Nos. 04-1244 & 04-1352

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *ET AL.*,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*,

Respondents.

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

BRIEF FOR PETITIONER OPERATION RESCUE

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QUESTIONS PRESENTED

In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), this Court held that "all of the predicate acts supporting the jury's finding of a RICO violation must be reversed," that therefore "the judgment that petitioners violated RICO must also be reversed," and that "[w]ithout an underlying RICO violation, the injunction issued by the district court must necessarily be vacated." *Id.* at 411. On remand, however, the Seventh Circuit held that all of the predicate acts were *not* reversed, and that an injunction under RICO might yet be sustained against petitioners on the basis of the supposedly unreversed predicate acts. The questions presented are:

1. Did the Seventh Circuit defy this Court's mandate?
2. Did the Seventh Circuit err by ruling, in conflict with the Sixth and Ninth Circuits, and in conflict with the official position of the Department of Justice, that the federal Hobbs Act, 18 U.S.C. § 1951, may plausibly be construed to prohibit, without any connection to robbery or extortion, any act or threat of "physical violence to any person or property" that "in any way or degree . . . affects commerce"?
3. Did the Seventh Circuit err by ruling, in conflict with the Ninth Circuit, and in conflict with the official position of the Department of Justice, that private civil litigants may obtain injunctive relief under the federal Racketeer Influenced and Corrupt Organizations (RICO) statute?

PARTIES

In addition to petitioner (in No. 04-1352) Operation Rescue (OR),[1] the following parties were defendants-appellants in the Seventh Circuit and are petitioners (in No. 04-1244) here:

Joseph M. Scheidler
Pro-Life Action League, Inc.
Andrew D. Scholberg
Timothy Murphy

The National Organization for Women, Inc. (NOW), respondent in Nos. 04-1244 & 04-1352 and plaintiff-appellee below, sued on behalf of itself and its members and was certified as representative of the plaintiff "class of women who are not NOW members and whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by defendants' unlawful activities." OR Pet. App. 91a n.12. In addition, there are two other named respondents (in Nos. 04-1244 & 04-1352), the Delaware Women's Health Organization, Inc. (DWHO) and the Summit Women's Health Organization, Inc. (Summit). Both DWHO and Summit sued on behalf of themselves and were certified as representatives of the plaintiff "class of all women's health centers in the United States at which abortions are performed." *Id.* These respondents, like NOW, were plaintiffs-appellees in the Seventh Circuit.

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[1]Operation Rescue is not a corporation. *See* S. Ct. Rule 29.6.

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DECISIONS BELOW

Except where noted, all pertinent decisions in this case to date are entitled *National Organization for Women, Inc. v. Scheidler*. The district court's original dismissal of the case appears at 765 F. Supp. 973 (N.D. Ill. 1991), and the Seventh Circuit's affirmance at 968 F.2d 612 (7th Cir. 1992). This Court's partial grant of certiorari appears at 508 U.S. 971 (1993), and subsequent reversal at 510 U.S. 249 (1994). On remand, the district court's partial dismissal of the case appears at 897 F. Supp. 1047 (N.D. Ill. 1995), and the district court's certification of plaintiff classes appears at 172 F.R.D. 351 (N.D. Ill. 1997). The Seventh Circuit's decision affirming judgment for respondents appears at 267 F.3d 687 (7th Cir. 2001). This Court's partial grant of certiorari appears *sub nom. Scheidler v. National Organization for Women, Inc.*, 535 U.S. 1016 (2002), and this Court's subsequent reversal appears *sub nom. Scheidler v. NOW*, 537 U.S. 393 (2003). The Seventh Circuit's initial order on remand is unpublished but is available at 91 Fed. Appx. 510, 2004 U.S. App. LEXIS 4020 (7th Cir. Feb. 26, 2004). The Seventh Circuit's opinion upon the denial of rehearing appears at 396 F.3d 807 (7th Cir. 2005).

JURISDICTION

The U.S. Court of Appeals for the Seventh Circuit rendered its panel decision on remand on Feb. 26, 2004, and denied timely petitions for rehearing and rehearing en banc on Jan. 28, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(l).

STATUTORY PROVISIONS

The Appendix to the Petition for Certiorari contains the text of the Hobbs Act, 18 U.S.C. § 1951 (OR Pet. App.[2] 139a), and

[2]Unless otherwise noted, "OR Pet." refers throughout this brief to the

excerpts of the federal Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1964 (OR Pet. App. 140a-41a).

STATEMENT OF THE CASE

This is a civil RICO case, filed in 1986, in which the district court's jurisdiction was invoked, *inter alia*, under 28 U.S.C. § 1331 and 18 U.S.C. § 1964.

Respondents -- plaintiffs below -- are the National Organization for Women, Inc. (NOW), the Delaware Women's Health Organization (DWHO), the Summit Women's Health Organization (Summit), and the classes they were certified to represent. (The plaintiffs changed over the course of the litigation. For convenience, this brief refers collectively to "NOW.") The defendants, including petitioner Operation Rescue (OR), are pro-life activist individuals and organizations.

This nearly twenty-year-old case has a lengthy history, most of which is immaterial to the questions presented here. *See* OR Pet. App. 33a-35a (this Court's recounting of history of litigation as of 2003). For present purposes, it suffices to note the following.

After considerable pretrial proceedings, including a trip to this Court, *see NOW v. Scheidler*, 510 U.S. 249 (1994) (*Scheidler I*), NOW went to trial solely on its federal RICO claim under 18 U.S.C. §§ 1962(c) and (d).

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petition for certiorari of Operation Rescue (OR) in No. 04-1352.

NOW's theory of the case was that any physical obstruction of abortion -- e.g., by a sit-in -- was extortion and thus a predicate act of racketeering under RICO. *See, e.g.*, Tr.[3] 4327; *id.* at 5003-09.[4] The district court had previously adopted this view of extortion. *E.g.*, *NOW v. Scheidler*, 897 F. Supp. 1047, 1072-74 (N.D. Ill. 1995).

In closing arguments, NOW argued for a jury finding of "no less than 30 blockades [i.e., sit-ins]," Tr. 5005, arguing that

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[3]"Tr." refers to the transcript of the jury trial.

[4]*E.g.*, Tr. 5003 (closing argument of plaintiffs) ("if the defendants prevented women from getting any of those services [provided by abortion businesses], then those interferences are RICO violations"); *id.* at 5005 ("Each and every one of those blockades that shut the clinics down for any period of time was an illegal act of extortion under RICO").

each sit-in was an act of predicate extortion, *id.* The jury apparently found 25 sit-ins total.[5] OR Pet. App. 143a-44a.

[5]The jury was instructed to treat each intentional sit-in at an abortion business as both *actual* and *attempted* extortion. *See* Tr. 4945-48. Accordingly, the jury found the same number of "acts or threats" as it did "attempts" in each category (25 each for "extortion," 23 each for Travel Act violations). OR Pet. App. 143a-44a. Furthermore, the instructions for state and federal extortion were virtually identical, Tr. 4944-47, with the difference that the federal version had an interstate commerce element. Tr.

NOW also argued for at least five *threats* of physical violence, Tr. 5013-16, and seven *acts* of physical violence, Tr. 5022-23, but the jury found only four acts *or* threats total. OR Pet. App. 143a.

The jury rendered a verdict in favor of NOW and awarded damages. OR Pet. App. 142a. The district court trebled those damages pursuant to RICO. *See id.* at 98a. Moreover, the district court, which had previously rejected petitioner's contention that RICO does not authorize private parties to sue for injunctive relief, *NOW v. Scheidler*, 897 F. Supp. 1047, 1081-83 (N.D. Ill. 1995), then issued a nationwide injunction, OR Pet. App. 82a-96a, and entered judgment for NOW, *id.* at 97a-102a.

The Seventh Circuit affirmed in all respects. *Id.* at 103a.

