IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH SCHEIDLER, ANDREW :
SCHOLBERG, TIMOTHY MURPHY, :
AND THE PRO-LIFE ACTION :
LEAGUE, INC., :
Petitioners :
v. : No. 01-1118
NATIONAL ORGANIZATION FOR :
WOMEN, INC., ET AL.; :
and :
OPERATION RESCUE, :
Petitioner :
v. : No. 01-1119
NATIONAL ORGANIZATION FOR :
WOMEN, INC., ET AL. :

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Washington, D.C.

Wednesday, December 4, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

ROY T. ENGLERT, JR., ESQ., Washington, D.C.; on behalf of the Petitioners.

THEODORE B. OLSON, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae.

FAY CLAYTON, ESQ., Chicago, Illinois; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:06 a.m.)

JUSTICE STEVENS: We'll hear argument in case Number 01-1118, Scheidler against the National Organization of -- of Women.

You may proceed.

ORAL ARGUMENT OF ROY T. ENGLERT, JR.

ON BEHALF OF THE PETITIONERS

MR. ENGLERT: Thank you, Justice Stevens, and may it please the Court:

This case comes to the Court in a remarkable posture. If you agree with the Hobbs Act arguments in the blue briefs, you should reverse the jury verdicts and direct entry of judgment for the defendants. But even if you believe the arguments in the red and gray briefs, you should still reverse, but for a new trial. And whatever you do on the Hobbs Act, you should reverse the RICO injunction because RICO simply does not authorize private injunctive relief.

Now, why do I say so starkly that even respondents and the Government's theories require reversal of the jury verdict? Because the attempts in those briefs, to salvage the theory of plaintiffs' case, concede that someone must obtain the victim's property for the offense of extortion to be shown. And the whole reason

the Court granted cert on the Hobbs Act issue was to review the Seventh Circuit's holding directly contrary to those concessions that, quote, a loss to, or interference with the rights of the victim is all that is required, closed quote. Likewise, the jury was instructed that all it had to find was that the defendants caused someone, quote, to give up a property right, closed quote.

You will find in the red and gray briefs very elaborate efforts to suggest meanings of obtain and property under which the record in this case supposedly could support a finding that petitioners obtained some abstract form of property from the clinics or women. But no defense of the Seventh Circuit's holding and the jury instructions that substituted the phrases, interference with and give up for obtaining. So there ought to be no question that some form of reversal is required.

Now, the reason why there should be reversal for the entry of judgment for the defendants, and not just for a new trial, is that respondents and the Government's brief-formulated conceptions of obtaining and property are wrong. The essence of the theories is that petitioners obtained control over the use and disposition of clinic assets. To refer to that as obtaining property of another -- the language of the Hobbs Act -- is an awfully broad use of language. It's a far cry from the New York

law on which the Hobbs Act was based.

QUESTION: I suppose in some instances one competitor can buy another competitor's firm and just close it up in a regular business transaction, and that -- that would be obtaining it in that sense. Now, of course, I recognize that title transfers, et cetera, et cetera.

Here the result is about the same.

MR. ENGLERT: No, Your Honor. Respectfully, it's not. My clients don't have the clinic's property today as they would if they had, in fact, obtained it. They may have temporarily interfered with some use of it.

QUESTION: Let's assume that the -- that the boycott or -- or the protests are sufficient to close it down. They have obtained it in a certain sense in that they have obtained -- they have secured for themselves the use that they want of it, i.e., no use.

MR. ENGLERT: That is a sense of the word obtain, but it's not the sense relevant for interpreting the Hobbs Act for several reasons. One is the Hobbs Act has historical predecessors that this Court has said should be looked to in interpreting its terms.

QUESTION: You -- you concede it's a sense of the term obtained? I mean, would you really speak of obtaining somebody's property when you -- when you interfere with that person's use of it?

MR. ENGLERT: Well, I certainly don't -- I'm sorry, Justice Scalia. I certainly don't concede it's a relevant sense of obtain.

Because of -- because of the Hobbs Act historical antecedents, because of the rule of lenity, because of the very odd use of language, for all those reasons, that's not how the Court should interpret obtain.

But more important than any of those things is the implications of such a theory. When Carry Nation went into saloons with her axe and destroyed property, she certainly interfered with the property owner's unfettered use and control over disposition of his assets, and that's exactly what she intended to do. Was that extortion?

The civil rights boycott of white merchants that the Court considered in Claiborne Hardware certainly affected the ability of the boycotted merchants to use their property and involved isolated acts of violence as well. Was that extortion?

These aren't hypothetical concerns.

QUESTION: Of course, that -- extortion wasn't charged in that case, was it?

MR. ENGLERT: No, Your Honor, but were the Court to uphold the theory in the red and gray briefs, which wouldn't support the judgment, but if the Court were to uphold that theory, it certainly could be charged the next

time the facts of Claiborne Hardware come along.

QUESTION: One must wonder why it wasn't charged.

MR. ENGLERT: Yes.

QUESTION: Because it was a State case it wasn't -- the reason -- reason it wasn't charged. It grew up through the Mississippi court system, if I remember correctly, didn't it?

MR. ENGLERT: Well, my -- that's correct, of course, Justice Stevens. But my fundamental point is not that one case was or wasn't charged as -- as extortion. It's if you uphold the theory of the red and gray briefs, it can be charged as extortion in the future. And that's actually happened to People for the Ethical Treatment of Animals. It's happened to other animal rights groups. Because of these implications, the Southern Christian Leadership Conference joined the amicus brief of the Seamless Garment Network at the cert stage. Disability rights groups that conduct protests have joined the Seamless Garment Network brief at the merits stage. Activists of all stripes and their admirers -- Daniel and Philip Berrigan, Nat Hentoff, Martin Sheen --

QUESTION: But are we talking about actions that constitute the commission of some kind of criminal offense in the process?

MR. ENGLERT: Oh, yes.

QUESTION: Yes.

MR. ENGLERT: Oh, yes. Trespass.

QUESTION: Yes, and other things, destruction of property and so forth, I suppose.

MR. ENGLERT: Oh, yes, Justice O'Connor.

QUESTION: Yes.

MR. ENGLERT: There's never been any doubt in this case --

QUESTION: I mean, we're not talking about conduct that is lawful here.

MR. ENGLERT: We are not talking about extortion, but we are talking about some things that could be punished much less severely.

It has never been disputed in this case, from the opening statement through the closing statement of the trial or in the earlier phases of the case, that there were trespasses. There could be in particular circumstances --

QUESTION: -- more than that. In some cases, assaults and so forth.

MR. ENGLERT: Well, fair enough except the -- the jury verdict really is quite at rejection of petitioners' proof in many respects rather than supporting it. But, yes, Justice O'Connor. I really don't want to

fight with you on that particular point.

But -- but let's --

QUESTION: -- I think to paint the picture that we're talking about, just pure speech is -- is not the case.

MR. ENGLERT: No, but that's why I used the examples of Carry Nation and Claiborne Hardware which weren't pure speech either. There was certainly violence in those cases, but not extortion.

QUESTION: Would you say coercion? One of the questions was, well, coercion -- if that's defined as using compulsion to force a person to do or not do something that she otherwise would do or not do, does this conduct fit that crime?

MR. ENGLERT: Yes.

