history of this litigation is provided in the Supreme Court's first opinion in this case, *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994) (*NOW I*), and in our prior decisions, *National Organization for Women, Inc.* v. *Scheidler*,

267 F.3d 687 (7th Cir. 2001), and *National Organization for Women, Inc.* v. *Scheidler*, 968 F.2d 612 (7th Cir. 1992).

After the Court in *NOW I* remanded the case, the district court conducted a seven-week trial, at which the plaintiffs introduced evidence of hundreds of acts committed by the defendants or others acting in concert with PLAN which, the plaintiffs contended, constituted predicate acts under RICO. In response to special interrogatories, the jury found that the defendants or others associated with PLAN committed 21 violations of federal extortion law (the Hobbs Act, 18 U.S.C. § 1951), 25 violations of state extortion law, 25 instances of attempting or conspiring to commit either federal or state extortion, 23 violations of the Travel Act, 18 U.S.C. § 1952, 23 instances of attempting to violate the Travel Act, and four "acts or threats of physical violence to any person or property." On this basis, the jury awarded damages to the two named clinics, and the district court issued a permanent nationwide injunction prohibiting the defendants from conducting blockades, trespassing, damaging property, or committing acts of violence at the class clinics. The defendants appealed a number of issues relating to the conduct of the trial and the issuance of the injunction. We affirmed the district court's judgment in all respects. *Scheidler*, 267 F.3d at 693.

The defendants then filed a petition for a writ of certiorari with the United States Supreme Court, which the Court granted with respect to two of the three questions presented by the petition. *Scheidler* v. *Nat'l Org. for Women, Inc.*, 535 U.S. 1016 (2002). Specifically, the Court limited its grant of certiorari to the following questions:

> 1. Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under [RICO].
>
> 2. 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 the wrongful use of actual or threatened force, violence, or fear" – 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.

Pet. for Writ of Cert., 2002 WL 32134867 (U.S. Jan 28, 2002) (No. 01-1118) (internal citation omitted). In its opinion, the Court explained that it granted certiorari to determine "whether petitioners committed extortion within the meaning of the Hobbs Act" and "whether respondents, as private litigants, may obtain injunctive relief in a civil action" under RICO. *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 397 (2003) (*NOW II*). The Court held that "petitioners did not commit extortion because they did not 'obtain' property from respondents as required by the Hobbs Act," and this determination "renders insufficient the other bases or predicate acts of racketeering supporting the jury's conclusion that petitioners violated RICO." *Id.* It therefore "reverse[d] without reaching the question of the availability of private injunctive relief under § 1964(c) of RICO," *id.*, and held that "[w]ithout an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated," *id.* at 411.

On remand to this court, the parties submitted Statements of Position pursuant to Circuit Rule 54. Plaintiffs argue that, although the Court in *NOW II* disposed of the 117 extortion-based predicate acts under RICO, the defendants did not petition for a writ of certiorari on the four predicate acts involving "acts or threats of physical violence to any person or property" and, accordingly, the Court did not decide whether these acts alone could support the district court's injunction. In response, defendants contend that the Hobbs Act does not outlaw "physical violence" apart from extortion and robbery, and

therefore the Supreme Court's holding that the defendants did not commit extortion precludes a finding that the four acts or threats of violence might independently support the injunction. We remand to the district court to address the issue – which never before in this litigation has been the subject of full briefing or judicial consideration – in the first instance.

Although "[a]n order limiting the grant of certiorari does not operate as a jurisdictional bar," *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 246 (1981), the Supreme Court has consistently adhered to its Rule 14.1(a), which provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." See *Toyota Motor Mfg., Inc.* v. *Williams*, 534 U.S. 184, 202 (2002); *Glover* v. *U.S.*, 531 U.S. 198, 205 (2001). Given the Court's general refusal to decide issues outside the questions presented by a petition for a writ of certiorari, see, *e.g.*, *Lopez* v. *Davis*, 531 U.S. 230, 244 n.6 (2001); *West* v. *Gibson*, 527 U.S. 212, 223 (1999); *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 140 (1998), we will not presume that in this case it went beyond the scope of its grant of certiorari, which it characterized as "whether petitioners committed extortion within the meaning of the Hobbs Act," to hold *sub silentio* that the four acts or threats of physical violence found by the jury cannot support the injunction. We note that the Court's opinion in *NOW II* makes no mention of these four predicate acts, and the parties' briefs before the Court reference these acts only in passing in footnotes. To conclude that the Court found these four predicate acts insufficient to support the district court's injunction would therefore require that we find both that the Court went beyond the scope of its grant of certiorari, and that it did so with respect to an issue not briefed by the parties and not discussed in its opinion. We decline to draw such a conclusion.

Instead, we remand to the district court to determine whether the four predicate acts involving "acts or threats of physical violence to any person or property" are sufficient to support the nationwide injunction that it imposed. See *Glover*,

531 U.S. at 205 ("As a general rule . . . we do not decide issues outside the questions presented by the petition for certiorari. Whether these issues remain open, and if so whether they have merit, are questions for the Court of Appeals or the District Court to consider and determine in the first instance." (citing Sup. Ct. R. 14.1(a))). As part of this inquiry, the court may find it necessary to interpret the language of the Hobbs Act, which provides that "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a). Specifically, the court may need to determine whether the phrase "commits or threatens physical violence to any person or property" constitutes an independent ground for violating the Hobbs Act or, rather, relates back to the grounds of robbery or extortion. In the alternative, the court may conclude that the proper interpretation of § 1951(a) is immaterial, if it decides that the four acts or threats of physical violence found by the jury are not sufficient standing alone to support the nationwide injunction. As the parties' Circuit Rule 54 submissions offer only a preliminary discussion of these issues, and neither this court nor the district court has addressed them previously, we consider it best to remand the case to the district court.

We therefore REMAND this case to the district court for further proceedings consistent with *NOW II* and this order.

APPENDIX C

United States Court of Appeals
for the Seventh Circuit

Nos. 99-3076, 99-3336, 99-3891, 99-3892
and 01-2050

National Organization for Women, Inc., on behalf of itself and its women members and all other women who use or may use the services of women's health centers that provide abortions, and Delaware and Summit Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., on behalf of themselves and the class of all women's health centers in the United States at which abortions are performed, Plaintiffs-Appellees,

v.

Joseph M. Scheidler, Pro-Life Action League, Inc., Andrew D. Scholberg, Timothy Murphy, and Operation Rescue, Defendants-Appellants.

Argued Sept. 14, 2000.
Decided Oct. 2, 2001.
Petition for Rehearing and Rehearing En Banc
Denied Oct. 29, 2001.

Before ROVNER, DIANE P. WOOD, and EVANS, Circuit Judges.

DIANE P. WOOD, Circuit Judge.

This case is in its fifteenth year of contentious litigation. The defendants are anti-abortion activists who employ a protest tactic they call "rescues," in which they and other activists physically block access to abortion clinics so that the patients and staff cannot get in or out of the buildings. Plaintiffs use words less benign than "rescue" to describe the defendants' activities. We will refer to them as "protest missions," in the hopes that this will be understood as a neutral term. The defendants' goal is frankly to prevent abortions from taking place. Participants in the protest missions engage in a substantial amount of protected speech, including efforts to persuade clinic patients not to have abortions and to persuade clinic doctors and staff to quit performing abortions. Unfortunately, the protest missions also involve illegal conduct: protesters do everything from sitting or lying in clinic doorways and waiting to be arrested to engaging in more egregious conduct such as entering the clinics and destroying medical equipment and chaining their bodies to operating tables to prevent the tables from being used. In a few instances, protesters apparently have physically assaulted clinic staff and patients. In addition to staging these protests, the defendants have issued letters and statements to other clinics threatening to stage missions at those clinics unless they voluntarily shut down.

The plaintiffs, the National Organization for Women (NOW) and two clinics that were the targets of protest missions, brought this class action alleging, among other things, that the defendants' conduct amounted to a pattern of extortion which violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (RICO). The trial judge certified two classes: one, represented by NOW, of all NOW members and non-members who have used or would use the services of an abortion clinic in the United States, and a second of all such clinics. After a trip through this court to the Supreme Court of the United States during which many of the legal issues in the case were clarified or resolved, the case was remanded to the district court for trial of the plaintiffs' RICO claims. A jury

found for the plaintiffs and awarded damages to the two named clinics, and the district court issued a permanent nationwide injunction prohibiting the defendants from conducting blockades, trespassing, damaging property, or committing acts of violence at the class clinics. The defendants have appealed a wide range of issues relating to the conduct of the trial and the issuance of the injunction. We find that the district court navigated its way through this complex and difficult case with care and sensitivity and affirm its judgment in all respects.

I

Many of the facts pertinent to this opinion are set out in the Supreme Court's decision remanding the case, *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994) (*NOW I*), and in our earlier decision in the case, *National Organization for Women, Inc. v. Scheidler*, 968 F.2d 612 (7th Cir. 1992), and we will not recount them in detail here. Nonetheless, in order to put the defendants' appeal in context, a brief overview of the facts presented at trial and of the procedural history of the case may be helpful.