4945. Accordingly, the jury found a virtually identical number of violations in the state and federal categories, with only slightly fewer in the federal categories (presumably for lack of the interstate element). OR Pet. App. 143a-44a. Thus, a single sit-in would count simultaneously in Verdict Form boxes 4(a), (b), (d), (f), and (g), except that 4(a), (f), and (g) also had interstate travel or commerce elements. *Id.*

The defendants filed two separate petitions for certiorari. This Court granted review limited to two questions: (1) whether RICO, 18 U.S.C. § 1964(c), authorizes private injunctive relief; and, (2) whether the Hobbs Act criminalizes sit-ins and obstructive demonstrations by political protesters. OR Pet. App. 32a, 138a.

After full briefing and oral argument, this Court reversed. *Scheidler v. NOW*, 537 U.S. 393 (2003) (*Scheidler II*) (OR Pet. App. 32a-55a). The Court held that there was no Hobbs Act violation here because the conduct at issue did not qualify as "extortion." OR Pet. App. 35a-46a. For the same reason, the Court held that the other RICO predicates, namely extortion under state law and under the federal Travel Act, were likewise meritless. *Id.* at 46a-48a. Accordingly, having eliminated all of the RICO predicates, and thus the RICO judgment, this Court held that the RICO injunction "must necessarily be vacated," *id.* at 48a. The Court said it "therefore need not address" the now-moot question whether RICO authorizes private injunctive relief. *Id.*

NOW did not seek rehearing in this Court.

On remand, the Seventh Circuit did *not* simply remand with instructions to enter judgment for defendants. Instead, the court below opined that this Court had overlooked four predicate acts, and that those predicate acts might yet support the nationwide injunction the district court had issued. *Id.* at 30a-31a. The court below did not explain how it could reconcile that ruling with this Court's holding that "all of the predicate acts . . . must be reversed," that "the judgment that petitioners violated RICO must also be reversed," and that "the injunction must necessarily be vacated."

The Seventh Circuit relied for its holding upon the jury's finding (*id.* at 143a) of four unspecified "[a]cts or threats of physical violence to any person or property." (It is undisputed

that this finding refers to the Hobbs Act's making it a crime to commit or threaten "physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section," *id.* at 139a.[6]) According to the Seventh Circuit, the question remained whether the Hobbs Act, 18 U.S.C. § 1951, outlaws "'physical violence' apart from extortion and robbery," OR Pet. App. 29a. The court opined that stand-alone violence possibly "constitutes an independent ground for violating the Hobbs Act," *id.* at 31a, and that the district court should therefore determine if "the four acts or threats of physical violence found by the jury" might "support the nationwide injunction," *id.*

Defendants petitioned for rehearing and rehearing en banc. The Seventh Circuit denied both, the latter over three dissenting votes. *Id.* at 1a n.*. In an opinion accompanying the denial of rehearing, the panel adhered to its view that there were "four more predicate acts" that this Court "made no ruling on," *id.* at 6a, and that an injunction under RICO remains

[6]NOW has pointed out, Opp. at 4, that the Jury Verdict Form (JVF) did not explicitly link the violent acts or threats to extortion. But neither did the JVF link the "violence" predicates to the Hobbs Act (as opposed to state law). *See* OR Pet. App. 143a (JVF #4(e)). Yet NOW concedes the latter link. *E.g.*, Opp. at 4. Obviously, the JVF label was meant to be shorthand. *See* OR Pet. at 5. No significance can be read into the JVF label's omission of the full text of the Hobbs Act.

possible "based on the record that has already been built," *id.* at. 8a.

The Seventh Circuit spent considerable effort (*id.* at 8a-16a) defending the "possibil[ity]" (*id.* at 8a) of reading the Hobbs Act to prohibit any act or threat of "physical violence to any person or property" which "in any way or degree . . . affects commerce," without any connection to robbery or extortion. The court below nevertheless insisted it had not actually decided the question whether stand-alone violence violates the Hobbs Act, *id.* at 7a, declaring instead that "at the tail end of litigation that has been running for almost twenty years, we prefer a wait-and-see approach," *id.* at 16a.

The Seventh Circuit did back away somewhat from its earlier ruling, however. It now declined to endorse a nationwide injunction, suggesting such would be an "abuse of discretion," *id.* at 16a, and that only some narrower injunction would be permissible, *id.* at 17a. Importantly, the court below also declared that it was "too late" for NOW to seek any damages, and that the record could not be reopened for further development. *Id.* at 7a-8a, 16a-17a.

Judge Manion, joined by Judge Kanne, wrote a dissenting opinion. *Id.* at 17a-25a. In that dissent, Judge Manion concluded that the panel's "order 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." *Id.* at 20a.

SUMMARY OF ARGUMENT

The Seventh Circuit made three errors in the latest round of this nearly twenty-year-old RICO case. Each of the lower court's three errors independently justifies reversal and remand with instructions to enter judgment for petitioners on all claims.

First, the Seventh Circuit defied this Court's mandate. This

Court had expressly held that *all* of the RICO predicate acts must be reversed, that the judgment for petitioners must be reversed, and that the permanent injunction must be vacated. The Seventh Circuit erroneously held that this Court had overlooked four predicate acts which might yet support a RICO judgment and an injunction for respondents. The Seventh Circuit identified no other basis for prolonging this case, and in fact expressly forbade any reopening of the record. Hence, the lower court's noncompliance with the mandate warrants reversal -- again -- with instructions to direct the entry of judgment for petitioners.

Second, the Seventh Circuit held that it was "not beyond the realm of possibility" (OR Pet. App. 15a) that acts or threats of violence to persons or property could qualify as Hobbs Act violations (and thus as RICO predicates) even where (as here) those acts were wholly unconnected to any robbery or extortion. The unprecedented notion that the Hobbs Act prohibits all violence that "affects commerce" cannot be squared with the text of the Hobbs Act, with the rule requiring clear statements from Congress to support such vast incursions of federal law into state criminal provinces, or with the rule of lenity. Given the Seventh Circuit's identification of no other basis for protracting this litigation, and given the Seventh Circuit's express foreclosure of any retrial or further development of the record, rejection of this wholly meritless "violence alone" theory also requires reversal and remand with directions to enter judgment for petitioners.

Third, the sole remedy open to respondents under the decision below -- injunctive relief -- is legally precluded. As the United States argued in its amicus brief in this Court in *Scheidler II*, RICO does not authorize private injunctive relief. *See* Br. for the United States as Amicus Curiae, § I, *Scheidler II* (available at

www.usdoj.gov/osg/briefs/2002/3mer/1ami/2001-1118.mer.ami.pdf). The text and history of RICO's civil remedies provision clearly demonstrate that private parties are *not* entitled to sue for injunctive relief under RICO. The remedies section -- 18 U.S.C. § 1964 -- confers unqualified authority on the federal government to "institute proceedings" under RICO, but gives private litigants only a right to sue for treble damages. RICO's treble damages provision is borrowed from indistinguishable language in the federal Sherman and Clayton antitrust statutes, language which this Court had already held does *not* authorize private injunctive relief. While Congress adopted a separate provision in the Clayton Act conferring injunctive remedies on private litigants, Congress adopted no such provision for RICO. On the contrary, the statutory history of RICO shows the repeated failure of efforts to add precisely such a private injunctive remedy. Hence, the injunction in this case -- which rests exclusively on RICO -- must be reversed. Since no other relief sought by respondents remains an available option (the Seventh Circuit expressly foreclosed any further pursuit of damages, *infra* § IV), the legal unavailability of a private RICO injunction also requires judgment for petitioners.

This gargantuan, meritless case has wasted nearly two decades of the federal judiciary's time and resources, not to mention those of the parties and their counsel. It is well past time for an end.

ARGUMENT

There are three major flaws in the decision below, each of which independently provides a sufficient ground for reversal and remand with instructions to direct the district court to enter final judgment for petitioners.