QUESTION: That crime --

MR. ENGLERT: And that's a very important point supporting our position because Congress at one point had coercion as a predicate act in the Anti-Racketeering Act of 1934 and, at the request of organized labor, took it out. In the Hobbs Act, in the passage of the Hobbs Act in 1946, again, organized labor lobbied to make sure that coercion was not part of the Hobbs Act. Coercion is a different crime from extortion, and interfering with someone's rights is the crime of coercion under the Model

Penal Code, under New York law, under various other bodies of law, but it's not the crime of extortion.

QUESTION: Just -- just on the obtain point, which I -- I agree with you is of great relevance here, if -- if a group trespasses on property and -- and remains there for a period of days, can it be said that they're obtaining the use of the property, or is -- is that too much of a stretch?

MR. ENGLERT: I think it's a stretch, Justice Kennedy, but even if it weren't a stretch, it still wouldn't be a Hobbs Act violation for a different reason. There must be consent to the obtaining of property or -- of another, and simply going in and engaging in adverse possession doesn't necessarily entail consent.

QUESTION: Well, suppose you withdraw in order to avoid confrontation. I suppose if A robs B, and B turns over the wallet, in a sense there's consent, not -- not the kind of consent that the law would ever recognize. It's a consent in a -- just from the standpoint that there's a voluntary act in handing over the -- the wallet.

MR. ENGLERT: Well, that actually --

QUESTION: You make your -- you make your muscles move and that's about it.

MR. ENGLERT: Yes. Words can be stretched to make lots of things into lots of things that the law

doesn't want them to be. And in fact, the common law distinction between robbery and extortion, which are both Hobbs Act predicates, is one is with consent and the other is without. So robbery is a classic example of something that you could stretch the word of consent to cover, but it isn't extortion.

QUESTION: I guess it's obtaining property if a group of people through criminal means tell an owner of a business precisely and in detail how he has to run his business.

MR. ENGLERT: Oh, I don't think so, Justice Breyer.

QUESTION: No? In other words, if -- if, say, you have a group of terrible criminals, and they say here is what -- we're going to kill you unless you do the following, and then they say, today you serve X and tomorrow you serve Y, and you send the money over to Z, and you do all these different things; in other words, they run the business.

MR. ENGLERT: If it --

QUESTION: Now, why haven't they obtained that business?

MR. ENGLERT: In the hypothetical example you just gave me, they most certainly have obtained property. You said send the money over to Z.

QUESTION: Because I said -- say -- I regretted putting that in the hypothetical the instant I did.

(Laughter.)

QUESTION: I'm simply looking for an example of a group of criminals who will tell a property owner, a businessman, exactly and precisely how to run his business in a way that he doesn't want to run it. Now, why isn't that obtaining the property called the business? I mean, that's what the SG I think is suggesting basically.

MR. ENGLERT: And the SG is wrong because that's not what obtaining property meant under the New York law in 1946. It -- it's a stretch of words. It's a modern concept of property.

QUESTION: It's like a theft of services. I mean, you go in and you -- there was a -- years ago a person who figured out how to whistle various tones into the telephone so that it would connect people without charge. All right. Now, hasn't that person stolen the use of the telephone?

MR. ENGLERT: Yes.

QUESTION: Yes. And -- and a person who tells the telephone company owner, I want you to go and provide the services to A, B, and C, hasn't he stolen those services?

MR. ENGLERT: Well, that's getting to be more of

a stretch, but probably yes, under United States v. --

QUESTION: Then -- then the difference between that and a person who tells the business owner to provide his services to A, B, C, D, and E, whom he doesn't want to, that doesn't seem a difference.

MR. ENGLERT: No. There is a major difference, with respect, Justice Breyer. Saying do provide services to A, B, C, D, and E is quite different from saying don't provide services to A, B, C --

QUESTION: That's what I wondered, and what is the difference there?

MR. ENGLERT: The difference is that A, B, C, D, and E have obtained the services in one case and they have -- and no one has obtained any property in the other case, exactly the words of the Hobbs Act.

QUESTION: Except that services is not property, and the one thing that is common in both the negative and the positive examples is the obtaining of control. It's -- it's -- it seems to me it's -- it's the control that's important when he says serve A, B, and C. It isn't property that he has obtained. It's -- it's an action. It's a service.

MR. ENGLERT: Justice Souter --

QUESTION: And that's true in each case.

MR. ENGLERT: -- if I've understood you

correctly, that's even more support for our position because the words of the Hobbs Act are obtaining of property from another. So if all of Justice Breyer's examples --

QUESTION: No, no --

MR. ENGLERT: -- property --

QUESTION: I -- I agree with you on that point, but I -- I guess I'm saying that if you concede in the one case, I don't see why you -- you really don't have to concede in -- in the other case because the one thing that is common to each is control, and there is no property in a tangible sense that is obtained in -- in the positive service examples.

MR. ENGLERT: No. With respect, what is common is not control. It's acquisition. It's obtaining. That's what obtaining means. The Solicitor General's own brief on page 21 in footnote 11 says that's what obtaining means. And --

QUESTION: And what does one obtain? One obtains, in each case, control --

MR. ENGLERT: But control --

QUESTION: -- i.e., direction.

MR. ENGLERT: I apologize, Justice Souter, for interrupting, but control is not property. Property is property.

QUESTION: My point is if you are conceding that Justice Breyer's positive examples would fall within the statute, I don't see why you don't have to concede that the negative example, i.e., don't serve, doesn't also fall --

MR. ENGLERT: The --

QUESTION: -- on -- on your own theory.

MR. ENGLERT: I don't think so, respectfully, Justice Souter. The distinction I draw is that in the words of the statute, one involves obtaining property, and the other doesn't, on the assumption that the services are property. If they aren't property, I win the case for a different reason.

QUESTION: What do you do with the New York case involving a work stoppage? Do you agree with that case, or do you think it's wrong? The one the Solicitor General cites in his brief, the -- the old 1890 case involving a stop -- a strike, I guess, is what you'd say. Do you think that case would -- would be decided the same way under your view?

MR. ENGLERT: I -- I think so, Justice Stevens, but the case is not immediately coming to mind. I'm sorry. I -- I do think the New York courts construed rather strictly the obtaining of property, and the Solicitor General's more expansive cases are from long

after 1946.

QUESTION: It's People against Barondess, decided in 1892. It was under the -- under the New York statute, which I think everyone agrees was the model for the Federal statute.

MR. ENGLERT: Yes, Your Honor.

QUESTION: It seemed to me there was no obtaining in the very literal sense that you used the term, but there was merely acquisition of control of the operation in that. And I'm not quite sure how you come out on -- on those facts.

MR. ENGLERT: Well, Your Honor, I'm -- I'm, as I stand here, blanking on those facts. I -- I believe the New York courts did construe obtaining of property rather strictly in that case and in every other pre-1946 case, but I can't -- I apologize. I can't give you an intelligent discussion of that right at this moment.

I'd like to turn to the RICO injunction issue, if I may. It's very straightforward. I plan to address it only briefly.

First, this Court has held in several cases that section 7 of the Sherman Act and section 4 of the Clayton Act, both worded almost identically to section 1964(c) of RICO, did not authorize private injunctive relief.

The dissent in Paine Lumber contended that

courts had inherent power to grant injunctions --

QUESTION: The language of the acts, though, is a little different than this, isn't it?

MR. ENGLERT: Well, very, very slightly different, Justice O'Connor.