The individual defendants, Joseph Scheidler, Andrew Scholberg, and Timothy Murphy are on the Board of Directors of one of the corporate defendants, the Pro-Life Action League (PLAL). The other corporate defendant is Operation Rescue. (Randall Terry, the director of Operation Rescue, was also originally a defendant in the case, but he has since settled with the plaintiffs). All of the defendants were among the organizers of the Pro-Life Action Network (PLAN), which is a loose national organization of groups that engage in protest missions and other aggressive anti-abortion tactics. Beginning in the mid-1980's, PLAN held annual conventions, organized in part by the defendants here, which included seminars on protest strategies. Those conventions concluded with protest missions being staged in the convention city. PLAN also sent a newsletter to its members and coordinated a hotline that potential protesters could call to get information about upcoming missions. The

plaintiffs alleged, and at trial the jury found, that PLAN was an "organization or enterprise" for purposes of RICO liability.

Initially, the plaintiffs alleged that the defendants' tactics violated both RICO and federal antitrust law. In 1992, however, this court issued an opinion dismissing both theories of liability, reasoning that the antitrust laws were not applicable because the plaintiffs had not alleged that the defendants exercised any form of market control over the supply of abortion services and that RICO did not reach the defendants' conduct because the plaintiffs had not shown that the alleged racketeering acts were "economically motivated." 968 F.2d at 617-30. The Supreme Court granted certiorari on the limited question whether RICO requires proof that either the racketeering enterprise or the alleged predicate acts were motivated by an economic purpose. (The antitrust holding of our 1992 decision was thus left undisturbed.) The Court concluded that RICO contains no such economic motive requirement and therefore reversed our decision on that point. 510 U.S. at 256-62, 114 S. Ct. 798. Thereafter, we remanded the case to the district court for trial of the plaintiffs' RICO claims.

During the course of the seven-week trial, the plaintiffs introduced evidence of hundreds of acts committed by the defendants or others acting in concert with PLAN which, the plaintiffs contended, constituted predicate acts under RICO. The alleged predicate acts included violations of federal extortion law (the Hobbs Act, 18 U.S.C. § 1951), state extortion law, the federal Travel Act, 18 U.S.C. § 1952, and conspiracy to violate these laws. A few of the more egregious acts the plaintiffs alleged included:

At a protest mission in Chico, California, protesters pressed four clinic staff members up against a glass entranceway to the clinic for several hours and refused to let them go even when they complained they were being crushed. The glass wall eventually either loosened or shattered, injuring a clinic staffer.

At a similar mission in Los Angeles, protesters grabbed at a patient's arms and legs and tried to restrain her physically from entering the clinic. The patient was actually at the clinic for a follow-up to ovarian surgery, and the attack by the protesters reopened her incisions. As a result of the attack, the patient had to be rushed to the hospital.

In several instances, protesters entered clinics and destroyed medical equipment.

In several cases, protesters not only blocked doorways with their bodies, but chained themselves to the doorways of clinics, or, in some cases, to operating tables inside clinics.

In December 1985, defendant Scheidler sent letters to every abortion provider in the Chicago area calling for a "Christmas Truce." In these letters, he requested that the clinics shut down for a specific day in December, stated that he would "call to confirm" the clinic's decision, and warned that non-complying clinics would be subjected to "non-violent direct action," a catch-phrase PLAN and PLAL frequently used for their activities.

Based on this and other evidence in the voluminous record that was created at the trial, the jury found in response to special interrogatories that the defendants or others associated with PLAN committed 21 violations of the Hobbs Act, 25 violations of state extortion law, 25 acts of conspiracy to violate federal or state extortion law, four acts or threats of physical violence, 23 violations of the Travel Act, and 23 attempts to commit one of these crimes. The jury awarded damages to both clinics; once the damages were trebled, as RICO requires, the awards totaled over $163,000 to Summit Women's Health Organization and over $94,000 to Delaware Women's Health Organization.

After the jury returned its verdict, the district court held three days of additional hearings and then entered a permanent, nationwide injunction prohibiting the defendants or those acting in concert with them from interfering with the rights of the class clinics to provide abortion services, or with rights of the class

women to receive those services, by obstructing access to the clinics, trespassing on clinic property, damaging or destroying clinic property, or using violence or threats of violence against the clinics, their employees and volunteers, or their patients.

II

Initially, we must consider the defendants' contention that RICO does not permit private plaintiffs to seek injunctive relief. The only court of appeals to have addressed this issue directly, the Ninth Circuit, concluded in 1986 that private plaintiffs cannot seek injunctions under RICO, relying largely on the court's reading of the statute's legislative history. See *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986). The other courts of appeals that have addressed the point in *dicta* are split. Compare *Johnson v. Collins Ent'mt. Co.*, 199 F.3d 710, 726 (4th Cir. 1999), *In re Fredeman Litig.*, 843 F.2d 821, 828-30 (5th Cir. 1988), and *Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 28-29 (2d Cir. 1983) (expressing doubt about availability of injunctive relief for private plaintiffs), with *Bennett v. Berg*, 710 F.2d 1361, 1366 (8th Cir. 1983) (McMillan, J., concurring) (suggesting injunctive relief is available); see also *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Cir. 1990), *Northeast Women's Ctr. v. McMonagle*, 868 F.2d 1342, 1355 (3d Cir. 1989) (noting controversy but expressing no opinion on resolution). Our study of Supreme Court decisions since the 1986 *Wollersheim* opinion convinces us that the approach of the Ninth Circuit (which relied almost exclusively on the legislative history of RICO to reach its result, as opposed to the actual language of the statute) no longer conforms to the Court's present jurisprudence, assuming for the sake of argument that it was a permissible one at the time. We are persuaded instead that the text of the RICO statute, understood in the proper light, itself authorizes private parties to seek injunctive relief.

In interpreting the remedial provisions of the RICO statute, our inquiry begins with the statute's text, and, if the text is unambiguous, it ends there as well. See *Alexander v. Sandoval*, 531 U.S. 1049, 121 S. Ct. 1511, 1520-21 & n. 7, 149 L. Ed. 2d

517 (2001); *NOW I*, 510 U.S. at 261, 114 S. Ct. 798. RICO's civil remedies section provides, in pertinent part:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to . . . imposing reasonable restrictions on the future activities . . . of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, . . . or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
>
> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. . . .

18 U.S.C. § 1964.

Both parties have offered interpretations of this text that support their positions. The plaintiffs read the statute in a straightforward manner. Section 1964(a), they contend, grants the district courts jurisdiction to hear RICO claims and also sets out general remedies, including injunctive relief, that all plaintiffs authorized to bring suit may seek. Section 1964(b) makes it clear that the statute is to be publicly enforced by the Attorney General and it specifies additional remedies, all in the nature of interim relief, that the government may seek. Section 1964(c) similarly adds to the scope of § 1964(a), but this time for private plaintiffs. Those private plaintiffs who have been

injured in their business or property by reason of a RICO violation are given a right to sue for treble damages. As the plaintiffs note, this reading of the statute gives the words their natural meaning and gives effect to every provision in the statute.

The defendants argue for a less intuitive interpretation. Relying on *Wollersheim*, they argue that § 1964(a) is purely a jurisdictional provision authorizing the district court to hear RICO claims and to grant injunctions to parties authorized by other provisions of the law to seek that form of relief. Section 1964(b), in the defendants' view, allows the Attorney General to institute RICO proceedings and authorizes the government to seek not only the relief described in that subsection, but also the relief described in § 1964(a). Section 1964(c) then provides a limited right of action for private parties. They read the two clauses of § 1964(c), however, as tightly linked provisions, under which private plaintiffs may sue *only* for monetary damages. The mention of this type of relief in the second clause must mean, the defendants argue, that by implication no other remedies, particularly injunctive remedies, are available. We cannot agree that this is a reasonable reading of the statute.

As an initial matter, we note that the *Wollersheim* decision apparently misreads § 1964(b) when it states that § 1964(b) explicitly "permits *the government* to bring actions for equitable relief." *Wollersheim*, 796 F.2d at 1082. Section 1964(b) does allow the government to seek equitable relief, but it specifically mentions only *interim* remedies. Although no one doubts that permanent injunctions are also available to the government, the government's ability to seek permanent, as opposed to interim, equitable remedies comes from the general grant of authority for district courts to enter injunctions found in § 1964(a), not from anything in § 1964(b). (The sentence "[t]he Attorney General may institute proceedings under this section" is in that respect the equivalent of the first clause in § 1964(c), which says "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any

appropriate United States district court. . . ." Neither one addresses what remedy the plaintiff may seek.) Given that the government's authority to seek injunctions comes from the combination of the grant of a right of action to the Attorney General in § 1964(b) and the grant of district court authority to enter injunctions in § 1964(a), we see no reason not to conclude, by parity of reasoning, that private parties can also seek injunctions under the combination of grants in §§ 1964(a) and (c).

In addition, we cannot agree with the defendants' contention that § 1964(a) is a purely "jurisdictional" statute, despite the Ninth Circuit's characterization of it in that way in *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1307 (9th Cir. 1992) (construing *Wollersheim* holding as jurisdictional). What § 1964(a) does is to grant district courts authority to hear RICO claims and then to spell out a non-exclusive list of the remedies district courts are empowered to provide in such cases. In that sense, § 1964(a) is strikingly similar to the statute the Supreme Court construed in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). The statute at issue in *Steel Co.* provided that "[t]he district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement." *Id.*, quoting 42 U.S.C. § 11046(c). Noting that "'[j]urisdiction' . . . is a word of many, too many, meanings," the Court held that it would be "unreasonable to read [the statute] as making all the elements of the cause of action under subsection (a) jurisdictional, rather than as merely specifying the remedial *powers* of the court, *viz.*, to enforce the violated requirement and to impose civil penalties." *Id.* This part of the *Steel Co.* holding supersedes any rationale to the contrary that the courts of appeals may have followed in earlier years. We find that it is applicable to RICO and that § 1964(a) both confers jurisdiction on the district courts and specifies certain remedial powers that the courts will have in cases brought before them.