I. THIS COURT'S DECISION IN *SCHEIDLER II* DEFINITIVELY DISPOSED OF THIS CASE IN ITS ENTIRETY.

This Court held in this case as follows:

> 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.

Scheidler v. NOW, 537 U.S. at 411 (OR Pet. App. 48a) (emphasis added).

Despite this clear decree, the Seventh Circuit on remand directed the district court to decide, in the first instance, whether there are remaining predicate acts that "might independently support the injunction," OR Pet. App. 29a, or some narrower injunction, *id.* at 16a-17a. This is direct defiance of this Court's ruling. The Seventh Circuit's suggestion that the permanent injunction could reissue on the basis of some of the predicates the jury found after trial back in 1998 conflicts both with this Court's express holding that "*all* of the predicate acts" supporting a RICO violation *and* the "judgment" "must be reversed," and with this Court's express direction that the injunction "must necessarily be vacated." OR Pet. App. 48a (emphasis added). *See also id.* at 33a ("We . . . hold that our determination with respect to extortion under the Hobbs Act renders insufficient the other bases or predicate acts of racketeering . . .").

The Seventh Circuit's ruling that the possibility of an injunction under RICO remains a live issue in this case also conflicts with this Court's holding that it need not reach the propriety of private civil injunctions under RICO *precisely because no such injunction was sustainable here*. OR Pet. App. 33a, 48a. This Court had originally granted certiorari to decide two questions. *See id.* at 32a. One question was whether private injunctive relief is available under RICO. *Id.* This Court did not answer that question only because its holding on the other question -- the merits of NOW's federal extortion predicates -- precluded *any* basis for such an injunction in the first place, *id.* at 33a, 48a. Thus, the injunction issue became moot because, regardless of whether RICO authorized such relief in the abstract, there was no RICO judgment left that could serve as a basis for an injunction *in this case*. *Id.* The Seventh Circuit's ruling that an injunction may nevertheless issue based on the prior jury verdict is irreconcilable with this Court's holding that the injunction issue no longer remains in the case.

Finally, the Seventh Circuit's remand order suffers an additional fatal flaw: it ignores the fact that the judgment -- the basis for the permanent injunction -- "must be reversed." OR Pet. App. 48a. As this Court unequivocally stated, "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." *Id.* at 33a. A permanent injunction can only issue when a party finally prevails on the merits and a final judgment is entered. *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987) (citing *University of Texas v. Camenisch*, 451 U.S. 390, 392 (1981)). Here, NOW has lost on all claims, and there is no final judgment in its favor. Even if NOW were to prevail in this Court, NOW would

need to pursue a *retrial* limited to their theory of predicate Hobbs Act "violence." A retrial order, of course, is not a final victory on the merits, and thus it cannot support a permanent injunction. But more importantly, even the retrial option is no longer open to NOW: the Seventh Circuit in this case directed that there be *no* retrial, OR Pet. App. 7a-8a, 16a-17a, and NOW has not cross-petitioned from that ruling.

The jury's verdict of liability under RICO rested on a series of separate findings. *See* Jury Verdict Form (JVF) (OR Pet. App. 142a). Even if NOW were correct that this Court did not overturn 100% of the predicates, NOW concedes that at least more than 96% of the predicates (117 of 121,[7] according to NOW) were reversed.[8] Thus, it is impossible to conclude that the four supposedly remaining predicates would necessarily

[7]The "121" figure exaggerates the number of predicates, as it reflects quintuple counting. *Supra* note 5. NOW has conceded this. Brief of Respondents (Nos. 01-1118 & 01-1119) at 3 & n.4, 35 & n.45.

[8]Tellingly, in its merits briefing before this Court in *Scheidler II*, NOW gave every indication that the four "violence" predicates were part and parcel of its extortion theory. In its answering brief, NOW expressly referred to "121" (not 117) RICO predicates, i.e., including the four "violence" predicates. *E.g.*, 01-1118 & 01-1119 Br. of Respondents at 1, 3 & n.4. In fact, NOW highlighted the alleged violent conduct. *E.g.*, *id.* at 2 & n.3, 11-12, 29, 50. Moreover, NOW argued that "[b]ecause the Hobbs Act requires the obtaining of property," NOW had "relied *only* on wrongful acts designed to make Respondents [NOW *et al.*] cede control of their property to Petitioners, *not on crimes that entailed no demand to surrender property*." *Id.* at 9 (emphasis added). NOW further argued that "*all* of the acts that supported the jury's findings as to *Hobbs Act* violations *also* supported its findings as to *state law* violations," *id.* at 35 (emphasis added). *See also id.* at 3 n.4 ("*each* of the Hobbs Act violations were also the basis for a finding as to state *extortion* laws") (emphasis added). The only *state* law predicates NOW claimed were alleged *extortion*, OR Pet. App. 34a, 46a, 106a, 143a (JVF #4(b)). Thus, NOW conceded that its Hobbs Act predicates *all* hinged on extortion.

have sufficed to sustain the other essential jury findings, for example, of a RICO "pattern" (JVF #7), an effect on interstate commerce (JVF #8), or proximate causation of injury to the plaintiffs (JVF #9). *See also Scheidler II*, 537 U.S. at 401 n.5 (OR Pet. App. 37a n.5) (even a single faulty theory of RICO liability in the jury instructions would preclude affirmance of the judgment); OR Pet. App. 23a (dissent from denial of rehearing) (noting that current record cannot support "affecting commerce" element of Hobbs Act).

In short, even under NOW's theory of the case, the judgment must be overturned, leaving no basis for the permanent injunction. The Seventh Circuit's failure even to mention this, especially given this Court's clear directive that the verdict and judgment "must be reversed," is truly remarkable.

II. THE HOBBS ACT DOES NOT PROHIBIT VIOLENCE WHOLLY APART FROM ANY ROBBERY OR EXTORTION.

According to NOW, the Hobbs Act, 18 U.S.C. § 1951, which proscribes robbery and extortion (neither of which is present here), also prohibits acts or threats of physical violence to any person or property *independent* of any robbery or extortion. The Seventh Circuit held that this was a "possible" reading of the Hobbs Act that could be adopted "without undue strain," OR Pet. App. 8a-9a. It is not.

A. The Text of the Hobbs Act Precludes a "Violence Alone" Construction.

NOW's construction of the Hobbs Act flies in the face of the plain text of the statute. The Hobbs Act, 18 U.S.C. § 1951(a) (OR Pet. App. 139a) (emphasis added), provides 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.

Plainly, any crime under the Hobbs Act relates, either expressly or by cross-reference, to robbery or extortion. By contrast, NOW's proposed construction, which would create a new offense of "violence" which "affects commerce," lacks grammatical parallelism, is awkward, and is incapable of coherent parsing.

The Seventh Circuit opined conclusorily that the "violence-in-furtherance" prong could, "without undue strain," OR Pet. App. 9a, grammatically be read not to require any link to robbery or extortion. Neither that court, nor respondents, however, have offered an alternative parsing of the text that would support such a construction, despite petitioner OR's repeated insistence that no such parsing is available.

The Hobbs Act proscribes acts or threats of violence *only* "in furtherance of a plan or purpose to do anything in violation of this section," *id.*[9] "This section," in turn, prohibits "obstruct[ing], delay[ing], or affect[ing]" commerce or the movement of any thing in commerce "by *robbery* or *extortion*," *id.* (emphasis added).

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[9]The "violence-in-furtherance" provision of the Hobbs Act covers, for example, the subordinate "enforcer" who, while not himself extorting anything, harms people or property when the extortionist does not obtain the desired payment from the victim. It also may be used to bring an additional criminal count, as where a defendant who has already committed the completed offense of extortion independently of any violence, e.g., "under color of official right," also threatens violence to person or property.