QUESTION: The analogy may not be perfect because the language differs.

MR. ENGLERT: Very slightly, but the -- where there's a world of difference and not a slight difference is between section 16 of the Clayton Act and section 1964 of RICO. And in section 16 of the Clayton Act, Congress authorized private injunctive relief. No language remotely resembling section 16 appears in section 1964 of RICO, but all of the language from the statutes this Court held didn't authorize injunctive relief with very tiny variations appears in RICO.

Besides the obvious statutory language borrowed from the Clayton and Sherman Acts, as this Court has recognized throughout its cases, the statutory evolution of RICO presented Congress with repeated opportunities expressly to provide private parties with injunctive relief under RICO. Every such proposal failed before and after the final enactment of RICO.

The court below dismissed the reliance on legislative history on the theory that this Court would

not ascribe any significance to legislative inaction. But ironically the very day the Seventh Circuit decided this case, this Court was hearing argument in Chickasaw Nation v. United States, and the opinion of the Court in that case reiterated the longstanding principle -- with which some members of the Court disagreed, but the longstanding principle in majority opinions -- that courts ordinarily will not assume that Congress intended to enact statutory language that it has earlier discarded in favor of other language.

QUESTION: Would you clarify one thing on the -- on the rejected amendment? Was it voted down or withdrawn? I can't remember.

MR. ENGLERT: It was actually passed unanimously by the Senate, but then the House didn't take a vote on it.

QUESTION: But we don't know why they --

MR. ENGLERT: I'm sorry. I -- Justice Stevens, I -- I've misspoken slightly. Excuse me. The -- the post-RICO effort --

QUESTION: Well, no. I'm talking about the one before enactment. The post -- the later statute is a little less persuasive.

MR. ENGLERT: The pre-RICO effort was withdrawn. The pre-RICO effort was withdrawn by Representative

Steiger on the ground that it would complicate matters too much to take it up at that stage of the legislation, but it was very important. He'd come -- come back again with it next year. But he recognized that the statute didn't have private injunctive relief in it in his floor statements.

QUESTION: At the -- on the second round, when -- when the Senate passed and the House didn't, there's no explanation in the House record, is there?

MR. ENGLERT: Nothing that sheds tremendous light on this except for Representative Steiger's --

QUESTION: Yes.

MR. ENGLERT: -- own statements.

QUESTION: It would -- it would be -- I -- the trouble I'm having is I don't have any trouble seeing the argument your way.

The -- the reason I'm -- at this point, I'm not convinced is that you do have in subsection (c) the language referring -- it says may. What is it? May sue -- I can't -- yes, may sue therefor. And we've got the general presumption that all appropriate remedies go with a cause of action. And I'm -- I'm wondering if in a case in which it's uncertain what to infer, either from the legislative record in -- on intent, or from the textual record here, whether the presumption not to carry

the day in a case of doubt --

MR. ENGLERT: It shouldn't because, as is pointed out at pages 7 and 8 of the Operation Rescue reply brief and correctly so, this Court has two lines of cases: one when Congress doesn't specify the remedies. That's cases like Franklin v. Gwinnett County which was an implied right of action case, and like Califano v. Yamasaki.

And a different line of cases saying, when Congress does specify remedies, they're intended to be exclusive. A line of cases that -- that --

QUESTION: Well, it -- may I tell you the reason I wasn't convinced on that is that if -- if Congress were -- were specifying in the text here choices among ordinary remedies, I think that would be a very strong argument.

The reason it seems less strong here is that the choices that -- or the -- the remedies that Congress has specified are extraordinary remedies, e.g., right in this section. What is specified is treble damages, not damages. If they had simply said can get damages, I think it would be a slam-dunk, but -- but what they did was -- was to specify something out of the ordinary, and I'm not sure that that carries the implication that ordinary remedies, consistent with what it specifies, are -- are

meant to be excluded.

MR. ENGLERT: Well, Justice Souter, this Court said over and over again that it did carry that implication when the exact same language was used in the Sherman and Clayton Acts. The Paine Lumber case, the D.R. Wilder Manufacturing case, a whole host of antitrust cases.

QUESTION: And I just don't remember this. Does -- does the -- does Clayton use the phrase, sue therefor?

MR. ENGLERT: Oh, yes.

QUESTION: I have to go back and look. Is that the term of art that's in there?

MR. ENGLERT: Oh, yes. Oh, yes. The -- the language of Sherman and Clayton is in the appendix to the Scheidler blue brief --

QUESTION: Yes. I just -- I just didn't go back and look. That is the phrase?

MR. ENGLERT: It is. It is. The terms that differ are quite trivial, and some sections are separated into different subsections. That's about all the difference there is.

I'd like to reserve the balance of my time for rebuttal.

QUESTION: Mr. Solicitor General.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE

MR. OLSON: Justice Stevens, and may it please the Court:

The right to control a business, whether or not for profit, is a well-recognized and longstanding interest in property. When that control is surrendered in response to unlawful force, whether motivated by economics, politics, or ideals, the extortionist has attained his objective, and the Hobbs Act has been violated.

QUESTION: Well, under that definition, I suppose that anytime protesters trespass on property, they've obtained the use of that property and there's a Hobbs Act violation --

MR. OLSON: If --

QUESTION: -- Hobbs Act predicate violation?

MR. OLSON: If there's an unlawful use of force or threats or violence, Justice Kennedy, whether it be in the form of trespassing -- and the aim -- which this Court recognized 8 years ago in this -- in this very predecessor case was to shut down the clinics. If that aim is achieved, the control of the property has been transferred from the owner of those clinics to the extortionist.

QUESTION: Well, if -- if that's -- if that's a

strained reading of obtained, shouldn't we be -- take counsel of -- that there's a -- serious First Amendment consequences -- consequence if we adopt that extensive definition?

MR. OLSON: As Justice Souter said in -- in the dissent, which you joined, in the earlier case, the First Amendment is not an issue in this case, and it can be dealt with in particular circumstances in particular cases where it arises. The issue here is if the use of force --

QUESTION: Well, the -- there's always a First Amendment implication in a protest case. There's -- at this point there is a First Amendment issue in the case because of the broad definition you're proposing, it seems to me.

MR. OLSON: Well, it was the question that was presented that was not accepted by this Court. Question 3, I think it was, or 4 in the -- the one Scheidler petition was not accepted by this Court.

QUESTION: Well, but the point -- the point is -- the point is not whether there's a First Amendment violation here. The point is whether the interpretation of the word obtain that the Government is -- is suggesting we adopt does not threaten to -- to bring us constantly into difficult situations where we're going to have to try to sort out whether that definition doesn't sail too close

to the wind with respect to First Amendment rights.

MR. OLSON: I submit, Justice Scalia, that that is not going to be the -- the problem that this Court or any courts are going to have to face.

First of all, the definition of property as controlling a business has been accepted for a long time. Now, the only question that is --

QUESTION: You -- you -- do you agree that your interpretation would have been applicable to the civil rights sit-ins?

MR. OLSON: Under some circumstances, it could have if illegal force or threats were used to prevent a business from operating.

QUESTION: Do you --

MR. OLSON: In many --

QUESTION: Do you agree that it would be applicable to many labor picketing situations --

MR. OLSON: Well, they --

QUESTION: -- where they obstruct entrance?