Once we accept that § 1964(a) is not purely jurisdictional, but also describes remedies available under RICO, the defendants' position becomes untenable. In the defendants' view, despite the general provisions for equitable relief in § 1964(a), injunctive relief is not available to any particular plaintiff unless it is also provided by some other section of the statute. This reading renders § 1964(a)'s provision for injunctive relief a nullity. Because an alternative reading exists which gives meaning to every section of the statute, see *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992) ("courts should disfavor interpretations of statutes that render language superfluous"), we reject the defendants' approach.

The defendants' final textual argument springs from the maxim that "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979). While we have no doubt that this is good advice as a general matter, we do not find it particularly helpful in this case. This is not a situation in which Congress has provided for a private damages remedy and has remained silent as to the availability of injunctive relief. Instead, Congress explicitly provided for injunctive relief in § 1964(a), although it did not specify in that section which plaintiffs can seek such relief. Given that the next two sections describe two types of plaintiffs, the government and private plaintiffs, and spell out additional remedies specific to each type, we find that the only logical conclusion is that Congress intended the general remedies explicitly granted in § 1964(a) to be available to all plaintiffs.

Although we would be confident resting our holding purely on the plain text of § 1964, we note that our interpretation is consistent with Congress's admonition that the RICO statute is to be "liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970). Adhering to this admonition, which "obviously seeks to ensure that Con-

gress' intent is not frustrated by an overly narrow reading of the statute," *Reves v. Ernst & Young*, 507 U.S. 170, 183, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993), the Supreme Court has consistently rejected interpretations by the courts of appeals that would limit the scope of RICO actions in ways not contemplated by the text of the statute. See, *e.g., Cedric Kushner Promotions, Ltd. v. King*, --- U.S. ---, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001) (rejecting argument that employee of corporation acting within scope of employment cannot be a "person" distinct from the corporation); *Salinas v. United States,* 522 U.S. 52, 61-66, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997) (rejecting requirement that conspiracy defendant himself has committed predicate acts); *NOW I*, 510 U.S. at 256-62, 114 S. Ct. 798 (rejecting requirement that enterprise have an economic motive); *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) (rejecting requirements that defendant has been convicted of predicate act and that plaintiff has suffered a "racketeering injury," as opposed to injury from mere predicate acts); *United States v. Turkette*, 452 U.S. 576, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981) (rejecting argument that RICO enterprise must have legitimate as well as illegitimate aspects). RICO's liberal-construction clause has particular force, as the Supreme Court has stated, when we are construing § 1964, the civil remedy provision, because it is in this section that "RICO's remedial purposes are most evident." *Sedima*, 473 U.S. at 491 n. 10, 105 S. Ct. 3275. In keeping with the spirit of these cases, we decline to restrict the remedies available under RICO, when Congress has provided for broad equitable relief under § 1964(a).

Our interpretation of § 1964 is also in keeping with the underlying purposes of the RICO statute. As the Supreme Court recently noted, Congress in enacting RICO intended to "encourag[e] civil litigation to supplement Government efforts to deter and penalize the . . . prohibited practices. The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." *Rotella v. Wood*, 528 U.S.

549, 557, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000). Recognizing that the statute gives private citizens the ability to seek injunctive relief as well as damages is fully consistent with this role for civil RICO litigation.

Perhaps realizing that the plain text of the statute strongly suggests that private plaintiffs can seek injunctions, the *Wollersheim* court relied heavily in its decision on two pieces of legislative history. First, the court noted that, during the floor debate on the bill in the House, Representative Steiger, the House sponsor of the bill, introduced an amendment that would have, among other things, made private plaintiffs' right to seek injunctive relief explicit. The amendment was withdrawn after another representative described it on the House floor as creating "an additional civil remedy." See *Wollersheim*, 796 F.2d at 1085-86. Second, the court noted that one year after the bill's passage, Congress failed to pass a bill introduced in the Senate with the same language as the Steiger amendment. See *id.* at 1086. From these two occurrences, the Ninth Circuit concluded that "in considering civil RICO, Congress was repeatedly presented with the opportunity *expressly* to include a provision permitting private plaintiffs to secure injunctive relief. On each occasion, Congress *rejected* the addition of any such provision." *Id.*

Again, with respect, we cannot agree with the Ninth Circuit that these snippets of legislative history amount to the kind of "'clearly expressed legislative intent to the contrary'" that we would require to cast doubt on unambiguous statutory language. *NOW I*, 510 U.S. at 261, 114 S. Ct. 798. Even these excerpts do not unequivocally indicate that Congress intended private plaintiffs to be limited to damages remedies. As the *Wollersheim* decision itself notes, there are indications in the legislative history to the contrary. *Id.* at 1085. More importantly, however, although the *Wollersheim* court may well have made a reasonable decision in 1986 to rely on Congress's refusal to enact amendments to the statute, recent Supreme Court precedent teaches that this type of legislative history is a

particularly thin reed on which to rest the interpretation of a statute. See, *e.g., Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 169-70, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) ("Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute. A bill can be proposed for any number of reasons, and it can be rejected for just as many others."); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change."). Given the Court's reluctance in recent years to rely on the type of legislative history that underpins *Wollersheim*, we cannot agree with the Ninth Circuit's earlier view that this legislative history trumps the otherwise plain language of § 1964.

In a last effort to save their reading of the statute, the defendants urge us that certain differences between the language of RICO and the language of section 4 of the Clayton Act (on which RICO was based) demand the inference that no private right to injunctive relief exists under RICO. The Clayton Act, they note, provides private rights of action in two separate sections: one for damages in § 4, 15 U.S.C. § 15(a), and one for injunctive relief in § 16, 15 U.S.C. § 26. RICO, in contrast, has only one statutory section addressing civil remedies, and the only subsection that specifically talks about private actions mentions only damages. Defendants argue that Congress's failure to include in § 1964(c) language analogous to that in Clayton Act § 16 must mean that it did not intend to allow private parties to seek injunctions.

We reject this line of analysis for a number of reasons. First, the mere fact that the Clayton Act spreads its remedial provisions over a number of different sections of the U.S. Code[1]

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[1] The remedial provisions of the Clayton Act are actually spread over far

and RICO does not, adds little to our understanding of either statute. More importantly, the Supreme Court regularly treats the remedial sections of RICO and the Clayton Act identically, regardless of superficial differences in language. See, *e.g., Klehr v. A.O. Smith Corp*., 521 U.S. 179, 188-89, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997) (applying Clayton Act rule for accrual of cause of action to RICO); *Holmes v. SIPC*, 503 U.S. 258, 267, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992) (applying proximate cause rule to RICO). Since the Court has already determined that litigants other than the Attorney General may obtain broad injunctive relief under the Clayton Act, see *California v. American Stores Co.*, 495 U.S. 271, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990), cases like *Klehr* and *Holmes* indicate that we ought to adopt the same interpretation with respect to RICO. Indeed, *American Stores* (which came to the Court from the Ninth Circuit) pointedly rejected the way in which the Ninth Circuit had relied on legislative history to limit the Clayton Act's textual grant of private injunctive relief. *Id.* at 285, 110 S. Ct. 1853. This in turn undercut *Wollersheim*, which had used the same methodology as the discredited *American Stores* opinion. For all these reasons, we find that § 1964 authorizes injunctive relief at the behest of both the Attorney General and private plaintiffs, authorizes interim measures when the Attorney General sues, and authorizes private treble damages only for private plaintiffs (and not the United States). The district court thus correctly concluded that RICO authorized the private plaintiffs here to seek injunctive relief.

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more than the two sections the defendants mention. In addition to §§ 4 and 16, the Clayton Act also includes (as codified) 15 U.S.C. § 15(b) (suits for actual damages brought by foreign governments), 15 U.S.C. § 15a (suits for treble damages brought by the United States for its own injuries to business or property), 15 U.S.C. § 15c (*parens patriae* suits brought by state attorneys general for treble damages on behalf of natural persons in the state), and 15 U.S.C. § 25 (actions for injunctive relief brought by the Attorney General).

III

With this much established, we may turn to the defendants' First Amendment arguments. All parties acknowledge that the defendants engaged in a substantial amount of protected speech during the protest missions and other anti-abortion activities, including picketing on public sidewalks in front of clinics and verbally urging patients not to have abortions. We entirely agree with the defendants that liability cannot constitutionally be imposed on them for this portion of their conduct. But the record is replete with evidence of instances in which their conduct crossed the line from protected speech into illegal acts, including acts of violence, and it is equally clear that the First Amendment does not protect such acts. As is true in many political protest cases, the defendants' protected speech was often closely intertwined with their unprotected illegal conduct. Nevertheless, we believe the district court adequately ensured that the jury's verdict was not based on activities protected by the First Amendment, and that the remedies it ordered also respected the line between protected expression and unprotected conduct.