NOW disagrees, but -- like the Seventh Circuit -- NOW steadfastly refuses to explain just what, under its view, "a violation of this section" means. To read a "violation" to mean merely "affecting commerce" would be perverse. The Hobbs Act does not proscribe merely "affecting commerce." (If it did, most business operations would violate the Hobbs Act.) To read a "violation" to mean "affecting commerce by acts or threats of violence," meanwhile, would be hopelessly circular. The Hobbs Act would, under this reading, forbid "affect[ing] commerce . . . by . . . physical violence . . . in furtherance of a plan or purpose to [affect commerce by physical violence in furtherance of a plan or purpose to affect commerce by physical violence in furtherance *etc. ad infinitum*]." That is not statutory interpretation; it is a skipping record.

NOW's faulty reading of the Hobbs Act excises the statutory text limiting the Hobbs act to robbery or extortion. Thus, NOW would read the Hobbs Act to make a federal crime of *any* act or threat of physical violence, to *any* person or property, whenever that act or threat "in any way or degree . . . affects commerce or the movement of any article or commodity in commerce," § 1951(a). This would convert the Hobbs Act into a breathtakingly broad general federal "anti-violence" statute, without any clear statement that Congress intended such an outcome. *See infra* § II(C).

As the amici States persuasively argue, *see* Brief of the States of Alabama *et al.* (States Br.), NOW's proposed reading of the Hobbs Act is not only grammatically implausible, *id.* § I, and irreconcilable with the statutory evolution of the Hobbs Act, *id.* § II, it is also untenable for other reasons. For one thing, reading the Hobbs Act to criminalize all violence that "affects commerce" would render superfluous numerous other federal statutes that address violence to persons or property in a more tailored manner. *Id.* § III (listing examples). For another,

reading the Hobbs Act as a broad anti-violence statute would dramatically expand the scope of RICO, in conflict with the deliberate efforts of Congress to limit RICO's scope by enumerating selected predicate offenses, *id.* And as if that were not enough, construing the Hobbs Act as a general anti-violence statute would dramatically alter the federal-state balance, without any clear statement from Congress of an intent to do so. *Id.* § IV. *See infra* § II(C).

B. Both of the Other Circuits to Address the Question, as Well as the Department of Justice, Reject a "Violence Alone" Construction.

NOW's argument was squarely rejected in the Sixth and Ninth Circuits in the only cases to assess the merits of this unlikely reading of the Hobbs Act. *United States v. Franks*, 511 F.2d 25, 31 (6th Cir. 1975) ("The statute's language and legislative history require that the violence be in furtherance of a plan or purpose to obstruct, delay, or affect commerce *by extortion or robbery*") (emphasis added; footnote omitted); *United States v. Yankowski*, 184 F.3d 1071 (9th Cir. 1999) (holding violence-alone theory "untenable in light of the clear language of the Hobbs Act," *id.* at 1072).

The Department of Justice also formally disavows NOW's proposed reading of the Hobbs Act. The Department of Justice takes the position that there can be no Hobbs Act "violence" crime absent a link to extortion or robbery. *See* U.S. Dep't of Justice Criminal Resource Manual 2402 (Hobbs Act -- Generally) ("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") (citing *Franks*) (available at www.usdoj.gov/usao/eousa/foia_reading_room/us

am/title9/crm02402/htm).

There is no reason for this Court to reach a contrary conclusion.

C. Federalism Concerns Preclude a "Violence Alone" Construction.

This Court is loath to interpret federal statutes in ways that "upset the usual balance of federal and state powers." *New York v. United States*, 505 U.S. 144, 170 (1992). *See generally Gregory v. Ashcroft*, 501 U.S. 452 (1991). "[W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Bass*, 404 U.S. 336, 349 (1971). *Accord Jones v. United States*, 529 U.S. 848, 858 (2000); *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543-44 (2002). This rule militates against turning the Hobbs Act into a device for federalizing such traditional state offenses as assault, battery, and destruction of private property. *See United States v. Staszcuk*, 517 F.2d 53, 55 (7th Cir.) (en banc) (per Stevens, J.) (the "extraordinary growth of federal criminal litigation poses a serious threat to the quality of federal justice; moreover, this growth may not only reflect but contribute to the continuing transfer of power from the several states to the national government. . . . [W]e have no desire to accelerate this trend unnecessarily"), *cert. denied*, 423 U.S. 837 (1975).

This Court expressed the same caution in refusing to apply the Hobbs Act to unlawful conduct incident to a labor strike:

> [It] would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can

> justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.

United States v. Enmons, 410 U.S. 396, 411 (1973) (citations omitted).

A construction of the Hobbs Act that would make a federal crime out of any "violence" that "affects commerce" flies directly in the face of this established norm of statutory interpretation.

D. The Rule of Lenity Precludes a "Violence Alone" Construction.

Even if the question were close and debatable (which it is not), the rule of lenity would foreclose NOW's astonishingly expansive and unprecedented misreading of the Hobbs Act.

Any "uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Kozminski*, 487 U.S. 931, 952 (1988) (and cases cited). As a criminal law, the Hobbs Act is subject to this rule of strict construction. *United States v. Enmons*, 410 U.S. 396, 411 (1973); *McCormick v. United States*, 500 U.S. 257, 272-73 (1991); *Scheidler v. NOW*, 537 U.S. 393, 409 (2003) (OR Pet. App. 46a). Although the present case involves a civil suit, the Hobbs Act

> is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.

Leocal v. Ashcroft, 125 S. Ct. 377, 384 n.8 (2004). Moreover, as a RICO predicate, the Hobbs Act is a particularly apt subject

for the rule of lenity:

> [W]e have instructed that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. . . . This interpretive guide is especially appropriate in construing . . . a predicate offense under RICO . . . .

Cleveland v. United States, 531 U.S. 12, 25 (2000) (internal quotation marks and citations omitted).

"The Court has often stated 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." *McNally v. United States*, 483 U.S. 350, 359-60 (1987) (citations omitted). This rule serves many important purposes: "to promote fair notice to those subject to criminal law, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts," *Kozminski*, 487 U.S. at 952.

To accept NOW's unprecedented expansion of the Hobbs Act would be to stand the rule of lenity on its head, as this would require both *creating* ambiguity where the pertinent statutory text is clear, and then resolving that ambiguity in favor of an extremely broad interpretation. This Court must therefore reject petitioners' novel and highly strained construction of the Hobbs Act.[10]

III. RICO DOES NOT AUTHORIZE PRIVATE

[10]As the foregoing discussion demonstrates, there is no need whatsoever for recourse to the legislative history of the Hobbs Act as an interpretive tool. It nevertheless bears mention that the pertinent history unequivocably confirms that Congress never intended the Hobbs Act to prohibit violence unconnected either to robbery or to extortion. *See* Brief for Petitioners Scheidler *et al.* § II(A).

INJUNCTIVE RELIEF.

RICO does not authorize injunctive relief in civil suits brought by private parties. The United States reads the statute in the same manner as petitioners do, as the Solicitor General made clear in the brief that the federal government filed in this Court in *Scheidler II*. *See* Brief for United States as Amicus Curiae (U.S. Br.), Nos. 01-1118 & 01-1119 (*Scheidler II*) (*supra* p. 7) (discussed *infra* § III(D)).

In RICO, Congress employed language taken almost word-for-word from antitrust law, language which this Court had already held *not* to authorize private injunctive relief. Congress eschewed other language, in antitrust law, expressly conferring private injunctive remedies. The exclusion of private injunctive relief from civil RICO could scarcely be clearer.