MR. OLSON: This -- this Court specifically carved out an exemption in -- in the Enmons case with respect to legitimate labor objectives --

QUESTION: No, but --

MR. OLSON: -- and made it --

QUESTION: The exception wasn't with regard to

labor objection. What -- what is there in the statute that -- that enables you to make an exception for labor picketing?

MR. OLSON: What -- what this Court --

QUESTION: What language of the statute enables you to separate labor?

MR. OLSON: Well, I -- I can't pull a specific piece of the language out of the statute, but this Court said nearly 20 times in the Enmons case that the Hobbs Act was not intended to cover achievement of legitimate collective bargaining demands, and because the Court did not want to --

QUESTION: It said any legitimate demands --

MR. OLSON: No, it --

QUESTION: -- elsewhere. It didn't always limit it to just legitimate collective bargaining demands, did it?

MR. OLSON: I -- I take that the Court, because it said over 15, nearly 20 times legitimate collective bargaining demands, legitimate union objectives --

QUESTION: Because that's what was involved in the case. But why would you separate legitimate collective bargaining demands from other legitimate demands? What is there possibly in the word obtain that could cause you to separate legitimate collective

bargaining demands from legitimate demands that you -- that you refrain from doing something else?

MR. OLSON: I -- I can only submit, Justice Scalia, that it seemed to me a clear implication of the words used by the Court and the fact that the Court emphasized that it was -- that we were dealing with -- the Court was dealing with the extraordinary -- the potential extraordinary change in Federal labor law, that that phrase was emphasized over and over again. Neither this Court --

QUESTION: So -- so you say we simply made a labor law exception to the extortion statute.

MR. OLSON: In the -- in the context of the history --

QUESTION: Just -- just out of nowhere, a labor law exception.

MR. OLSON: No, not out of nowhere, Justice Scalia. There was a long history of --

QUESTION: You give me no language in the statute that would justify it.

MR. OLSON: What -- what the statute -- what the language of the statute does -- and here's -- here's where -- what I would emphasize. The language of the statute specifically makes it unlawful and makes no exception for -- for whether the -- whether the -- the

petitioner -- the -- the protester, or the -- or the alleged extortionist is motivated by ideals or politics or wanting to shut down a business or a -- or a boycott of Israel or -- this is a classic use of force and extortion in the organized crime setting. The use of force or threats to take over a labor union or a business --

QUESTION: But it says there, to obtain control. To obtain control.

MR. OLSON: Yes.

QUESTION: Fine. What I don't understand is whether there isn't a line somewhere between obtaining control in the sense of taking over a business for a period of time, shutting down a business, and just telling the owner of the business to do one single thing once that the blackmailer -- but not the owner -- wants to do.

MR. OLSON: Let me --

QUESTION: There's a spectrum that falls within that word control or the word taking over that if you push it to an extreme, the Hobbs Act becomes a coercion statute in respect to a business owner.

MR. OLSON: It -- the question, it seems to me, was answered in part by this Court in the earlier NOW case by saying that the extortionist doesn't have to gain a financial benefit or take possession.

Now, the -- the robbery and larceny statutes at

common law required the taking and acquiring of possession.

QUESTION: I take where you're going is that it is a coercion statute in respect to a businessperson insofar as you ask the owner of the business to do something that he doesn't want to do.

MR. OLSON: That's -- that's part of it, yes. And the answer to the question about obtaining --

QUESTION: If I think that's too extreme, is there any stopping place?

MR. OLSON: Well, there -- there is a stopping point, is whether at the end of the day, through the threats or the -- the actions of the extortionist, that property interest that was held by the victim of the extortion has been transferred to the hands of the extortionist in the sense that the aim has been accomplished. The aim was to shut down the clinics. That was the attempt, and to the extent that that was or was attempted to be accomplished, that control --

QUESTION: General Olson --

QUESTION: Mr. -- yes, Mr. Olson. If -- if we agreed with your view -- and I'm not sure we will -- about property including the right to control business assets, it does not, I assume, cover some personal right of somebody to obtain services in the clinic. And I guess

the jury verdict covered both. Could the jury verdict be upheld here even if the Court agreed with your view?

MR. OLSON: We -- we have not addressed that, Justice O'Connor. I do --

QUESTION: Well, I'm asking you to.

MR. OLSON: I do -- I do agree. I think that it would have to be sent back to the Seventh Circuit for a remand to examine that question. The jury instruction did have the component to which you refer which we would characterize as a liberty interest of a right of an individual. And that was --

QUESTION: And we have no idea what the jury went on. There were three pieces, and one involved the people who worked in the clinic. One involved the women who were served by the clinic, and the third involved the clinic operation.

And that was exactly the question that I wanted to ask you. Is your bottom line a new trial? Because the charge doesn't match the theory you're putting forward.

MR. OLSON: I think that -- I think that at the end of the day, although we haven't briefed it and the Government is interested in the definition of extortion, at the end of the day that might have to be the result because the general -- generalized verdict does not make a distinction between that which we contend is a property

right which was obtained by the extortionist or -- or was attempted to be obtained --

QUESTION: Well, you wouldn't want us to send it back without resolving the extortion issue, would you?

MR. OLSON: That's -- no, I --

QUESTION: You want us to send it back so it is -- it is -- the jury is given a charge only on the extortion theory that you're -- that you're delivering. Then it comes back up and then we will resolve the issue.

MR. OLSON: Well, I -- the question presented, in connection with the Hobbs Act, I think is answered this way. Where unlawful -- which this Court should articulate, we hope, in its opinion. Where unlawful force is used to arrest sufficient control of a business to stop the performance of its services, the Hobbs Act has been violated because control of the business, a property right has been acquired.

I -- I may have 1 minute left to just mention one thing with respect to the -- the RICO provision.

Congress created a private right to damages for RICO violations by intentionally copying language from the antitrust laws that this Court had repeatedly held did not confer a right to seek injunctive relief. This Court has said that Congress was aware of the antitrust history, was copying it, intended to copy it, and was presumed to know

the consequences of what Congress was doing.

QUESTION: Of course, at the time the statute was enacted, a private litigant could get relief, injunctive relief, under the antitrust laws, not under the -- not under the section 7 of the Sherman Act, or section 4 of the Clayton Act, but under whatever the other number is.

MR. OLSON: Section 16.

QUESTION: But the question is really whether the first section of the RICO gives us authority.

MR. OLSON: Well, may I answer that, Justice Stevens?

QUESTION: Sure.

MR. OLSON: It seems to me that in the context of the language that the -- that Congress knew would not create a right, and knowing -- Congress knowing that section 16 did specifically create such a right, and knowing that this Court had said that when a right is created and remedies specifically provided, the Court -- the Court will not expand. The Court will accept what Congress has done. And Congress did not adopt and in fact rejected the opportunities or -- or failed to accept the opportunities to adopt precisely the remedy that would have had that result.

QUESTION: Thank you, Mr. Olson.

Ms. Clayton.

ORAL ARGUMENT OF FAY CLAYTON

ON BEHALF OF THE RESPONDENTS

MS. CLAYTON: Justice Stevens, and -- and may it please the Court:

I'd like to begin with the RICO issue, if I may, and then turn to the Hobbs Act questions.

The stark contrasts between the antitrust law and RICO prove the -- prove why private injunctions are available. When it comes to damages, we agree that the language is virtually the same, treble damages and so forth. But when you look at the injunction provisions, they are radically different.