The defendants' First Amendment arguments fall into two categories. First, they argue broadly that imposing liability on them on the basis of their protest activities violates the First Amendment. Second, they argue that, even assuming they could constitutionally be held liable for their alleged conduct, the jury instructions and verdict form in this case did not contain necessary First Amendment safeguards. Before we reach either of these arguments, we pause to consider the standard of review we should apply in analyzing the defendants' First Amendment claims.

The Supreme Court has repeatedly held that, in cases in which First Amendment concerns are implicated, reviewing courts have an obligation to conduct an "'independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United*

States, Inc., 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Although this maxim has been applied most often in cases reviewing the factual findings of lower courts, the Court in *Bose* noted that the rule is equally applicable "whether the factfinding function be performed in the particular case by a jury or by a trial judge." 466 U.S. at 501, 104 S. Ct. 1949. Citing this rule, the defendants urge that our review of their First Amendment challenges must be plenary.

As we have noted before, however, even though *Bose* calls for an "independent examination of the whole record," it is not entirely clear what this "plenary" review is supposed to entail. See *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1128-29 (7th Cir. 1987). In particular, it is not clear whether *Bose* requires an independent review only of the ultimate factual conclusion that the defendants' conduct fell outside the protection of the First Amendment, or whether this court is required to conduct a more searching review of "findings of underlying facts, evaluations of credibility, and the drawing of inferences." *Brown & Williamson*, 827 F.2d at 1128. In cases in which we are reviewing a jury verdict rather than the findings of a lower court, the question is even more complex, because we must somehow reconcile the defendants' First Amendment rights against the command of the Seventh Amendment that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. *Bose* itself involved review of facts found by the district court under Fed. R. Civ. P. 52(a), and thus the Court had no occasion to consider this problem. For a different reason, we conclude that it is not necessary here to decide whether or not a broader version of the re-examination of jury findings is permissible when First Amendment rights are at issue. Even assuming that the *Bose dicta* requires us to conduct a plenary review of all of the factual findings relevant to the First Amendment issues before us (which is the most favorable position we can take for

the defendants), we find that the jury's determinations are fully supported by the record.

A.

Protection of politically controversial speech is at the core of the First Amendment, and no one disputes that the defendants' speech labeling abortion as murder, urging the clinics to get out of the abortion business, and urging clinic patients not to seek abortions is fully protected by the First Amendment. See, *e.g., Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993). It is equally clear, however, that the First Amendment does not protect violent conduct, *Wisconsin v. Mitchell*, 508 U.S. 476, 484, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993), nor does it protect threats, *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 773, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994), or language used to carry out illegal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed. 834 (1949). Even when a defendant's conduct involves expressive elements, the government is free to regulate the non-expressive aspects of the conduct if such regulation is necessary to serve important government interests. *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). The protection of the plaintiffs' rights to seek and provide medical care free from violence, intimidation, and harassment is such an important government interest. See, e.g., *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 376, 117 S. Ct. 855, 137 L. Ed. 2d 1 (1997); *Madsen*, *supra*, 512 U.S. at 768, 114 S. Ct. 2516. As the Supreme Court has explained, "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection." *Roberts v. United States Jaycees*, 468 U.S. 609, 628, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

In this case, the plaintiffs presented ample evidence that the individual defendants and others associated with PLAN engaged in illegal conduct that directly threatened an important governmental interest. The evidence presented at trial showed

that, at PLAN-sponsored events, protesters trespassed on clinic property and blocked access to clinics with their bodies, including at times chaining themselves in the doorways of clinics or to operating tables. At other times, protesters destroyed clinic property, including putting glue in clinic door locks and destroying medical equipment used to perform abortions. On still other occasions, protesters physically assaulted clinic staff and patients. In addition, defendant Scheidler, on behalf of defendants PLAL and PLAN, sent letters to class clinics threatening that they would be subjected to similar attacks if they did not cease performing abortions. In light of the protesters' conduct at other PLAN events, the district court correctly concluded that these letters were not protected political speech but constituted true threats outside the protection of the First Amendment.

Assuming that the defendants can be held liable for these incidents, all of which occurred under PLAN sponsorship, then the plaintiffs produced ample evidence of illegal conduct that may legitimately be regulated given the importance of the governmental interest in protecting the right to seek and provide medical care. In a case where a similarly important governmental interest is not present and the conduct in question has an expressive element, we do not disagree with the defendants that the First Amendment might well shield that particular conduct from being used as the basis for RICO liability. (We express this thought cautiously only because the balance between the strength of the government's interest and the degree to which conduct has an expressive element will vary from case to case.) In any event, this case presents no such problems. We are satisfied that the record here easily supports the jury's finding of liability.

At this point, the defendants shift their argument to a more personal one: maybe someone associated with PLAN was engaged in unprotected conduct, but the evidence did not establish that the defendants themselves were involved, as opposed to being involved exclusively in PLAN's protected

speech activities. In *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982), the Supreme Court noted that, where an organization engages in both protected speech and unprotected, illegal conduct, the First Amendment does not permit individuals to be held liable for the organization's illegal acts merely based on their association with the organization. *Id.* at 908-09, 102 S. Ct. 3409. Rather, in order to impose liability on an individual based on that individual's association with an organization, a plaintiff must show both that the organization itself, rather than just isolated members, possessed unlawful goals and that the individual defendant held a specific intent to further those illegal aims. *Id.* at 920, 102 S. Ct. 3409.

We agree that *Claiborne Hardware* is directly applicable to our case. Although the plaintiffs established that the individual defendants themselves participated in many of the incidents described during the trial, the plaintiffs also introduced evidence of many other incidents coordinated or orchestrated by PLAN for which they did not specifically show that the individual defendants themselves committed the illegal acts described. In order for the defendants to be held responsible for acts committed by other members of PLAN during PLAN-organized events, *Claiborne Hardware* required the plaintiffs to show that PLAN itself, and not merely isolated members, intended that the illegal acts occur, that the defendants were aware of PLAN's illegal aims, and that the defendants held a specific intent to further those aims through their association with PLAN.

Even though this is an exacting test, once again the record shows that the plaintiffs satisfied it in this case. All of the individual defendants who remain in the case were on the board of directors of PLAL. PLAL and Operation Rescue, the two remaining organizational defendants, were in turn the primary organizers of PLAN. The plaintiffs put into evidence numerous letters, newsletters, and other publications authored by defendant Joseph Scheidler, executive director of PLAL, and by Randall Terry, executive director of Operation Rescue, detailing

the activities planned for upcoming PLAN events. The activities detailed in these letters included blocking access to clinics and entering clinics to block passageways. As noted above, these types of protest activities are illegal conduct unprotected by the First Amendment. Similarly, the threatening letters to plaintiff clinics were sent on PLAL letterhead, signed by Scheidler, and specifically described the threat as coming from PLAN. The jury was entitled to conclude from this evidence that PLAN itself, not merely isolated members, held illegal aims.

It is also significant that all of the individual defendants were high-level leaders within PLAN, and as such they knew of PLAN's illegal aims and intended to further those aims. The record showed that defendant Scheidler personally organized and coordinated many of PLAN's activities. Defendants Scholberg and Murphy also participated in planning meetings for PLAN events at which illegal blockades were to take place and spoke at PLAN conventions designed to train protesters in the use of these tactics. The plaintiffs presented more than enough evidence to convince us that the individual defendants actively intended to further PLAN's illegal goals.

B.

Turning to the defendants' narrower First Amendment argument, the defendants contend that, regardless of whether there was sufficient evidence from which the jury could have found that they engaged in unprotected activities, the jury instructions and verdict form used by the trial court allowed the jury to find the defendants liable based solely on the defendants' protected speech. The verdict form that the district court used asked the following relevant questions:

> 1. Is the Pro-Life Action Network (PLAN) a group of people or organizations associated together for a common purpose?

> 2. Were the . . . defendants associated with PLAN? (See Jury Instruction No. 20 for the definition of "associated with.")
>
> . . .
>
> 4. Did any Defendant, or any other person associated with PLAN, commit any of the [alleged predicate acts]?

The jury instruction to which the verdict form referred stated, in relevant part:

> *Jury Instruction No. 20*: Plaintiffs must show that the defendant was "associated with" PLAN. That is, the defendant must have had some minimal association with PLAN and have known something about PLAN's activities as they relate to the illegal acts under RICO. It is not necessary that the particular defendant committed acts unlawful under RICO or was aware of all of the unlawful acts committed by the other people who were associated with PLAN. . . .

In the district court, the defendants objected to these instructions, arguing that they did not require the jury to find that the defendants harbored a specific intent to further PLAN's illegal aims, as required by *Claiborne Hardware*. The district court apparently agreed, because it added an additional jury instruction which stated:

> *Jury Instruction No. 30--Defendants' Liability for Acts of Others*: Liability may not be imposed upon any defendant merely because that defendant belonged to a group, some members of which committed acts of violence. In order to find the defendants liable, you must conclude that the enterprise, or those acting on behalf of the enterprise, directly or indirectly authorized or ratified unlawful activities and that the defendants held a specific intent to further those illegal objectives.

The defendants did not renew their objection to the jury instructions after the district court made this change. Nevertheless, in this court, the defendants have argued that, even with the additional instruction, the jury instructions did not

adequately protect their First Amendment rights, because the Claiborne Hardware standard was incorporated only into the jury instructions, not into the verdict form.