The decision below is aberrant and erroneous. The virtually unanimous conclusion of the lower courts analyzing the issue -- that RICO does not authorize injunctive relief for private parties -- is clearly correct.[11]

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[11]Many lower federal courts have addressed this question. In *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), the Ninth Circuit exhaustively analyzed the text and history of the remedies section of RICO, the pertinent precedents, and the competing legal arguments, *see Wollersheim*, 796 F.2d at 1080-88. The *Wollersheim* court concluded that "the legislative history and statutory language suggest overwhelmingly that no private equitable action should be implied under civil RICO." *Id.* at 1088 (footnote omitted). Moreover, almost no court since *Wollersheim* -- other than in this case -- has held that private parties can obtain injunctive relief under RICO. Even prior to *Wollersheim*, only one district court so held. *See infra* note 18. Every other court to address the issue (except in this case and two other district court cases, *see infra* note 18) has either rejected private equitable relief under RICO, expressed serious doubts about such relief, or declined to decide the question. *See* 01-1119 Pet. at 11-12 & nn. 16-19. (For an especially

thorough analysis of the issue, *see Wollersheim*; *In re Fredeman Litig.*, 843 F.2d 821, 828-30 (5th Cir. 1988); *Sedima, S.P.R.L. v. Imrex*, 741 F.2d 482, 489 n.20 (2d Cir. 1984), *rev'd on other grounds*, 473 U.S. 479 (1985); *Kaushal v. State Bank of India*, 556 F. Supp. 576, 581-84 (N.D. Ill. 1983); *DeMent v. Abbott Capital Corp.*, 589 F. Supp. 1378, 1381-83 (N.D. Ill. 1984).)

A. RICO's Statutory Text Gives the Attorney General Exclusive Authority to Seek Injunctive Relief.

1. The text and structure of RICO's remedial provisions preclude private injunctive relief.

The remedies provision of RICO (18 U.S.C. § 1964), OR Pet. App. 140a-41a,[12] contains three subsections addressing civil relief. None gives injunctive relief to private parties.

Subsection (a) confers jurisdiction upon the district courts and authorizes broad equitable remedies. This provision, however, does not empower private litigants to seek the injunctive relief authorized.

Subsection (b) authorizes the U.S. Attorney General to "institute proceedings under this section." This unqualified authorization to "institute proceedings" plainly authorizes the federal government to pursue the full range of remedies for which subsection (a) creates jurisdiction.

Subsection (c) then specifies that "[a]ny person injured in his business or property . . . may sue therefor . . . and shall recover

[12]The version set forth in OR's Petition Appendix was effective at the time the present lawsuit was filed. In 1995, Congress amended subsection (c) in a way irrelevant here. The 1995 amendment does not apply to actions, like the present suit, commenced prior to December 22, 1995.

threefold the damages he sustains . . . ." Unlike subsection (b), there is no blanket authorization to "institute proceedings"; instead, using distinct language, the provision specifies a right to sue and a remedy, namely, treble damages. This Court's observation in *Russello v. United States*, 464 U.S. 16 (1983), therefore applies here:

> Where Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Id. at 23 (internal quotation and editing marks omitted). Had Congress intended to confer on private parties an unqualified right to "institute proceedings," then -- in the words of *Russello* -- "it presumably would have done so expressly as it did in the immediate [preceding] subsection," *id.*

Subsection (b) and (c) are decidedly *not* parallel; hence, contrary to the court below, no "parity of reasoning," OR Pet. App. 111a, leads to the conclusion that private parties can claim the universe of relief authorized under subsection (a). On the contrary, as in *Russello*, this Court should

> refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.

464 U.S. at 23. Indeed, were the contrary true, private parties would be entitled to sue, not just for treble damages and injunctions, but also for all the other equitable relief available to the Attorney General, including dissolution of enterprises. *See* § 1964(a).

The statutory text of RICO therefore plainly indicates that Congress did *not* authorize private injunctive relief:

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.

Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974); *accord Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 731-32 (1989). For example, this Court has held that a statute expressly authorizing private citizens to sue for injunctions would not be construed as implying a private right of damages. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981). This rule makes perfect sense: "In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id.* at 15. *Accord Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) ("it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it"); *City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453, 1458 (2005) ("the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others") (internal editing marks and citation omitted).

2. The remedial provisions of RICO were borrowed directly from remedial provisions of antitrust statutes that do not authorize private injunctive relief.

The conclusion that private parties cannot obtain injunctive relief under RICO is confirmed beyond all doubt by reference to the antitrust model from which Congress borrowed the remedial provisions of RICO. Congress borrowed, for RICO,

precisely the remedial language this Court had held *not* to authorize private injunctive relief, and *declined* to borrow a separate provision of antitrust law expressly conferring private injunctive remedies.

With RICO, Congress employed the "use of an antitrust model for the development of remedies" against crime. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 151 (1987). The "clearest current in the legislative history of RICO is the reliance on the [antitrust] model." *Id.* (internal quotation marks and citation omitted). *Accord Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985). It follows that the same language held *not* to authorize injunctive relief in an antitrust statute does *not* authorize injunctive relief under RICO:

> We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4 (15 U.S.C. § 15). . . . It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.

Holmes v. SIPC, 503 U.S. 258, 268 (1992) (citations omitted).

This Court construed the statutory language in question, in the Sherman antitrust statute, *not* to authorize private injunctive relief. *See Minnesota v. Northern Sec. Co.*, 194 U.S. 48, 70-71 (1904) (section 7 of antitrust statute does not authorize private suits for equitable relief).

> We cannot suppose it was intended that the enforcement of the act should depend in any degree upon original suits in equity instituted by the States or by individuals to prevent violations of its provisions.

Id. Accord Paine Lumber Co. v. Neal, 244 U.S. 459, 471

(1917). The parallels to RICO are striking. Section 7 of the Sherman antitrust statute provided:

> "*Any person* who shall be *injured in his business or property* . . . by reason of anything forbidden or declared to be unlawful by this act *may sue therefor . . . and shall recover threefold the damages* by him sustained, and the costs of suit, including a reasonable attorney's fee."

194 U.S. at 68 (quoting statute) (emphasis added). The language of RICO § 1964(c) is virtually word-for-word the same:

> *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.

OR Pet. App. 140a-41a (emphasis added).

Like RICO § 1964, the Anti-Trust Act construed in *Northern Securities* contained a subsection conferring on federal courts "jurisdiction to prevent and restrain violations of this act" (Section 4), *see* 194 U.S. at 67. The existence of a similar grant of equity jurisdiction in RICO § 1964(a) (OR Pet. App. 140a) only bolsters the statutory parallel.

After *Northern Securities*, Congress in 1914 enacted the Clayton Antitrust Act. That statute contains the following treble damages language:

> *[A]ny person* who shall be *injured in his business or property* by reason of anything forbidden in the antitrust laws *may sue therefor . . . and shall recover threefold the damages* by him sustained, and the cost of suit, including a reasonable attorney's fee . . . .

15 U.S.C. §15(a) (emphasis added). This provision is borrowed straight from Section 7 of the Sherman Act -- i.e., the provision held *not* to authorize private injunctive relief. In addition to the treble damages provision, Congress *added* a *separate* provision authorizing private parties to sue for injunctions:

> Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . .

15 U.S.C. § 26. *See California v. American Stores Co.*, 494 U.S. 271, 287 (1990) (provision "filled a gap in the Sherman Act by authorizing equitable relief in private actions"). This express conferral of private injunctive remedies has no parallel in RICO.

In sum, when enacting RICO § 1964, Congress borrowed the treble damages language of the Sherman and Clayton Acts, but did *not* borrow the private injunctive remedy language of the Clayton Act. The conclusion is inescapable: RICO does not authorize private injunctive relief.[13]

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[13]The Seventh Circuit declared that because this Court "regularly treats the remedial sections of RICO and the Clayton Act identically," OR Pet. App. 117a, RICO should be read as authorizing private injunctive relief "regardless of superficial differences in language," *id.* To state this argument is to refute it. The *existence* of an express grant of private injunctive relief in the Clayton Act, and its *absence* in RICO, is not a

“superficial” difference in language.