In the antitrust law, Sherman IV, all the injunction provisions were put in a single paragraph giving the Government the exclusive duty to enforce. That is not -- that was not copied in RICO. In RICO, Congress took out permanent injunctions, put them in section 1964(a), a separate, unrestricted section. Not only did it give the duty to the Government, it didn't even mention the Government.

QUESTION: But in the next section, it did mention the Government and said that the Government shall have the authority to -- to use the injunctive provisions mentioned in the first section. Right?

MS. CLAYTON: No, Your Honor.

QUESTION: And then in the third section, it gives private individuals a right to damages, but does not mention that they have the right to use the first -- first section.

MS. CLAYTON: Justice Scalia, of course, you are correct about section (c). Section (c) does give standing to private parties, and gives them these extraordinary new remedies, treble damages and legal fees, which they could never get without a statutory grant.

But section (b) does not give the Government the right to use permanent injunctions. It only talks about preliminary relief. It takes that one section of Sherman IV out, and the other part, the permanent injunctions in Sherman IV, are now, under RICO, put in a wholly different provision, the unrestricted section (a).

The natural reading of section (a), which says all these permanent remedies, including the injunction that our trial court granted here, went against future criminal activity. Section (a) in an -- unrestricted language makes that available to the Court to restrain violations of section 1962, the very violations that section (c) --

QUESTION: Section (a) says what the court may grant. It doesn't say who has authority to ask the court

to do that. And in the -- the provision (b), it empowers the Government and the Government only to ask for preliminary injunctive relief. It's a strange thing. Why would Congress withhold the power to seek a preliminary injunction and yet give that party the right to seek a permanent injunction?

MS. CLAYTON: That's a question that we have pondered for a long time, and -- and I think the Motorola brief, which explains -- a very important brief -- why preliminary injunctions should be available to everybody, makes a good argument for that. But we don't have to address that question here.

My own thinking is that section (b) gives the Government something that it wouldn't have had without the statutory grant because preliminary injunctions require one -- one element that permanent ones don't, the irreparable harm to the victim. And the Government, suing as sovereign, doesn't have property that's harmed. And if you look at the Wollersheim case, they recognize that was a plausible reason for why section (b) is there.

QUESTION: But you're just addressing the second sentence of section (b). There is a first sentence which says, the Attorney General may institute proceedings under this section.

MS. CLAYTON: That's right.

QUESTION: Now --

MS. CLAYTON: That's right.

QUESTION: -- that -- that gives the Attorney General the power to institute proceedings under (a).

MS. CLAYTON: Your Honor, it doesn't -- excuse me, Justice Scalia. Section (b) does not say the Attorney General may institute proceedings under section 1964(a). It says under this section which is section --

QUESTION: What else could it mean?

QUESTION: What else could it mean?

MS. CLAYTON: It means section 1964 as a whole, Your Honor, and in section (c) private parties are given the right to sue, which is another way of saying the very same thing. In fact --

QUESTION: As I -- sorry.

MS. CLAYTON: I was going to say in the American Stores case, this Court construed the very same language in the Clayton Act, sections 15 and 16. Institute proceedings, sue for in the other. And the Court said both of them mean both the Government and private parties may go and get injunctive relief including divestiture. It's just two ways of saying the same thing. The Government is thought to institute proceedings. It's bringing them as a sovereign. Private parties are suing for. It's just the traditional language. Certainly those

phrases don't bear the weight of the argument that institute proceedings means this party and only this party has access to those unrestricted remedies of section 1964(a).

QUESTION: And I looked -- I mean, I couldn't make too much out of the fact that you take the language from the Clayton Act which says the Attorney General may institute proceedings in equity, and you move it to section (b) and just change it to say, he may institute proceedings under this section. That's the only difference with the Clayton Act that I could find.

So I looked up the history. In the history, it looks as if there were five different bills floating around, and things didn't -- weren't all that straightforward. It got a little mixed up. And you have in the House several Congressmen getting up and saying they made a mistake in the Senate. They didn't include this. They should have. And then there were four more bills floating around, and the ones who wanted to include it said, send it all to the Judiciary Committee, let them work it out, and they never worked it out. I mean, that's -- that's the thrust of it that I -- that I got out of that.

Maybe it was just a mistake. Well, if it was a mistake, you're the -- you have another law. You can

bring it under the -- you could get an injunction I guess under the Abortion Act, the Abortion Clinics Act, or -- it seemed to me this one -- they made a mistake. Well, they made it.

MS. CLAYTON: Well, Justice Breyer, even if someone made a mistake, the bill, as it stands, is what Congress voted on, and what the President signed. It is that bill that we interpret. And we all agree -- this Court has said on many occasions that --

QUESTION: I'm with you on that.

MS. CLAYTON: I know you are, Justice Scalia.

(Laughter.)

MS. CLAYTON: Perhaps the only thing. And you've often commented on how there are probably as many reasons for congressional action or inaction as there are Members of Congress.

But the fact is the bill makes a very -- it's a very radically different structure from the antitrust law. Private -- I mean, permanent injunctions are unrestricted, and under the traditional jurisprudence, Califano -- when we -- we assume all traditional remedies are available unless -- unless there's the clearest command. There's not even a hint here. Maybe it was a mistake. It was certainly not a clear command to do the opposite.

And as my -- petitioners have pointed out, the

only time private injunctions were voted on, they passed unanimously. Why didn't they put it in there? I think it would have been redundant, and the Court doesn't like surplusage. If they had said in section (c), and private parties can get permanent injunctions, then the courts would have been trying to figure out, well, what did they mean in section (a). That has to mean something different.

They didn't say again the Government could get permanent injunctions in section (b). That would have been redundant too. But everybody agrees the Government can get permanent injunctions.

In any event, this Court's jurisprudence teaches us --

QUESTION: Don't you think it's --

QUESTION: We don't agree on whether they get it pursuant to section (a) or section (b), though.

MS. CLAYTON: The Scheidler brief, the opening brief, says that section (b) gives the Government unrestricted access to the remedies in section (a). That's the way they've put it. I don't read -- if -- if that's the case for the Government, the same applies to private parties. By parity of reasoning, anyone with standing -- and it's strict standing for private parties. You've got to be injured in your business or property.

QUESTION: But -- so you say private parties have the power to require -- to ask the court to order a person to divest himself of any interest, direct or indirect? Do you know of any other situation in which a private party can -- can cause the -- the divestiture of a business?

MS. CLAYTON: Justice Scalia, it's not automatic. The court in its discretion might do it or might not, but it must --

QUESTION: I understand that, but to put that power and -- and to request it in the hands of a power -- of a private party seems to me extraordinary.

MS. CLAYTON: It's been in the hands of private parties under the antitrust law for more than a half century before RICO was passed, and the courts have had no problem exercising their discretion to my knowledge.

In fact, in the American Stores case, this Court pointed out how the very same remedy sought by the Government and sought by private parties, the Government might get it, and the private party might not.

Furthermore, any -- any injunctive relief --

QUESTION: You can understand it in the context of the antitrust laws where the divestiture is the only way to prevent the -- the monopolization, but to use that as a punishment for -- for extortion is, it seems to me,

quite -- quite bizarre.