Initially, we note that by not renewing their objection to the jury instructions and verdict form after the district court added Instruction 30, the defendants at least implied that they were satisfied with the court's resolution of their objection. Accordingly, we are inclined to find that the defendants have waived any objection to those instructions on appeal. See *United States v. Jones*, 224 F.3d 621, 626 (7th Cir. 2000) (objection to jury instruction waived where defense counsel agreed to instruction at trial). Because this is a civil trial, not a criminal trial, there is no equivalent of "plain error" review for a challenge that is forfeited rather than waived. In the interest of absolute fairness, however, we will consider this point based on the earlier objections.

Our review of jury instructions is deferential, and we consider only whether the instructions, taken as a whole, adequately informed the jury of the applicable law. *Molnar v. Booth,* 229 F.3d 593, 602 (7th Cir. 2000). We are confident that these instructions did so. This jury could not have found the defendants liable without finding that the defendants themselves specifically intended to further PLAN's illegal aims. Jury Instruction 30 made this requirement explicit, and absent any indication to the contrary, we presume that jurors follow the instructions they are given. *Miksis v. Howard*, 106 F.3d 754, 763 (7th Cir. 1997). There is no requirement for a district judge to replicate every instruction on the verdict form itself. We are confident that the jurors followed their instructions, heeded Instruction 30 when they considered the questions on the special verdict form, and that nothing on the form misled or confused them or caused them to ignore their instructions.

IV

The last serious contention we must address is the defendants' argument that the injunction in this case is vague

and overbroad. The operative portion of the injunction reads as follows:

> Defendants . . . and any other on their behalf or in concert with them, are hereby enjoined from directly or indirectly:
>
> a. interfering with the right of any member of the Certified Class of Plaintiff Clinics to conduct its business (including but not limited to the right to provide abortion services) or the right of any NOW member or any member of the Certified Class of women to avail herself of the Plaintiff Clinics' services (including but not limited to abortion services), by:
>
> (1) blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of any Plaintiff Clinic;
>
> (2) trespassing on the premises or the private property of any Plaintiff Clinic;
>
> (3) destroying, damaging or stealing property of any Plaintiff Clinic, its employees, volunteers, or any woman who seeks to use the services of such a Clinic;
>
> (4) using violence or threat of violence against any Plaintiff Clinic or any of its employees, volunteers, or any woman who seeks to use the services of such a Clinic;
>
> b. aiding, abetting, inducing, directing, or inciting any of the acts enumerated in subsection a. of this paragraph (the "Acts") through any of the Defendants or through others; or
>
> c. Operating an enterprise through any of the Acts described above.
>
> This injunction does not prohibit or preclude activities that are constitutionally protected, including but not limited to the following conduct:

> a. Peacefully carrying picket signs on the public property in front of any Plaintiff Clinic;
>
> b. Making speeches on public property;
>
> c. Speaking to individuals approaching the clinic;
>
> d. Handing out literature on public property; and
>
> e. Praying on public property.
>
> This injunction shall bind Defendants . . . and all other persons in active concert with them, and who have actual or constructive notice of this Order, and any other person acting in concert with PLAN.

The defendants raise two principal objections to the scope of the injunction. First, they complain that it contains a number of terms that are vague or indefinite, and that as such, it is likely to chill a substantial amount of protected speech. Second, the defendants charge that the injunction makes them liable for the conduct of persons they do not control and for actions they do not authorize or approve. We consider each of these contentions in turn.

First, we recognize that it is a delicate task to craft an injunction that prohibits illegal conduct when that conduct is closely tied to political protests and other protected activity. The court must tread carefully to avoid hampering protected speech. Here, we do not disagree with the proposition that some language in this injunction, taken in the abstract, is rather general. But the key question is: Compared to what? Any effort to deal with a case of this complexity will inevitably involve some imprecision. Many criminal statutes contain key terms such as the word "material" which are somewhat imprecise but have never been considered void for vagueness. The defendants in this case never proposed any alternative language for an injunction, despite several invitations from the district court to do just that, so the real question is whether the injunction the court entered is as precise as possible while still ensuring that the defendants' illegal activities are enjoined.

We are satisfied that the injunction drafted by the district court here has struck the proper balance and has avoided any risk of curtailing protected activities. By its terms, the injunction prohibits only illegal conduct – trespassing, obstructing access to clinics, damaging property, using violence or threats of violence, or aiding, abetting, inducing, directing, or inciting any of these acts. We do not find any ambiguity in the terms the district court used to describe the prohibited conduct, and as discussed above, none of this conduct is protected by the First Amendment.

Although we do not believe that the terms of the injunction would reach protected speech in any case, the injunction itself includes an additional safeguard. A specific provision underscores that it does not prohibit peaceful picketing, speeches, or praying on public property, attempts to speak with patients and staff, handing out literature, or any other activity protected by the First Amendment. Given this explicit language, there can be no doubt that this injunction reaches only unprotected, illegal conduct, not protected speech. The defendants' alarmist prediction that, under the terms of the injunction, a protester who engages in "months of peaceful picketing" and then takes "two accidental footsteps onto private property" could be subject to contempt proceedings not only for trespass but also for the picketing is pure fancy and bears no relation to the actual wording of the injunction.

Nor do we find that the injunction impermissibly holds the defendants responsible for the actions of persons beyond their control. The injunction applies only to the defendants and to persons working in "active concert" with the defendants or in concert with PLAN. For that reason alone, the injunction's sweep is not so broad as the defendants suggest. Activists and protesters not closely associated with the defendants or with PLAN, an organization the defendants control, are not affected by the injunction. (This takes care of the specter of renegades who, the defendants assert, are utterly beyond their control.) Moreover, to the extent the injunction reaches the conduct of

individuals not named in this lawsuit, the order enjoins those individuals from violating its mandates. If individuals acting in concert with the defendants or PLAN violate the injunction, without inducement or direction by the defendants, the violators, not the defendants, would be in contempt of the court's order. Nothing in the order purports to hold the defendants liable for actions they do not direct, incite, or control.

The injunction as it is written is narrowly tailored to prohibit the specific types of illegal conduct that the defendants have engaged in on past protest missions. As such, it does not threaten the defendants' First Amendment rights. We are confident that the district court will take as much care in enforcing the injunction as it plainly took in crafting it. Indeed, with its explicit protection of peaceful picketing, speech, literature, and prayer, perhaps in the end the injunction may further rational discourse on one of the most volatile political controversies facing the nation today. Violence in any form is the antithesis of reasoned discussion. By directing those with passionate views about the abortion controversy – on either side – away from the use of threats and violence and back to "all the peaceful means for gaining access to the mind," the injunction the district court issued is in harmony with the fundamental First Amendment protection of free speech.

V

The defendants have raised a hodgepodge of other challenges to the judgment, none of which need detain us long. First, the defendants point out that in the plaintiffs' First and Second Amended Complaints (which were filed before the first set of appeals in the case) only the clinic plaintiffs alleged RICO claims; NOW joined only the counts alleging antitrust violations. As noted above, when the Supreme Court granted certiorari to review our earlier decision in this case, that grant was limited to questions concerning the RICO counts. The antitrust claims fell out of the case after the Court declined to review our decision with respect to them. According to the defendants, once all the counts to which NOW was a party fell

out of the case, the effect was the same as a final judgment against NOW, and *res judicata* barred the plaintiffs from amending their complaint to include NOW as a plaintiff in the RICO counts. The district court, however, permitted the plaintiffs to file a Third Amended Complaint, after remand from this court, which included NOW as a plaintiff in the RICO counts.

Whether to allow amendments to a complaint is a question committed to the discretion of the trial court. *Bethany Pharmacal Co. v. QVC, Inc.*, 241 F.3d 854, 861 (7th Cir. 2001). Contrary to the defendants' assertion, there was no final judgment in this case after the Supreme Court's decision to which *res judicata* principles could apply. The case was still pending, first in this court and then in the district court. As a general rule, amendments to complaints are liberally allowed up to and even after trial, judgment, and appeal. See *United States v. Security Pac. Bus. Credit, Inc.*, 956 F.2d 703, 707-08 (7th Cir. 1992); see also *Guse v. J.C. Penney Co.*, 570 F.2d 679, 680 (7th Cir. 1978) (even after plaintiff lost on appeal, there was no final judgment against plaintiff, and district court was free to allow plaintiff to file amended complaint putting forth new legal theory). The Supreme Court made it clear in its opinion that it was evaluating the complaint only on the pleadings, see 510 U.S. at 256, 262, 114 S. Ct. 798, which is the most preliminary stage of proceedings one can imagine. The district court was thus well within its discretion in allowing NOW to continue as a plaintiff for the RICO claims in the Third Amended Complaint.

The defendants also argue that the clinics' claims are barred by *res judicata*. While this case was pending, one of the plaintiff clinics, Summit Women's Health Organization, filed suit in state court in Wisconsin seeking an injunction against Scheidler and several other defendants to prevent PLAN from engaging in illegal blockades during a PLAN convention in Milwaukee. The Wisconsin courts ultimately dismissed that lawsuit without prejudice as to most of the defendants.

However, before the case was dismissed, Scheidler and the Summit Women's Health Organization entered into a settlement agreement that specified that "all claims against [Scheidler] relating to conduct which occurred prior to the signing of this stipulation are hereby dismissed as to [Summit] with prejudice." The defendants argue that, because the claims that Summit raises in this case had already accrued at the time Summit entered into this stipulation, Summit is barred from bringing these claims in this lawsuit.