* * *

This Court appears already to have acknowledged that private injunctive relief is not available under RICO. This Court has consistently described RICO § 1964(c) as authorizing a "private treble-damages action," *Sedima*, 473 U.S. at 486. *Accord id.* at 481, 487-88, 490, 493; *Agency Holding Corp.*, 483 U.S. at 151-52; *Klehr v. A.O. Smith Harvestore Products, Inc.*, 521 U.S. 179, 183 (1997); *Rotella v. Wood*, 528 U.S. 549, 551 (2000); *Beck v. Prupis*, 529 U.S. 494, 496 & n.1 (2000) (describing RICO provisions for criminal penalties and civil suits, and separately noting that RICO "authorizes *the Government* to bring civil actions to 'prevent and restrain' violations") (emphasis added). The text of RICO confirms this Court's consistent understanding of civil RICO.

NOW conceded in *Scheidler II* that § 1964(c), the private remedies provision of RICO, does not authorize injunctive relief. 01-1118 & 01-1119 Opp. at 9 ("RICO's *only* source of permanent injunctions is § 1964(a)") (emphasis added). NOW therefore hangs its entire case for injunctive relief on § 1964(a). This Court has already noted, however, that § 1964(a) is part of remedial provisions "limited to injunctive actions by the United States," *Sedima*, 473 U.S. at 486-87 (1985). Despite *Sedima*, NOW argues that because § 1964(a) does not *expressly exclude* private parties, it must be read to *include* them. 01-1118 & 01-1119 Opp. at 9-10. This is illogical. Section 1964(a) does not, by its terms, authorize *any* party to bring a civil RICO action, including the federal government. The United States can sue for injunctive relief under RICO only because a separate subsection -- § 1964(b) -- gives the Attorney General authority to "institute proceedings under this section." By contrast, the private treble-damages provision, § 1964(c) -- the only subsection to authorize private relief --

contains no blanket authorization for private parties to "institute proceedings." That subsection only entitles persons injured in their business or property to "sue therefor . . . and recover threefold the damages," § 1964(c). This subsection does not reference § 1964(a) or even "this section," but instead, as this Court has always understood, provides a distinct private damages remedy.

B. RICO's Legislative History Shows Congress Repeatedly and Deliberately Declined to Authorize Private Injunctive Relief.

The legislative history of RICO confirms, indeed compels, the conclusion already drawn from the text of RICO: private injunctive relief is not available under RICO.

1. Congress specifically selected treble damages as the exclusive remedy for private RICO suits.

RICO was enacted as Title IX of the Organized Crime Control Act of 1970. *Sedima*, 473 U.S. at 486. The Senate, which passed the legislation first, did not provide for private party suits under RICO.

> The civil remedies in the bill passed by the Senate, S 30, were limited to injunctive actions by the United States and became §§ 1964(a), (b), and (d).

473 U.S. at 486-87. The "private treble-damages action" was added, later, in the House of Representatives. *Id.* at 487-88. The Senate then adopted the bill as amended in the House. *Id.* at 488. As the Fifth Circuit explained, "Section 1964(c), providing the treble damage remedy, then becomes a branch grafted onto the already-completed trunk of the statute." *Fredeman*, 843 F.2d at 829 (footnote omitted).

This "grafted-on branch" very specifically authorized "a

private treble-damages action," *Sedima*, 473 U.S. at 487, as a supplement to federal government enforcement of the statute, and as a remedy for those wronged by organized crime, *id.* *See also Agency Holding Corp.*, 483 U.S. at 151 (RICO's civil enforcement provision was designed "to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees"); *id.* ("the mechanism chosen to reach the objective in . . . RICO is the carrot of treble damages"). The selection of a treble damages remedy, and *only* a treble damages remedy, was plainly a deliberate choice by Congress.

2. Congress repeatedly considered, but failed to adopt, a private injunctive remedy under RICO.

That Congress deliberately limited private civil relief to treble damages (and costs and attorney fees) appears even more clearly from the rejection by Congress of proposals to authorize private injunctive relief:

> [I]n 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.

Wollersheim, 796 F.2d at 1086 (emphasis in original).

RICO predecessor legislation in the Senate and in the House explicitly allowed for private party injunctive relief. *Id.* at 1084. *See* 115 Cong. Rec. 6,992-96 (1969) (discussing predecessor Senate bills); H.R. 19215, 91st Cong., 2d Sess. (1970) (predecessor House bill). In fact, Representative Steiger, who proposed the addition of the treble damages provision, *Sedima*, 473 U.S. at 487, made that proposal in an amendment which also included a provision for private

injunctive relief. *See* 116 Cong. Rec. 27,738-39 (1970) (Steiger Amendment, proposed subsection (c), provided: "Any person may institute proceeding under subsection (a) [of § 1964] . . . [and] relief shall be granted in conformity with the principles which govern the granting of injunctive relief . . ."). The House Committee on the Judiciary, however, adopted only the private treble damages remedy, not the private injunctive remedy. *See* H.R. Rep. No. 1549, 91st Cong., 2d Sess. 58 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4034. Rep. Steiger, while "extremely pleased . . . that the Judiciary Committee has approved . . . a provision authorizing treble damage actions by private persons," 116 Cong. Rec. 35,227 (1970), nevertheless lamented that the committee version did "not do the whole job," *id.* In particular, Rep. Steiger bemoaned the fact that "the Judiciary Committee version . . . fails to provide . . . equitable relief in suits brought by private citizens." *Id.* at 35,228.

On the floor of the House, Rep. Steiger again "offered an amendment that would have allowed private injunctive actions" under RICO, *Sedima*, 473 U.S. at 487. *See* 116 Cong. Rec. 35,228, 35,346 (1970). "The proposal was greeted with some hostility . . . and Steiger withdrew it without a vote being taken." *Sedima*, 473 U.S. at 487-88. *See* 116 Cong. Rec. 35,346-47 (1970). As this Court has explained, the reason for this hostility, for the withdrawal of the proposal, and for the reference of the proposal instead to a committee, was precisely because the proposed amendment "included yet another civil remedy," *Agency Holding Corp.*, 483 U.S. at 154, namely, private injunctive relief. *See* 116 Cong. Rec. 35,346 (1970) (statement of Rep. Poff) (Steiger amendment "does offer an additional civil remedy" and "prudence would dictate that the Judiciary Committee very carefully explore the potential consequences that this new remedy might have").

Congress failed to enact legislation, proposed the very next term after the enactment of RICO, which was designed "to broaden even further the remedies available under RICO. In particular, it would have . . . permitted private actions for injunctive relief." *Agency Holding Corp.*, 483 U.S. at 155.[14]

In 1973, Congress again considered, and failed to enact, a bill to amend RICO by adding private injunctive relief. *See* 119 Cong. Rec. 10,317-19 (1973) ("Civil Remedies for Victims of Racketeering Activity and Theft Act of 1973").

In sum, Congress repeatedly declined to authorize private injunctive relief under RICO. *See Russello*, 464 U.S. at 23-24 (citing "evolution of [RICO's] statutory provisions" as aid to statutory construction, and adding, "[w]here Congress includes [certain] language in an earlier version of the bill but deletes it prior to enactment, it may be presumed that the [omitted text] was not intended").[15]

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[14]*See also Sedima*, 741 F.2d at 489 n.20; 117 Cong. Rec. 46,386 (1971) (statement of Sen. McClellan) (Title IV of "Victims of Crime Act of 1972" would "authorize private injunctive relief from racketeering activity"); *id.* at 46,393 (text of bill proposing to amend RICO to add private injunctive remedy); *Victims of Crime: Hearings on S. 16, S. 33, S. 750, S. 1946, S. 2087, S. 2426, S. 2748, S. 2856, S. 2994, and S. 2995 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 3 (1970-1971) (text of proposed bill providing for private injunctive relief under RICO); *id.* at 51 (same); *id.* at 158 (statement of Richard Velde, Associate Administrator, Law Enforcement Assistance Administration) (proposed legislation "would expand the available civil remedies. Section 1964 [of RICO] would be amended to permit any person to institute a civil proceeding to prevent or restrain violations . . . . Now only the United States can institute injunctive proceedings"); 118 Cong. Rec. 29,368 (1972) (text of "Civil Remedies for Victims of Racketeering Activity and Theft Act of 1972" proposing *inter alia* to amend RICO to add private injunctive relief); *id.* at 29,370 (statement of Sen. McClellan) (bill "authorizes private injunctive relief from racketeering activity").