MS. CLAYTON: And then I think the court wouldn't grant it to the private party, and they certainly wouldn't grant it unless it was designed to remedy the particular injury that the private party suffered to their business and property by virtue of a 1962 violation. It would be very strange, indeed, Your Honor, to remove from private parties who are deputized to be a -- private attorneys general, supplement the Government resources, to take away this powerful core injunctive remedy and instead make them sue for treble --

QUESTION: But the divestiture -- you say the divestiture should never be -- should never be used by the courts.

MS. CLAYTON: No, I don't, Your Honor. I think that the district courts are --

QUESTION: It could -- could simply destroy an organization as the punishment for -- for extortion as you --

MS. CLAYTON: The court would only do that in an extreme case, I am sure. Maybe they would never give it to a private party, but it would be up to the -- but the private party may seek it. Section (a) doesn't say they automatically get it.

QUESTION: Then it's even odder that they

don't -- the private party can't seek that preliminary injunction even if they can show irreparable injury. To give the extraordinary power of ordering divestiture and not giving a party who is irreparably injured the authority to go into court and say, stop now -- temporarily --

MS. CLAYTON: I -- I agree, Your Honor, and even though that's not an issue that the Court has to resolve in this case, I think the Motorola brief makes an excellent case for why -- since this is a very special remedy, it's not an exclusive list. Congress didn't mean to deprive private parties or anyone else of any of the traditional remedies. The Califano rule is clear. Unless there's a clear command to deny it, it's available. I don't think section (b) -- remember, it doesn't even have that duty language.

One other point I'd like to make is when the antitrust laws were written, there was no merger of law in equity. To go in -- when someone had a right to get damages, they had to go into the law court which could only give money damages. It couldn't give injunctions. That had changed by the time RICO passed. And Congress knew that. Congress knew the Federal courts had the ability to design any appropriate remedy to fix the wrong, barring the clearest command. There's no clearest

command.

QUESTION: Well, you do agree, though, I guess that were efforts to include language authorizing the obtaining of injunctions by private petitioners, and that was not adopted by Congress.

MS. CLAYTON: But they were passed unanimously. They didn't get in I believe because it would have been surplusage. It would have been redundant, and we don't like that in statutes.

QUESTION: Well, we don't know.

MS. CLAYTON: We don't know, Your Honor, and we can -- and as the Court has said in Central Bank and Solid Waste, one never -- it's a thin reed to rest an interpretation on what Congress might have had --

QUESTION: And they have a long, long discussion of the battle, and everybody says, without any opposition, that this isn't there. You would have thought if it was surplusage, somebody would have gotten up and said, well, it is.

MS. CLAYTON: Well, I think that's what Representative Steiger said. The -- in fact, we quoted him. It's ambiguous.

QUESTION: I don't know.

MS. CLAYTON: But it's certainly not the clear command to the contrary.

QUESTION: Well, you have two -- two difficult and major arguments here.

MS. CLAYTON: I'd like to turn to it. Thank you, Justice Kennedy.

QUESTION: I -- I would like to hear your comments on obtaining property.

MS. CLAYTON: I would like to turn to those.

I think we all agree that property includes both tangible things and intangible things. Of course, in this information age, some of our most important property is intangible. So the question, of course, is how does one obtain it. One obtains it by obtaining control over it or dominion over it, as this Court explained in the Carpenter and Green case.

Remember in Carpenter -- now, this is a mail fraud case that had the same phrase, obtain property. Mr. Winans, the Wall Street Journal reporter, the On the Street column, was held to have wrongfully obtained property. Now, he had already received the information.

QUESTION: Do you think that it includes liberty interest deprivation?

MS. CLAYTON: No. No, Your Honor, I don't. We do not believe -- but sometimes they --

QUESTION: Then what happens to a generalized verdict no matter how you define this --

MS. CLAYTON: Your Honor, the verdict here is based only on property. If you look at the Hobbs Act instruction, it required that the respondents be made to part with property, not part with liberty interests. If a newspaper publishes an editorial, it has a liberty interest, a First Amendment right, to do it, but it also has a property right.

QUESTION: Yes, but it defined property. It says you can find a violation, other things -- all the other -- all the other requirements being met. You have to say that the doctors, nurses, or other staff or clinics themselves give up a property right. The term property right means anything of value --

MS. CLAYTON: Right.

QUESTION: -- including a woman's right to seek services from the clinic, the right of doctors or nurses to perform their jobs, the right of the clinic to provide medical services free from wrongful threats.

MS. CLAYTON: Right.

QUESTION: Now, your brief I think, more or less, seemed to concede that -- that at least two out of those three parts were certainly wrong.

MS. CLAYTON: Oh, no.

QUESTION: You don't. I mean, then -- then do we have to decide -- is this -- is --

MS. CLAYTON: No, no. No, Your Honor. What we believe is that to find property in any one of those aspects of property -- there are three aspects of property: the clinic's right to control its equipment and buildings and so forth, the women's right to spend their money, and the contract among -- between the two parties. Extortion of any one of them proximately injures all of them because it's two sides of the same coin. If the clinic is forcibly -- through threats of violence, the clinic is forcibly closed, now the women who have appointments, which are contracts, bilateral contracts, they can't get in. It's a -- it's two sides of the same coin. So to extort the property of the clinic is to proximately injure the women in her business or property, which is -- the standing comes under RICO. This is something that petitioners have never even challenged at the trial court --

QUESTION: All right. So -- so in other words, this instruction is correct that it's -- it's --

MS. CLAYTON: It is, Your Honor.

QUESTION: So a -- a woman's right to seek services is property which, if they say, I don't want you, the clinic, to serve the woman so the woman can't get the services, that is obtaining property?

MS. CLAYTON: It is under these circumstances

where she has an actual agreement with the -- the clinic. She's not just going shopping. Each woman who went to these clinics had an actual appointment for a particular service at a particular time. When I have an appointment with my doctor for a biopsy, I have a property right in seeing my doctor at that time.

QUESTION: What have you obtained control of? What have you obtained control of?

MS. CLAYTON: Just as in the Carpenter case, you've obtained control of the right to do business and the intangible rights that come out of business, the exclusive rights.

QUESTION: Obtaining control means -- means nothing at all if -- if whenever you deprive somebody of -- of a right, you say you obtain control of the right that -- that you've deprived them of. I mean, everything becomes an obtaining of property.

MS. CLAYTON: When one uses a demand to make one cede their control over property -- this is my pen. This is my property. It has ink and plastic. But I also have a right to use it for writing. And if someone puts a gun to my head and says, if you use that pen, I'll shoot you, they have taken my property. They've taken my control.

QUESTION: If I -- if I say to you, don't -- don't use that pen, or I'll do something unlawful and you

don't use the pen, I have obtained the pen.

MS. CLAYTON: You have obtained control.

QUESTION: In -- in ordinary parlance, I have obtained the pen.

MS. CLAYTON: Your Honor, in the Florida Prepaid case, in the Craft case, in the Drye case, this Court made crystal clear the essence of intangible -- and, for that matter, tangible property is the rights that come out of it, especially the right of control. The right to control my pen, the right of the clinics to control their --

QUESTION: Or what about the right to perform a job? Let's think of a labor strike.

MS. CLAYTON: Absolutely.

QUESTION: And -- and think of the strike, my goodness, where people can't get into the factory. And -- and somebody comes out and says, you've -- you've interfered under the Hobbs Act and have obtained property; namely, my right to perform my job is interfered with.