We need not consider what preclusive effect the Wisconsin settlement might have, because the defendants waived this issue in the district court. *Res judicata* is an affirmative defense that is waived if a party does not plead it. Fed. R. Civ. P. 8(c). Under the local rules of the Northern District of Illinois, the defendants were required to list all their defenses in their trial brief, and any defenses not listed were waived. The defendants admit that they did not list *res judicata* based on the Wisconsin litigation as an affirmative defense in their trial brief, and accordingly they have lost the opportunity to argue that issue here. Although we find that this claim is waived, we also note that, even if it were not waived and if the Wisconsin settlement had a preclusive effect in this case, the preclusion could run only between Summit and Scheidler and would not affect any of the other plaintiffs, including the class members, or any of the other defendants. The injunction would not be affected, all of the defendants would remain jointly liable for the damages to Delaware Women's Health Organization, and all of the defendants except Scheidler would remain liable to Summit. The practical effect of any preclusion would therefore be negligible.

The defendants have also urged this court to decertify the two classes, arguing that NOW and the named clinics are inadequate class representatives. The defendants particularly object to the district court's decision to include in the NOW class women who are not members of NOW, arguing that because NOW is a partisan advocacy group and the issues

involved in this case concern a matter of great social controversy, NOW is likely to have interests antagonistic to the views of some members of the class. Class certification decisions are committed to the discretion of the district court, however, see *Chavez v. Illinois State Police*, 251 F.3d 612, 629 (7th Cir. 2001), and we find that the district court's decision to certify the two classes here was well within the court's discretion. It is inaccurate in any event to imply that the district court certified a class of "all women." The court did no such thing. Instead, it certified a class that included only those women, whether or not members of NOW, whose right to seek abortion services has been or will be interfered with by the defendants. In order for these women's interests to be antagonistic to the claims NOW is bringing, the defendants would have to argue that at least some women in the class want to seek abortion services, but do not want to be free from harassment and intimidation while doing so. This scenario strikes us as exceedingly unlikely; at the very least, we agree with the district court that it "is clearly speculative and projects personally held views onto the plaintiff class." *National Organization for Women, Inc. v. Scheidler*, 172 F.R.D. 351, 362 (N.D. Ill. 1997).

As to the defendants' more general arguments that the named plaintiffs have not performed adequately as class representatives, we note that the named plaintiffs have pursued this litigation diligently for fifteen years, through a trip to the Supreme Court of the United States and a seven-week trial, and ultimately were successful in securing a nationwide injunction against the defendants prohibiting the conduct they set out to challenge. Given this record of performance, we cannot say that the district court in any way abused its discretion in certifying these classes.

The defendants have also argued that the conduct in which they engaged is not prohibited by RICO for a number of reasons. First, the plaintiffs alleged as predicate acts numerous violations of the federal extortion statute, the Hobbs Act, 18

U.S.C. § 1951, and the defendants argue that the Hobbs Act does not apply to their conduct. The defendants' primary contention on this point is that the Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear," and that the things the plaintiffs claim were taken here – the class women's rights to seek medical services from the clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to provide medical services and otherwise conduct their businesses – cannot be considered "property" for purposes of the Hobbs Act. However, this circuit has repeatedly held that intangible property such as the right to conduct a business can be considered "property" under the Hobbs Act, see, *e.g., United States v. Anderson*, 716 F.2d 446, 450 (7th Cir. 1983), and we will not revisit that holding here.

In a similar vein, the defendants assert that, even if "property" was involved, the defendants did not "obtain" that property; they merely forced the plaintiffs to part with it. Again, this argument is contrary to a long line of precedent in this circuit holding that "as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required." *United States v. Stillo,* 57 F.3d 553, 559 (7th Cir. 1995).

In addition to their challenges to the application of the Hobbs Act, the defendants argue that the district court erred in giving the jury a generic instruction describing the elements of the state law extortion offenses the plaintiffs alleged as additional predicate acts. According to the defendants, there are substantial differences in the extortion laws of the states in which these alleged predicate acts occurred, and the district court's attempt to cover all the relevant state laws with a single, generic instruction impermissibly discounted these differences. Without expressing an opinion on whether this approach was permissible, we simply note that, if any error occurred, it was harmless. The jury found that the defendants committed 21

predicate acts under the Hobbs Act alone, which is far in excess of the two predicate acts that RICO requires. In the face of this finding, any error in the state extortion law instructions, which could at most have affected the jury's decision on the additional state-law predicate acts it found, could not have had any effect on the outcome of this case.

Finally, while this appeal was pending, the defendants filed motions in the district court seeking relief from the judgment under Rules 60(b)(2) and (3). The district court denied the motions, and the defendants appealed. We consolidated that appeal with this case and suspended briefing on the 60(b) issues. We have reviewed the defendants' motions in the trial court and the trial court's resolution of those issues, and we conclude that no further briefing on the issues is necessary.

"Rule 60(b) relief is an extraordinary remedy granted only in exceptional circumstances." *Rutledge v. United States*, 230 F.3d 1041, 1052 (7th Cir. 2000). Our review of the district court's decision denying relief is deferential, and we will reverse only if the district court has abused its discretion. *J & W Fence Supply Co. v. United States*, 230 F.3d 896, 898 (7th Cir. 2000). We find no abuse of discretion in this case. In their 60(b) motions, the defendants argued that they had newly discovered evidence relating to two specific incidents described by witnesses during the trial. In addition, the defendants posited that newly discovered evidence called into doubt whether an anonymous witness who testified at the trial in fact needed to remain anonymous. The district court denied the motions on the grounds that the defendants had documents in their possession from which they could have discovered most of the "new" evidence for well over a decade, and that relief at this late date accordingly was not warranted. In addition, the court noted that it was very unlikely that any of the "new" evidence, if admitted at trial, would have had any impact on the jury's verdict. Given that Rule 60 motions cannot be used to present evidence that with due diligence could have been introduced before judgment, *Rutledge*, 230 F.3d at 1052, or to put forth evidence that is not

material or that would likely not change the result at trial, *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 732 (7th Cir. 1999), we find no error in the district court's denial of relief.

We have considered all of the defendants' remaining contentions, but find none that requires comment. For the foregoing reasons, the judgment of the district court is AFFIRMED in all respects.

**[pages 62a-174a of
the Petition Appendix omitted]**

APPENDIX F

The Hobbs Act, 18 U.S.C. § 1951, provides in full:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section –
>
> > (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
> >
> > (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
> >
> > (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

> (c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964, provides in relevant part:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
>
> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in

connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

APPENDIX G

[*Excerpts From Jury Instructions*]

* * * *

[Tr. 4938] This lawsuit is brought under the Racketeer Influenced and Corrupt Organizations Act called RICO and state law. The plaintiffs seek injunctive relief and damages from the defendants who allegedly have conspired among themselves and with others through their alleged enterprise, the Pro-Life Action Network or PLAN, to engage in a pattern of illegal activity, which the plaintiffs contend was designed to injure the business and property of clinics where abortions are performed and to deprive women of the right to obtain the services of those clinics.

A woman's – it says women's. It should be woman's. A woman's right to obtain an abortion is not at issue in this [Tr. 4939] lawsuit. The United States Supreme Court already has declared that women have a constitutional right to choose to have an abortion, nor is the right to engage in peaceful protest an issue in this lawsuit. The parties agree that peaceful picketing, leafletting, and participating in the legislative process are activities protected by the First Amendment of the United States Constitution.

What is at issue in this case is whether the defendants engaged in activities that are prohibited by RICO. The fact that it has taken 12 years for this case to come to trial should not concern you.

In this case you have heard testimony relating to incidents of murder, arson, and bombing. There is no claim in this case, however, that the defendants themselves are responsible for any of those acts. An issue has been raised in this case as to the relationship between Operation Rescue and Operation Rescue National. On this issue you are directed that Operation Rescue and Operation Rescue National are one in the same organization for actions taken in the following times and places:

From July 31st, 1990 through December 1993 in Washington, D.C., the summer of 1991 in Wichita, Kansas; March 1st, 1989 through December 1993 in the Philadelphia, Pennsylvania metropolitan area including Cherry Hill, New Jersey. As to other times and places the issue of the [Tr. 4940] relationship between Operation Rescue and Operation Rescue National is a question for you to decide.

Also you heard testimony from Mr. Keith Tucci denying that he ever – it says never. It should be ever – that he ever observed anyone acting on behalf of Operation Rescue National or Operation Rescue engaged in activity designed to deprive a clinic of property. You are instructed that a Court of the United States has found that Operation Rescue National, Flip Benham, Keith Tucci, Don Treshman, and Rescue America engaged in activity that did deprive a clinic of property in August of 1992 during the Republican National Convention in Houston, Texas.

In this case the plaintiffs must prove every element of their RICO claims by a preponderance of the evidence. A preponderance of the evidence simply means evidence that persuades you that the plaintiffs' claim is more likely true than not true. In deciding whether any fact has been proven by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all witnesses regardless of who may have called them and all exhibits received in evidence regardless of who may have produced them.

I will instruct you on the plaintiffs' burden of proof with respect to their state law claims when I give you the instructions on those claims. The plaintiffs have made two separate claims that the defendants engaged in activities [Tr. 4941] prohibited by RICO. The first, which I will refer to as Claim 1, is that the defendants committed acts which violate RICO. The second, which I will refer to as Claim 2, is that the defendants conspired to commit acts that would violate RICO. I will instruct you on the elements of each of these claims separately.