[15]The Seventh Circuit disparaged recourse to the legislative history of

RICO. OR Pet. App. 115a-16a. But this Court has repeatedly invoked legislative history as a basis for limiting RICO. *E.g.*, *Holmes v. SIPC*, 503 U.S. 258, 267-68 (1992); *Reves v. Ernst & Young*, 507 U.S. 170, 179-83 (1993). In fact, as illustrated in the text *supra*, analysis of legislative history is characteristic of this Court's RICO jurisprudence.

C. The Counterarguments in Favor of Private Injunctive Relief Under RICO Lack Merit.

In light of the foregoing, it is not surprising that virtually every court to address the issue has concluded that RICO does not authorize private parties to sue for injunctive relief. *See supra* note 11. Indeed, lower courts have frequently declared themselves *compelled* to reach this conclusion.[16]

The district court[17] and court of appeals in the present case, meanwhile, offered no convincing analysis. Furthermore, none of the arguments offered for reading into RICO a private injunctive remedy has merit.[18]

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[16]*See, e.g.*, *Wollersheim*, 796 F.2d at 1088 ("Taken together, the legislative history and statutory language suggest overwhelmingly that no private equitable action should be implied under civil RICO") (footnote omitted); *First Nat'l Bank and Trust Co. v. Hollingsworth*, 701 F. Supp. 701, 703 (W.D. Ark. 1988) ("it would be difficult, if not impossible, to draw a different conclusion"); *P.R.F., Inc. v. Philips Credit Corp.*, No. CIV 92-2266CCC, 1992 WL 385170 at *3 (D.P.R. Dec. 21, 1992) ("any other conclusion would not be reasonable").

[17]The district court provided virtually no analysis of the issue. *See NOW v. Scheidler*, 897 F. Supp. 1047, 1081-83 (N.D. Ill. 1995) (order regarding motions to dismiss); OR Pet. App. 82a-84a (granting permanent injunction). That court said that there was "substantial authority" for its position among the lower courts and declared itself "persuaded by the rationale in those opinions." 897 F. Supp. at 1083. But none of the cases the district court cited held that private parties can sue for injunctive relief under RICO. Indeed, several of the decisions the district court relied upon did not even involve RICO.

[18]Out of some two dozen courts to discuss the issue, only three district courts (aside from the courts below here), have held that private parties can obtain injunctions under RICO. *See Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1540-41 (W.D. Pa. 1984); *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) (per curiam) (directing dismissal of RICO claims as

unripe); *In re Managed Care Litigation*, 298 F. Supp. 2d 1259, 1281-83 (S.D. Fla. 2003).

One case -- *Chambers* -- preceded the extensive analysis in *Wollersheim* and has not been followed by any other court. Indeed, even later district court decisions in the same federal circuit (the Third) as the *Chambers* court reached the opposite conclusion from *Chambers*, ruling that RICO does not provide for injunctive relief to private parties. *See Vietnam Veterans of America, Inc. v. Guerdon Indus., Inc.*, 644 F. Supp. 951, 960-61 (D. Del. 1986); *Curley v. Cumberland Farms Dairy, Inc.*, 728 F. Supp. 1123, 1137-38 (D.N.J. 1989).

The second, while distancing itself from the Seventh Circuit's reasoning in this case, erroneously relied upon a presumed power of courts, *apart from RICO*, to grant equitable relief. *Motorola Credit*, 202 F. Supp. 2d at 243-44. In effect, the *Motorola* court placed the burden on Congress explicitly to *deny* private injunctive relief to private parties, rather than following the rule that where Congress specifies certain remedies, they are normally deemed exclusive. *See supra* § III(A)(1). In any event, this decision was overturned on other grounds. *See supra*.

The third district court simply followed the Seventh Circuit's decision in this case. *In re Managed Care Litigation*, 298 F. Supp. 2d at 1283.

1. The word "and" does not create a private injunctive remedy.

It has been argued that the word "and" in RICO § 1964(c) provides a justification for private injunctive relief. The contention is that, because subsection (c) provides that any person injured in his business or property may sue "*and* shall recover" treble damages, instead of providing that any such person may sue "*to* recover" treble damages, that therefore the relief under subsection (c) is not limited to treble damages.

The Seventh Circuit embraced essentially this argument in support of its holding. The court read the word "and" as severing the first clause of subsection (c) from the remainder of that subsection. In effect, the Seventh Circuit read subsection (c) as if it were written as follows:

> (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~~[. In addition to any other available remedies, such person] shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

See OR Pet. App. 111a-12a. This "reconstruction" of RICO § 1964(c) is simply another version of the argument that the word "and," rather than linking the private cause of action with the treble damages remedy, instead justifies construing subsection (c) as a blanket authorization for private parties to institute civil RICO suits for both treble damages and all equitable relief identified in subsection (a).

This argument is deeply flawed.

First, this reading is "bizarre and wholly unconvincing as a

matter of plain English and the normal use of language."[19] If Congress had intended to take such a significant step as authorizing private RICO suits for injunctive relief -- and the text and legislative history, discussed above, decidedly refute any such intent -- it would be truly "bizarre" for Congress to do so by such an obscure and indirect means when Congress could simply have said so in plain language.

[19] *Kaushal*, 556 F. Supp. at 582. *Accord Sedima*, 741 F.2d at 489 n.20.

Second, the identical term "and" appears, in an indistinguishable context, in the Sherman antitrust statute, *see supra* § III(A)(2) ("Any person who shall be injured in his business or property . . . may sue therefor . . . *and* shall recover threefold the damages . . ."') (emphasis added), which this Court held does *not* authorize private suits for injunctive relief, *see Paine Lumber Co. v. Neal*, 244 U.S. 459, 471 (1917); *Minnesota v. Northern Sec. Co.*, 194 U.S. 48, 67-68, 70-71 (1904). Moreover, the private treble damages provision of the Clayton antitrust act, 15 U.S.C. § 15, uses the term "and" in identical fashion. *Supra* p. 24. To read this word as implying that private litigants may also sue for injunctive relief would render the Clayton Act's separate, express authorization of private injunctive relief, 15 U.S.C. § 26, a meaningless redundancy.[20]

Third, the term "and," if anything, operates to *limit* the available relief to that explicitly set forth in RICO § 1964(c). Had that subsection merely authorized anyone injured in his business or property "to sue therefor," *period*, then there might be some ambiguity as to what relief would be available. But by spelling out that an injured person may sue "and recover threefold the damages he sustains," the statute leaves no doubt as to both the right and the remedy.

In short, the word "and" simply cannot bear the weight this argument places upon it.

2. Subsection (a) of § 1964 does not create a

[20] *See Wollersheim*, 796 F.2d at 1087 & n.11; *Kaushal*, 556 F. Supp. at 583 & n.22; *Sedima*, 741 F.2d at 489 n.20; *DeMent*, 589 F. Supp. at 1382.

private injunctive remedy.

The argument has also been made that subsection 1964(a), which confers jurisdiction and authorizes certain remedies, should be read as creating remedies under RICO for both private parties and for the government. Under this reading, subsection (b) merely gives the government an *additional* right to equitable relief *pendente lite*, and subsection (c) merely gives private parties an *additional* right to treble damages, costs, and attorney fees. The Seventh Circuit appears to have embraced this argument. OR Pet. App. 110a-11a.

This argument is defective.