The person at the soda fountain -- you've heard the litany.

MS. CLAYTON: Right.

QUESTION: There are the soda fountain -- the sit-ins. The soda jerk who wouldn't serve the black customers. Well, this -- this is interfering with my right to perform my job.

I mean, this seems -- you have another statute that you can sue under. But a lot of -- a lot of people who don't like these various demonstrations don't, and they'll all be in under the Hobbs Act and -- and RICO and so forth. I'm rather concerned about this problem. I'd like you to address it.

MS. CLAYTON: I'd like to address those, Justice Breyer. Let's start with the soda joke -- jerk example.

Martin Luther King didn't tell his followers to go into the Woolworth's and bash the people around and forcibly prevent the white people from getting service.

QUESTION: No, but just obstructing -- just obstructing -- you've used the term violence several times. That's not what the instruction required.

MS. CLAYTON: It --

QUESTION: As -- as your argument to the jury itself indicated, it was enough if they obstructed the entrance and failed to part like the Red Sea --

MS. CLAYTON: Not true.

QUESTION: -- if somebody wanted to go in.

MS. CLAYTON: Justice Scalia, that is not correct. We -- the instruction required that the respondents be made to give up property. We -- and -- and question 12 ensured that a mere blockade or sit-in --

question 6 on the jury form asked the jury if any of the predicate acts they found was based on a mere blockade and sit-in. The jury said no. I told the jury don't include in your predicate acts -- I told them -- anything that was based on mere speech, or mere presence, or the message. It had to be something that involved force or violence, the wrongful use of --

QUESTION: I -- I am reading the closing argument on behalf of the clinic plaintiffs at the trial, and it says, in every issue we've shown you the property rights of the clinics and the women were extorted under RICO. Even a few hours of deprivation of legal rights will satisfy the RICO act of extortion.

There is one way, I guess, in which you don't have the element of force in a blockade, and that would be if the blockaders did something that they were specifically instructed that they should never do, that is, politely move aside, part like the Red Sea, and let a woman through.

But you know that never happened. No witness ever testified to that. No witness -- not defense, not plaintiff -- ever said that any of the blockaders were instructed to let women through.

In other words, you told the jury that you could find an offense here under the Hobbs Act by the mere

blockade. It wasn't smacking people around. It was just not letting people in.

MS. CLAYTON: No, Your Honor. If the jury had found a mere -- first of all, that was argument. The jury follows instructions not argument, as the Weeks case from this Court has held. But the evidence supported --

QUESTION: So you're -- you're changing your position here.

MS. CLAYTON: No, Your Honor.

QUESTION: I see.

MS. CLAYTON: When we made -- we made that argument, but we also told the jury that if they were basing any predicate acts on the mere presence and a mere blockade, mere sit-in, they had to put yes to question 6. They put no because we showed them that they had to find that any predicate act needed an element of force or violence. And that's what PLAN did. It used these --

QUESTION: Well -- well, but still -- still it seems to me that your -- your theory doesn't depend on violence. Your theory is that you're obtaining -- or that the defendants here were obtaining property because they prohibited its use. That's your theory.

MS. CLAYTON: Yes, Your Honor, by -- by wrongful means. That's correct.

QUESTION: And -- and so -- so long as the means

were wrongful, the obtaining definitional problem still remains, and I think you should address that.

MS. CLAYTON: I'd like -- yes, I'd like to go back to the Carpenter case. Mr. Winans had the information, but then he wrongfully obtained it. How did he wrongfully obtain it? When he exercised dominion or control over it. This Court said he -- he wrongfully obtained it when he deprived -- that was this Court's word -- deprived the Journal of its right to control that property.

In the Green case, the same way. The --

QUESTION: How about Carry Nation? I -- you would concede, I take it, based on your argument that if RICO had been around then and the Hobbs Act, that she would have been in violation.

MS. CLAYTON: I would, Your Honor, if she had been doing it to get consent, to get the business to change its ways, which I guess she was. Yes, that's not the lawful way. If my client, the National Organization for Women, organized people to go to Augusta Golf Course and tear up the greens until they let women members, that would be extortion.

QUESTION: But it is -- it is strange to think of Carry Nation, that notorious extortionist. I mean, you know, that's just not the crime involved. There --

there's a crime there, but is it extortion?

MS. CLAYTON: Your Honor, the Hobbs Act doesn't give exemptions for motives, as this Court has repeatedly held. There's no more a motive requirement there than there is under RICO.

QUESTION: What's the difference between --

QUESTION: Ms. Clayton, may I ask you one question? I just -- I -- I want to be sure I heard you correctly. There's a definition of property in the instructions, a three-part definition, at page 158. Did you tell us that that instruction was not objected to?

MS. CLAYTON: Oh, no, I don't believe I said that.

QUESTION: I just misunderstood you.

MS. CLAYTON: The -- the petitioners had offered a definition of -- of extortion that was part with property, and they didn't define it. So at the trial -- at the pretrial stage, that was all they offered. They didn't object then.

During the course of trial, they made numerous objections. I can't say they never objected. They didn't timely object.

And their original view of what extortion meant was part with property, which is the same I think as give up property.

QUESTION: What is the difference between coercion and extortion?

MS. CLAYTON: The difference is whether property is being attacked. When you coerce somebody to give up their First Amendment right, that might be coercion, but since it's not focused on property, it's not extortion.

QUESTION: What would you coerce them to do that is not the giving up of property? Give me an example.

MS. CLAYTON: To stop speaking. You don't have property in your speech. Liberty interests are not the subject of extortion, but -- but property interests are. Every extortion is a coercion.

QUESTION: Shouldn't we draw the line this way? Instead of speaking as, for example, the Solicitor General did and some of the cases do about obtaining control, isn't the way to -- to adhere to the line between the liberty and property distinction to say that you extort if you gain control in a way which prevents them from doing business, i.e., engaging in a property exercise, but you do not extort if you gain control simply in the way they do business, i.e., their choice of whom to serve?

If we draw that distinction, then the old sit-ins in the lunch counter weren't there to stop them from doing business. They wanted them to do business. They wanted them to do business with them. Whereas, the

case which I think you have is a case that could be argued that the point of it was to stop the business, period, and that gets into property and crosses the line from liberty to property. Would you accept that distinction?

MS. CLAYTON: Not quite, Justice Souter. I certainly agree that the -- that the sit-in protesters were not extorting anybody because they were trying to change people's mind by persuasion, not by intimidation. But I believe if you look at the old --

QUESTION: Well, they wanted a -- I mean, but they -- the --

MS. CLAYTON: They --

QUESTION: -- their immediate object was to get the sandwich or the Coke. So that was easy.

MS. CLAYTON: But -- okay, that -- that may be right.

But when we look at the old organized crime, the classic organized crime extortion cases that the Hobbs Act was based on, we see organized crime going in saying, let these people run your pension fund. Don't do business with these people. Fire these people. Hire those. Any attempt to control a lawful business decision I believe is extortion, whether it's positive or negative.

QUESTION: Well, maybe -- maybe it is, but I -- I think -- among other things, I think we are, and should

be more concerned about the First Amendment issues which arise when you cross the line into liberty than the -- than the cases were 40 years ago and --

MS. CLAYTON: But the proper -- excuse me, Justice Souter. The best way to address the First Amendment issue is to apply the standards of Claiborne Hardware to any extortion at conduct, as was done here. Make sure that the petitioners had to have specific intent that the crime be done. Make sure it was done knowingly, willingly, wrongfully, not just accidentally. Make sure the enterprise authorized or ratified it. Those were the instructions given here. There was -- nothing could be a predicate act unless all those tests were met.