Claim 1 RICO violation. In order for you to find that the defendant violated RICO, the plaintiffs must prove by a preponderance of the evidence, 1, that PLAN is an enterprise; 2, that PLAN affected interstate commerce; 3, that the defendant was associated with PLAN; 4, that the defendants' association with PLAN involved operating or managing PLAN; and 5, that the defendant participated in the affairs of PLAN through some pattern of acts illegal under RICO.

I will now instruct you as to each of these elements. From here on in order to avoid repeating myself when I say defendant, that also means more than one defendant. If you find that more than one defendant committed a RICO violation, you may find that one, some, or all the defendants violated RICO. I will now instruct you on each of these elements.

The plaintiffs allege – first element, enterprise. The plaintiffs allege that the Pro-Life Action Network or PLAN is an enterprise with the common purpose of preventing [Tr. 4942] abortion and shutting down clinics that perform abortions. An enterprise is defined as a group of persons or organizations associated together formally or informally for a common purpose of engaging in a course of conduct.

An enterprise requires an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchial or consentual decision making. An enterprise does not have to be a legally recognized entity such as a corporation, and it need not have a formal structure with such things as officers, employees, titles, or bank accounts. Further, it does not matter whether PLAN is organized for a lawful or unlawful purpose or whether its unlawful acts actually benefitted the group.

Second element, interstate commerce. The second element requires that PLAN engaged in or had an effect on interstate commerce. In order to establish this element the plaintiffs must prove by a preponderance of the evidence that PLAN or any of its activities affected interstate commerce. For example, if the

defendants or others associated with PLAN used the United States mail or traveled or made phone calls across state lines while doing any action connected with PLAN regardless of whether these actions were unlawful, then you must find that this element has been met.

Plaintiffs must show that the defendant was associated with PLAN. That is, the defendant must have had [Tr. 4943] some minimal association with PLAN and have known something about PLAN's activities as they relate to the illegal acts under RICO. It is not necessary that the particular defendant committed acts unlawful under RICO or was aware of all of the unlawful acts committed by other people who were associated with PLAN. If the defendant was associated with PLAN at any time during its existence, this element is met. It is not necessary that the particular defendant be associated with PLAN for the entire time that it existed.

The fourth element, operating or managing an enterprise. The plaintiffs must show that as part of his or its association with PLAN the defendant participated in the operation or management of PLAN or acted at the direction of PLAN's leaders. The defendant need not have been a part of the top management or have held any formal position in PLAN.

The fifth element, pattern of unlawful activity. Plaintiffs must show that the defendant or other people associated with PLAN committed the two or more unlawful acts in any of the following categories in any 10-year period:

1, acts or threats involving extortion against a patient, prospective patient, doctor, nurse, clinic worker, or clinic. 2, threats of murder against a doctor, nurse, or clinic worker. 3, attempting or conspiring to do any of the acts listed in paragraphs 1, 2 above even if the act was not actually carried out.

[Tr. 4944] 4, acts or threats of physical violence to any person or property. 5, travel across state lines or use of the mails or telephone with the intent to promote, manage, or carry out any act of extortion, arson, or any crimes of violence in

violation of state or federal law followed by an act in furtherance of that intent. 6, attempting to travel across state lines or use the mail or telephone to do acts described in paragraph 5 above. Or 7, causing others to travel cross state lines, use the mail or telephone to do or attempt acts described in paragraph 5 above.

The two or more acts may be from the same category or different categories. I will give you further explanation about some of these categories of unlawful acts in a moment. The plaintiffs must also show that there was some connection between the acts. For example, that they happened as a result of a common scheme, plan, or motive.

Unlawful acts under RICO. I will now instruct you on the elements of certain of the unlawful acts under RICO which the plaintiffs allege that the defendants have violated.

Federal law extortion, Hobbs Act. The plaintiffs have alleged that the defendant and others associated with PLAN committed acts that violate federal law prohibiting extortion. In order to show that extortion has been committed in violation of federal law, the plaintiffs must [Tr. 4945] show that the defendant or someone else associated with PLAN knowingly, willfully, and wrongfully used actual or threatened force, violence, or fear to cause women, clinic doctors, nurses, or other staff or the clinic themselves to give up a property right.

The term property right means anything of value, including a woman's right to seek services from a clinic, the right of the doctors, nurses, or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion, and fear. It does not matter whether or not the extortion provided an economic benefit to PLAN. Any fear involved must be reasonable under the circumstances.

Fear includes not only fear of physical violence but fear of wrongful economic injury. Exploitation of the victim's reasonable fear constitutes extortion regardless of whether or

not the defendant was responsible for creating that fear and despite the absence of any direct threats.

Plaintiffs must also show that the extortion of the defendant or others associated with PLAN affected interstate commerce. See instruction No. 19 for a definition of interstate commerce. It is sufficient if the acts of extortion were aimed at medical facilities that purchased supplies made in another state or that served patients who came from another state.

[Tr. 4946] If the defendant or someone else associated with PLAN attempted to commit such an act, it is a violation even if the act was not completed.

Definition of a threat. In order for the plaintiffs to establish a threat, they must demonstrate that the defendants or their co-conspirators made a statement or engaged in conduct in a context or under such circumstances wherein a reasonable person would foresee that the statement or conduct would be interpreted by those to whom the maker communicates the statement or conduct as a serious expression of an intention to inflict harm, including bodily harm or wrongful economic harm.

Context as used in this instruction includes the surrounding events and reaction of the listeners. Whether an action or statement is a threat is a matter for you the jury to decide. For example, you have heard evidence about physical blockades at clinics. You must decide whether the act of blockading constituted a threat. You need not find that the defendant or co-conspirator intended to carry out the threat or was even capable of carrying out the threat in order to find that the action or statement was, in fact, a threat.

State law extortion. Plaintiffs have alleged that the defendants and others associated with PLAN committed acts that violate various states' laws against extortion. In [Tr. 4947] order to show that state law extortion has been committed, the plaintiffs must show that the defendant or someone else associated with PLAN intentionally caused women, clinic

doctors, nurses, or other staff or the clinics to give up a property right.

The term property right means anything of value, including a woman's right to seek medical services from a clinic, the right of the doctors, nurses, or other clinic staff to perform their jobs, and the right of the clinics to provide medical services from wrongful threats, violence, coercion, and fear.

Plaintiffs must also show that the defendant or other persons associated with PLAN did this through the use of violence or fear including threats of personal injury, damage to property, or economic interests, or threats to commit other crimes. The threat need not have been actually carried out and the defendant need not have even actually intended to carry out the threat.

If you find that the defendant or another person associated with PLAN committed, attempted, or conspired to commit extortion in certain states, you must also find that the value of the rights involved is as follows:

In Missouri more than $150, in Kansas more than $500, and in Texas more than $1500.

State law attempted extortion. A defendant or [Tr. 4948] another person associated with PLAN committed the unlawful act of attempted extortion under state law if you find that 1, he or she intended to commit extortion; 2, he or she took a substantial step towards committing extortion; and 3, the attempt was accompanied by a threat.

Proximate cause. Finally you must consider whether there was some direct relationship between the wrongful action of the defendant or others associated with PLAN and the injury or harm to plaintiffs' business or property rights, which includes a woman's right to seek medical services from a clinic, the right of doctors, nurses, and other clinic staff to perform their jobs, and the right of the clinics to provide medical services.

An injury or harm is proximately caused when an act plays a substantial part in bringing about or actually causing the injury

or harm. In determining whether actions of defendant or someone else associated with PLAN proximately caused the injury or harm to the plaintiffs, you may consider the various unlawful acts under RICO discussed above and any overt act taken in furtherance of PLAN's goals.

Threat of murder. Although plaintiffs do not allege that the defendants committed murder, they do allege that the defendants and others associated with PLAN have threatened murder against doctors and clinic staff members. Murder is the killing of a human being if it was done 1, intentionally [Tr. 4949] and with premeditation; or 2, unintentionally but recklessly under circumstances showing extreme indifference to the value of human life.

The defendants' liability for acts of others. Liability may not be imposed upon any defendant merely because that defendant belonged to a group, some members of which committed acts of violence. In order to find the defendants liable, you must conclude that the enterprise or those acting on behalf of the enterprise directly or indirectly authorized or ratified unlawful activities and that the defendants held a specific intent to further those illegal objectives.

Claim 2, RICO conspiracy. Plaintiffs have also alleged that each defendant engaged in a conspiracy to violate RICO. This means that a defendant agreed with one or more other persons that defendants or others associated with PLAN would engage in acts that violate RICO. A person may be liable for conspiring to violate RICO even if you find that the conspiracy was not successful and no unlawful acts were actually committed.

If you have found all the defendants liable under Claim 1, then you need not consider this second claim. However, if you have found any defendant not liable under Claim 1, then you should consider whether that defendant agreed with any other person or organization to violate RICO.

[Tr. 4950] Agreement. To prove liability for conspiring to violate RICO, the plaintiffs must prove that the defendant

knowingly became associated with PLAN and agreed with another person to operate and manage PLAN through a pattern of racketeering activity. You do not need to find that the defendant agreed to personally commit unlawful acts under RICO. People or groups who are associated with the RICO enterprise may agree to divide up the work, and each person who agrees to operate or manage an enterprise through a pattern of unlawful acts under RICO may be liable even if he intended that someone associated with the enterprise would carry out the unlawful acts.