First, this argument ignores the explicitly *jurisdictional* nature of subsection (a) ("The district courts . . . shall have jurisdiction to . . ."). *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 576-77 (1979) (rejecting the argument that a jurisdictional provision in a statute can give rise to cause of action: "[t]he source of plaintiff's rights must be found . . . in the substantive provisions . . ., not in the jurisdictional provision"). While subsection (a) authorizes equitable relief, it does *not* -- as the Seventh Circuit conceded, OR Pet. App. 113a -- specify which plaintiffs can seek the remedies it provides. For the answer to that question, recourse must be had to subsection (b) ("The Attorney General may institute proceedings under this section."). Thus, the subsection (a) argument depends entirely upon the premise that subsection (c) grants private plaintiffs -- and not just the Attorney General -- *plenary* authority to "institute proceedings under this section," an argument refuted above. *Supra* §§ III(A)(1), (C)(1).

Second, this argument again ignores the parallels to antitrust law. The very statute which this Court held did *not* authorize private injunctive relief, *supra* § III(A)(2), also contained a broad jurisdictional provision with language largely identical to

subsection 1964(a). *See Northern Securities*, 194 U.S. at 67 (quoting text of § 4).

The Seventh Circuit perceived (OR Pet. App. 112a) support for its reasoning in this Court's decision in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1990). But reliance on *Steel Co.* is puzzling. That case merely rejected the claim that a provision giving courts "jurisdiction in actions brought under [a subsection]" made every element of the pertinent substantive subsection "jurisdictional." *Id.* Petitioners made no such argument regarding RICO.

3. RICO's "liberal construction" clause and general purposes do not create a private injunctive remedy.

Another argument the Seventh Circuit offered to justify reading into RICO a right of private injunctive relief is the legislative directive to construe RICO liberally to effectuate its purposes. OR Pet. App. 113a-14a. This argument is a make-weight. As this Court has explained, "RICO's 'liberal construction' clause . . . is not an invitation to apply RICO to new purposes that Congress never intended." *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993). The meaning of RICO "must be gleaned from the statute through the normal means of interpretation." *Id.* at 184.[21]

The Seventh Circuit's invocation of the broad "underlying purposes" of RICO, OR Pet. App. 114a, is likewise no warrant

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[21] As the Fifth Circuit observed:

> The "liberal construction" directive, however, neither compels nor authorizes us to disregard convincing evidence from the legislative history that Congress believed it had not approved private injunctive remedies and balked at doing so.

Fredeman, 843 F.2d at 830.

for construing RICO contrary to its text and legislative history. "Our task here is not to determine what would further Congress's goal . . . but to determine what the words of the statute must fairly be understood to mean." *Holmes Group Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 833 (2002).

D. The United States as Amicus in *Scheidler II* Officially Opposed Construing RICO to Authorize Private Litigants to Invade the Attorney General's Exclusive Prerogative to Seek Equitable Relief.

In its amicus brief filed in *Scheidler II*, the United States agreed that "RICO does not authorize private parties to seek injunctive relief." U.S. Br. at 3, *Scheidler II* (*supra* p. 7).

The United States argued first that the text and structure of RICO "vests the Attorney General with the exclusive authority to bring suit for injunctive relief." *Id.* at 4.

> By empowering the Attorney General alone to institute proceedings "under this section," Congress signaled its intent that the district court's equitable jurisdiction under Section 1964(a) must be invoked by the Attorney General. There is no corresponding provision that authorizes a private party to institute proceedings "under this section" . . . .

Id.. Describing the Seventh Circuit's contrary reasoning as "flawed," *id.* at 8, the United States continued:

> As explained, Section 1964(b) expressly grants the Attorney General the right to bring actions under "this section," an obvious cross-reference to the court's power to award injunctive relief under Section 1964(a). Section 1964(c), by contrast, is a free-standing, self-contained grant of a private

> right to recover treble damages. The provision contains no express or implied reference to, or incorporation of, Section 1964(a).

Id.

The parallels between the remedy provisions of antitrust laws and RICO, the United States continued, "support the same conclusion." *Id.* at 9. In light of this Court's precedents recognizing that the pertinent provisions of the Sherman Act "did not authorize private parties to bring suit for injunctive relief," *id.* at 10 (footnote and authorities omitted), "Congress is presumed to be aware when it enacted RICO that, absent inclusion of an *express* private right to obtain injunctive relief, the language it selected would be construed to exclude such a right," *id.* at 11 (emphasis in original). The absence of any such provision, the United States explained, "makes clear that Congress did not intend to create a private right to equitable relief under RICO." *Id.* at 12.

The legislative history of RICO, the United States observed, "confirms that Congress made a deliberate choice in omitting authority for a private injunctive action." *Id.* The United States pointed specifically to "repeated attempts to do so" -- all of which failed -- both before and after the passage of RICO. *Id.* at 13.

Finally, as a matter of policy, the United States argued that "[i]t is neither necessary nor appropriate to construe RICO implicitly to place . . . in private hands" the "wide-ranging injunctive relief, including divestiture and corporate reorganization and dissolution," which RICO empowered the Attorney General to seek. *Id.* at 14. Given the "rigor" of these remedies -- going so far as to include "corporate death" -- it is "not surprising," the United States reasoned, "that Congress entrusted the Attorney General, acting with 'official unity of

initiative,' with the exclusive authority to obtain such relief." *Id.* (some editing marks and citations omitted).

* * *

By in effect amending RICO to authorize private civil suits for injunctive relief, the Seventh Circuit has abolished the federal government's exclusive prerogative to seek such relief. Not only is this an affront to a unique federal executive power, it is an open invitation to abuse. Under the decision below, private parties are no longer limited to damages for the harm they suffered; they now can seek equitable relief wholly independent of, and potentially in conflict with, the decisions of the Attorney General regarding pursuit of such relief. "That holding could adversely affect the United States' ability to obtain equitable relief such as disgorgement when both private parties and the government seek such relief for the same conduct." U.S. Br., *Scheidler II*, p. 1.

Furthermore, private parties do not have the political accountability, or the duty to exercise prosecutorial discretion, that apply to the federal government. Under the Seventh Circuit's faulty interpretation, the RICO injunctive weapon can now be misused -- as in the present case -- as a means of waging political or commercial warfare against one's adversaries.

This Court should reverse the Seventh Circuit and hold that RICO does not authorize private injunctive relief.

IV. THIS COURT SHOULD LEAVE NO DOUBT THAT THIS CASE IS OVER.

The Seventh Circuit identified *no* grounds for further prolonging this lengthy case other than the possibility of granting some *injunctive relief under RICO*, based upon the

theory that the Hobbs Act prohibits "*violence alone*," i.e., unconnected to robbery or extortion, and that this Court had overlooked and thus *not reversed four predicate acts* of actual or threatened violence. As demonstrated above, *each* of the three links in this chain of reasoning is independently flawed.

The Seventh Circuit not only failed to endorse any other theory for extending the litigation, but in fact affirmatively forbade any retrial or further development of the record

> [I]t is too late in the day for the plaintiffs to try to prove an entitlement to damages associated with [the "violence predicates.] 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 . . . . [Our remand on the "violence" predicates theory] is not . . . 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.

OR Pet. App. at 7a-8a.

> In closing, we wish to re-emphasize that this remand is not a "green light" to start this old litigation anew. . . . [I]t 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.

Id. at 16a-17a.

Respondents did not seek certiorari to contest the Seventh Circuit's preclusion of damages, retrial, or reopening of the record. Hence, there is no basis for respondents to pursue still more litigation in this case.

The present case, at nineteen years of age, has long since

passed the point at which NOW should be free to spend additional months and years pursuing new theories of liability. "Given the age of this case, remanding to the district court unnecessarily wastes additional judicial resources." *Id.* at 24a (dissent below). This Court should make clear beyond all doubt that petitioners are entitled to final judgment on *all* claims, and that the present case is *over*. As this Court said last time, "*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, [and] the *injunction* . . . must necessarily be vacated." *Id.* at. 48a (emphasis added).

CONCLUSION

This Court should reverse the judgment of the Seventh Circuit and remand with instructions to direct the entry of judgment for petitioners on all claims.

Respectfully submitted,

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