And then on top of that, they had to use demands, wrongful demands, to control lawful business decisions. And I do believe that decisions either to do something or not to do something, as long as the business owner -- say the company makes round widgets and square widgets. And the -- the extortionist says, we don't like round widgets. We want you to only make the other kind. Or maybe they don't make round and they want them to start doing it. That's as much a control of their business decisions as all those classic organized crimes that were the basis of the Hobbs Act. And it's just as offensive here.

Your Honor, we ask the clock not to turn back the -- ask the Court not to turn back the clock on 50 years of Hobbs Act jurisprudence which protected businesses and their customers in making their lawful business decisions.

We ask the Court to decline to add any limitations like tangible or personal to -- to the Hobbs Act. By the way, even if you did, the State law --

QUESTION: You want to retain the labor union exception, however, I assume.

MS. CLAYTON: And of course. Enmons -- and it's section (c), Your Honor. It's section (c) of 1951 that says nothing in this law will affect -- and then they list all the labor laws. That's why there's a union exception. Plus the -- the New York and all the other States had not only a statutory labor exception, but common law.

And please don't --

QUESTION: Thank you, Mrs. -- Ms. Clayton.

MS. CLAYTON: Thank you. Thank you, Your Honors.

QUESTION: Mr. Englert, you have 6 minutes left.

REBUTTAL ARGUMENT OF ROY T. ENGLERT, JR.

ON BEHALF OF THE PETITIONERS

MR. ENGLERT: Thank you, Justice Stevens.

The defendants in this case objected strenuously

to reading the word obtain out of the Hobbs Act. They did not say that giving up property is enough. If you read the 1995 opinion wrongly denying the 12(b)(6) motion, that's all over the place. If you look at pages 4324 to 4340 of the transcript at the jury colloquy, the point that there needs to be obtaining was made quite strenuously.

QUESTION: Was -- was this particular instruction, the one that I read from in 1998, the instruction that had the three parts to it -- was that objected to?

MR. ENGLERT: Yes, at the -- at the pages I indicated.

People v. Barondess. The work stoppage led to obtaining $100. Of course, it was extortion. That's the property in that case. That's -- it's cited in footnote 16 of our opening -- of the Scheidler opening brief.

United States v. Cleveland Indians Baseball Company. This Court reminded us members of the bar that the tendency to assume that a word used in two different legal rules always has the same meaning, has all the tenacity of original sin, and must constantly be guarded against. To think that property's definition in tax cases and in Fifth Amendment takings cases is necessarily the definition of the Hobbs Act is simply wrong. The Hobbs

Act draws its definition of property from the common law and the New York law, not from takings cases and tax cases.

The First Amendment is in this case. Yes, the Court did not take the First Amendment question, but the principle of constitutional avoidance always governs the construction of statutes. And Ms. Clayton concedes that classic protest activities that are venerated in American history in retrospect would be covered as extortion by her definition. That should give the Court pause.

Claiborne --

QUESTION: They wouldn't -- they wouldn't be if you observed the distinction I was throwing out.

MR. ENGLERT: The -- the answer to that distinction, if I may, Justice Souter, is Claiborne Hardware and Carry Nation -- those fact patterns certainly would be covered even under the distinction you suggest. There were 10 acts of violence in 1966 in Claiborne Hardware.

QUESTION: Yes, Carry Nation would be covered. There's no question. The -- the lunch counter sit-ins would not, as I understand it.

MR. ENGLERT: Well, actually I -- I don't think that's historically accurate. I think there was an effort to stop the lunch counters from serving other people in

addition to getting them to -- to serve black people. But it doesn't matter.

QUESTION: Well, the --

MR. ENGLERT: It -- it -- there are -- there are examples that this Court should be concerned, I respectfully submit, about calling extortion under Ms. Clayton's definition, and that would include the facts in Claiborne Hardware. That would include the Carry Nation example. The Seamless Garment Network brief goes into many other examples.

QUESTION: If the conduct in Claiborne Hardware was pretty rough. Maybe it should have been included.

QUESTION: You're not going to get -- you're not going to get my --

MR. ENGLERT: Your Honor, the -- the opinion of the Court in that case refers to it has having elements of majesty as well as elements of violence. And the Court really should be concerned about whether the classic historical pattern -- and please look at the Seamless Garment Network brief -- the classic historical pattern of venerable leaders whose followers get out of hand is really what is meant by Hobbs Act extortion and RICO.

QUESTION: No majesty with Carry Nation. I mean, you don't get my sympathy by saying you -- you might have interfered with Carry Nation on --

MR. ENGLERT: Well, I --

QUESTION: He didn't say might have. You said that you would.

MR. ENGLERT: There's another more legalistic reason.

QUESTION: I think both sides agree on Carry Nation.

MR. ENGLERT: If -- if I may, there's another more legalistic reason why Ms. Clayton's and the Solicitor General's position has to be wrong, and Justice Breyer and others have laid their finger on it, Justice Ginsburg as well.

What they're talking about is the classic example of coercion, not extortion, and for those who like legislative history, the fact that organized labor got coercion out of the statute should give you pause. For those who don't like legislative history, the fact that there's a list of predicate acts and coercion isn't one of them should give you pause.

I think almost everyone agrees that there has to be at the very least a remand in this case, and Ms. Clayton hasn't quite conceded it. But if this Court's decision in Griffin v. United States, a criminal case, is applicable in civil cases or if this Court's decisions in Yates v. United States, Maryland v. Baldwin, Sunkist

Growers are applicable, then this jury verdict, which almost indisputably rests, at least in part, on indefensible notions of property, has to be reversed.

QUESTION: Can I ask you one question about that? Did the individuals get damages here, or was it just the clinics?

MR. ENGLERT: Only the clinics for extraordinary security costs.

QUESTION: Okay.

MR. ENGLERT: Violence. Let's talk about violence for a moment. Please look at -- at special interrogatory 4(e). The jury was asked to find how many acts or threats of violence to persons or property were there. The jury said four. Ms. Clayton argued 30 in her closing argument, and the jury said 4. So actually the jury rejected -- we know to a certainty the jury rejected most of NOW's evidence, and there weren't even any allegations that Mr. Scheidler, Mr. Scholberg, or Mr. Murphy actually engaged in violence. There were allegations they were connected to violence, not that they engaged in violence. And I should say my clients are proponents of nonviolence. Mr. Terry was not alleged to engage in acts of violence either, I should add.

RICO. Section 4 of the Sherman Act is repeated almost verbatim in 1964(a) and 1964(b). Section 7 of the

Sherman Act is repeated almost verbatim in 1964(c). Section 4 of the Clayton Act is repeated almost verbatim in 1964(c). Section 15 of the Clayton Act is repeated almost verbatim in 1964(a) and 1964(b). Section 16 of the Clayton Act, the statute that authorizes injunctions, nowhere in 1964.

And as -- as -- thank you.

JUSTICE STEVENS: Thank you, Mr. Englert.

(Whereupon, at 11:07 a.m., the case in the above-entitled matter was submitted.)