Once a defendant agrees with a co-conspirator that PLAN would engage in RICO violations, that defendants is responsible for the previous acts of the conspiracy as well.

Multiple conspiracies. You must determine whether a single conspiracy existed between two or more conspirators. If you find that no such conspiracy existed, then you must return a verdict in favor of the defendants on this count. Proof of several separate conspiracies does not prove that a single overall conspiracy existed. While the parties to the agreement must know of each other's existence, they need not know each others' identity nor need there be direct contact.

The agreement may continue for a long period of time and include the performance of many transactions. New [Tr. 4951] parties may join the agreement at any time, while others may terminate their relationship. The parties are not always identical, but this does not mean that there are separate conspiracies. The distinction must be made between separate conspiracies, where certain parties are common to all and one overall continuing conspiracy with various parties joining and terminating their relationship at different times.

Various people knowingly joining together in furtherance of a common design or purpose constitute a single conspiracy. While the conspiracy may have a small group of core conspirators, other parties who knowingly participate with those co-conspirators and others to achieve a common goal may be

members of an overall conspiracy. In essence, the question is what is the nature of the agreement. If there is one overall agreement among the various parties to perform different functions in order to carry out the objectives of the conspiracy, the agreement among all the parties constitutes a single conspiracy.

If you decide that such a conspiracy did exist, you must determine whether the defendants were members of that conspiracy. If you should find that a particular defendant was a member of some other conspiracy but not the one alleged, then you must return a verdict in favor of that defendant.

The First Amendment. The First Amendment to the [Tr. 4952] Constitution permits persons to join with others to express a particular viewpoint. In public debate, speech including conduct is protected by the First Amendment. This may be so even if the speech is uninvited and unwelcome by the person to whom it is directed or to others within earshot. The First Amendment even protects speech that is insulting or even outrageous.

You have heard evidence of speeches made by some of the defendants and have read some of their writings. Some of those speeches and writings contain strong and emotional language. Mere advocacy of the use of force and violence may not be the basis for finding defendants liable for having made the speech or authored the writing unless the words used may be used to incite imminent unlawful conduct that, in fact, followed within a reasonable period.

Speeches and writings may be taken, however, as evidence that the defendants or the enterprise gave other specific instructions to carry out violent acts or threats.

Threats to patients, owners or operators of clinics, clinic staff including doctors and those assisting patients, owners, operators, or clinics or staff are not protected by the First Amendment. Physical attacks on patients, owners, operators of clinics, or clinic staff are not protected by the First Amendment.

Destruction of property is not protected by the First Amendment. The protection of the [Tr. 4953] First Amendment does not extend to joining together to deprive others of their lawful rights.

Damages. In considering the issue of damages, if any, with respect to the RICO claim you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just, and reasonable compensation for all of the damages to the plaintiff and its business or property, no more and no less. Damages may not be based on speculation because it is only actual damages, what the law calls compensatory damages that you are to determine.

You should consider the amount of damages, if any, with respect to each claim separate and independent from the amount of damages, if any, with respect to other claims. For example, and by way of example only, if you determine that damages should be awarded to a plaintiff under his RICO claim, you should award full, just, and reasonable compensation for damages under the RICO claim without regard to the damages, if any, you might award under any other claim.

Damages for personal injury such as pain and suffering, emotional suffering, humiliation, and mental anguish are not recoverable under RICO. You should not award damages for any personal injuries or harm derived from personal injuries.

[Tr. 4954] During the trial of this case ceratin testimony has been presented to you by way of deposition consisting of sworn recorded answers to questions asked of a witness in advance of trial by one or more of the attorneys for the parties to the case. The testimony of the witness who for some reason cannot be present to testify from the witness stand may be presented in writing under oath. Such testimony is entitled to the same consideration and is to be judged as to credibility, weighed, and otherwise considered by the jury insofar as possible in the same way as if the witness had been present and had testified from the witness stand. All persons are equal before the law.

This case should be considered and decided by you as an action between persons of equal standing in the community of equal worth, and holding the same or similar stations of life. A corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, partnerships, unincorporated associations, and other organizations stand equal before the law and are to be dealt with as equals in a court of justice.

Although there are more than one plaintiff in this action, it does not follow from that fact alone that if one is entitled to recover all are entitled to recover. The defendants are entitled to a fair consideration of their defense as to each plaintiff, just as each plaintiff is [Tr. 4955] entitled to a fair consideration of its claim against each defendant. Unless otherwise stated, all instructions given you govern the case as to each plaintiff.

Multiple defendants. Although there are five defendants in this action, it does not follow from that fact alone that if one is liable all five are liable. Each defendant is entitled to a fair consideration of his own defense and is not to be prejudiced by the fact, if it should become a fact, that you find against any of the others. Unless otherwise stated, all instructions given to you govern the case as to each defendant.

* * * *

[Tr. 4957] Now, ladies and gentlemen, accompanying the verdict form are what we call special interrogatories. They are questions directed to you as a jury. They must be answered by you as a group. You are to answer these questions and return them with the verdict form.

* * * *

APPENDIX H

[*Special Interrogatories and Verdict Form*]

We, the jury in this action, unanimously find as follows:

1. Is the Pro-Life Action Network (PLAN) a group of people or organizations associated together for a common purpose?

   Yes ✓ No ___

2. Were the following Defendants associated with PLAN? (see Jury Instruction No. 20 for the definition of "associated with")

   Joseph Scheidler Yes ✓ No ___

   Andrew Scholberg Yes ✓ No ___

   Timothy Murphy Yes ✓ No ___

   Pro-Life Action League Yes ✓ No ___

   Operation Rescue Yes ✓ No ___

3. Did the following Defendants participate in the operation management of PLAN? (see Jury Instruction No. 21 for a definition of participation in operation or management)

   Joseph Scheidler Yes ✓ No ___

   Andrew Scholberg Yes ✓ No ___

   Timothy Murphy Yes ✓ No ___

   Pro-Life Action League Yes ✓ No ___

   Operation Rescue Yes ✓ No ___

4. Did any Defendant, or any other person associated with PLAN, commit any of the following acts?:

		Yes	Number of Acts	No
(a)	Acts or threats involving extortion against any patient, prospective patient, doctor, nurse, or clinic employee, in violation of federal law	✓	21	
(b)	Acts or threats involving extortion against any patient, prospective patient, doctor, nurse, or clinic employee, in violation of the law of any state	✓	25	
(c)	Threats of murder against a doctor, nurse, or clinic employee		0	✓
(d)	Attempt or conspiracy to do any of the acts listed above, even if the act was not actually carried out	✓	25	
(e)	Acts or threats of physical violence to any person or property	✓	4	
(f)	Travel across state lines, or the use of the mail or telephone, with intent to commit or facilitate an unlawful act, such as extortion, under state or federal law	✓	23	

(g)	Attempt to do an act described in (f) above, even if the act was not actually carried out	✓	23	
(h)	Causing another person to do an act described in (f) above		0	✓

5. Were at least two (2) of these acts committed during any ten-year period?

Yes ✓ No _____

6. If you answered "yes" to any item of 4(a) or 4(b), was your answer based solely blockades of clinic doors or sit-ins within clinics, without more?

Yes _____ No ✓

7. Did PLAN or persons associated with PLAN engage in a "pattern" of at least two of the acts that you found in Question 4 above? (see Jury Instruction No. 28 for the definition of "associated with")

Yes ✓ No _____

8. Did any of the acts that you found in Question 4 above affect interstate commerce? (see Jury Instruction No. 19 for the definition of interstate commerce)

Yes ✓ No _____

9. If any defendant or person associated with PLAN committed any two (2) acts described or listed above in question number 4 within any 10 year period, did those acts proximately cause injury to the business or property of the

following plaintiffs? (see Jury Instruction No. 28 for the definition of proximate cause)

The women represented by NOW:

Yes ✓ No _____

Delaware Women's Health Organization:

Yes ✓ No _____

Summit Women's Health Organization:

Yes ✓ No _____

If you answered "yes" to Questions 1, 5, 7 and 8, and if you found that at least two acts were committed in Question 4, and if you answered "yes" as to any Defendant(s) in Questions 2 and 3, you have found those Defendant(s) liable on Claim I, and you should proceed to the next question:

10. As to the Defendants whom you have found liable on Claim I, what amount will adequately compensate these Plaintiffs for their RICO injuries?

Summit Women's Health Organization $ 54,471.28

Delaware Women's Health Organization $ 31,455.64

If you found all of the Defendants liable on Claim I, you need not proceed any further; simply go to the last page and sign and date the Verdict Form.

If you did not find all of the Defendants liable on Claim I, you should answer the following questions as to Claim II for any such Defendant(s):

11. Did the following Defendants combine or agree with one another or with others to operate PLAN through a pattern of acts illegal under RICO?

Joseph Scheidler Yes _____ No ____

Andrew Scholberg Yes _____ No ____

Timothy Murphy Yes _____ No ____

Pro-Life Action League Yes _____ No ____

Operation Rescue Yes _____ No ____

12. As to the Defendant or Defendants whom you have found liable on Claim II, what amount will adequately compensate these Plaintiffs for their RICO injuries?

Summit Women's Health Organization $ _____

___Delaware Women's Health Organization $ _____

Please now sign and date the verdict form and tell the bailiff that you have reached a verdict.

_____ _____
Date Foreperson

_____ _____
Juror Juror

_____ _____
Juror Juror

_____	_____
Juror	Juror