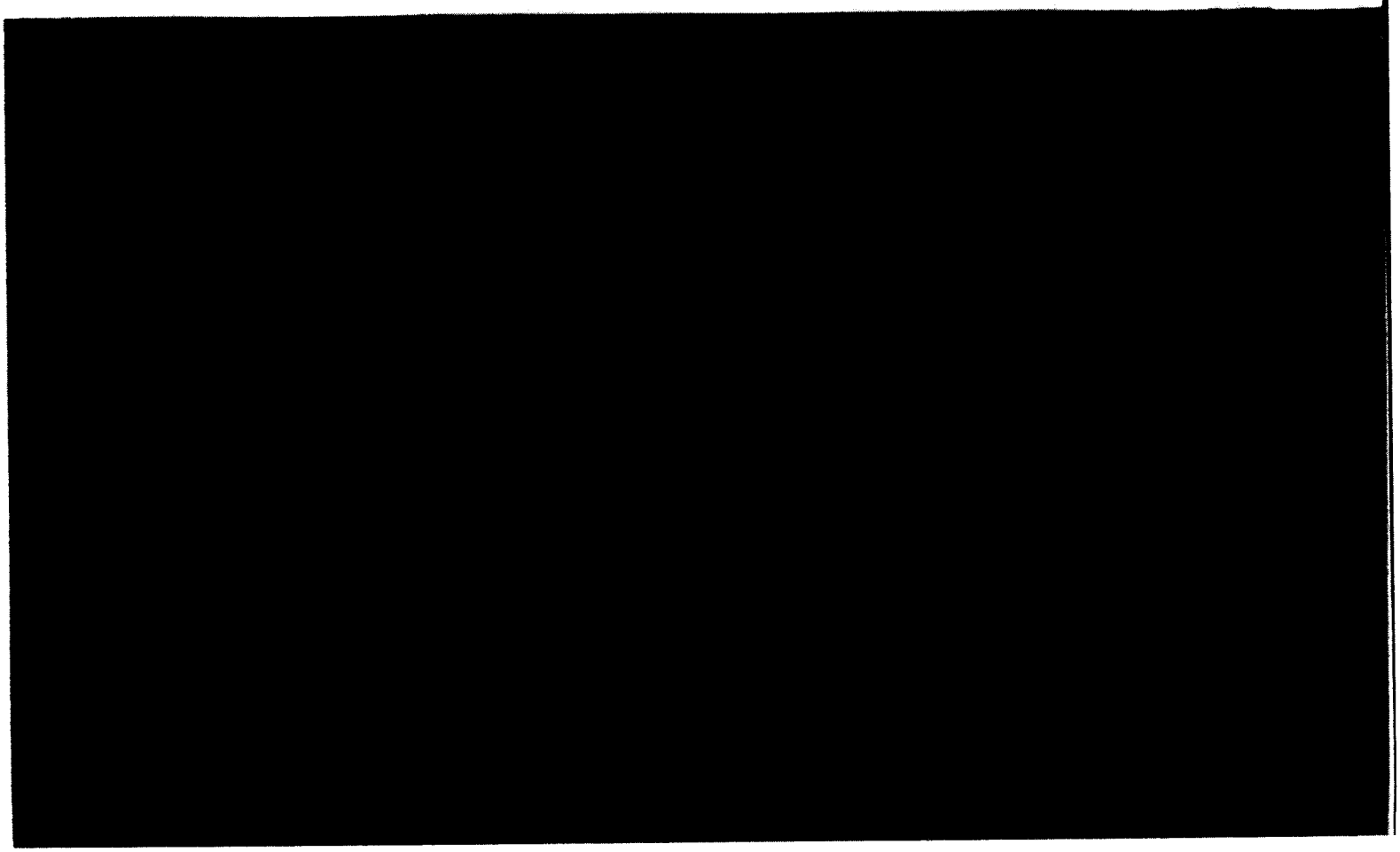

QUESTIONS PRESENTED

Petitioners, a national membership organization, and two abortion clinics, brought claims under the Sherman and Clayton Antitrust Acts, 15 U.S.C. § 1, § 26, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, and pendent state claims seeking treble damages and a nationwide, federal injunction against persons and organizations who engage in political protest against abortion clinics—including, *inter alia* demonstrations, rallies, picketing, leafletting, sit-ins, and other First Amendment-related activities. Over the course of five years, Petitioners engaged in voluminous discovery and filed a first and second amended complaint. The district court dismissed all counts of their second amended complaint. The court of appeals unanimously affirmed.

1. Whether Petitioners' antitrust complaint against demonstrators was properly dismissed when they failed to allege that the demonstrators engage in business activity in the commercial marketplace, are commercial competitors, have any market power, have any commercial motive, or engage in any commercial conspiracy.

2. Whether Petitioners' complaint alleging RICO extortion by demonstrators was properly dismissed when they failed to allege any economic motive in the enterprise or the predicate act.

3. Whether Petitioners' complaint alleging RICO extortion was properly dismissed when they failed to allege that the demonstrators obtained, or conspired to obtain, any property from the clinics, doctors, patients, or prospective patients.

4. Whether Petitioners' antitrust and RICO claims were properly dismissed when they failed specifically to tailor their claim against demonstrators whose exercise

of First Amendment rights of free speech, assembly, petition, and association was allegedly intertwined with sporadic acts of trespass, theft, and vandalism.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-780

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,
Petitioners,

v.

JOSEPH M. SCHEIDLER, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENTS JOSEPH M. SCHEIDLER, TIMOTHY MURPHY, ANDREW SCHOLBERG, AND THE PRO-LIFE ACTION LEAGUE, INC.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the U.S. Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Hobbs Act provides, in pertinent part:

> (1) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. § 1951(b)(2) (1982). Other statutory provisions are reproduced in the Petition (Pet. at 2-3).

STATEMENT OF THE CASE

Petitioners filed a single-count complaint under the federal antitrust laws (Sherman Act, 15 U.S.C. § 1, and the Clayton Act, 15 U.S.C. § 26), in 1986 in the District of Delaware against Respondents and other defendants.[1] The suit was voluntarily dismissed. Petitioners refiled their single-count, antitrust class action complaint in the Northern District of Illinois on October 17, 1986 (No. 86 C 7888). Petitioners sought declaratory and nationwide injunctive relief. No class was ever certified.

Petitioners pursued discovery nationwide—reviewing hundreds of tapes, files, and correspondence of Respondents and numerous others—which ensued for four years, with depositions conducted in seven cities across the country—including Chicago, Fargo, North Dakota, Fort Wayne, Indiana, St. Louis, Durham, North Carolina, Jacksonville, Florida, and Washington, D.C. The extensive discovery matters caused the district court to defer discovery matters to a federal magistrate.

Petitioners filed a first amended complaint on February 2, 1989, which added alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, in addition to the original

[1] The plaintiffs originally consisted of the National Organization for Women, the Delaware Women's Health Organization, and the Ladies Center of Pensacola. The Ladies Center was dismissed from the case. Petitioner Summit Women's Health Organization was added in the first amended complaint. For purposes of brevity, Respondents refer to the plaintiffs as the "Petitioners" throughout this Brief in Opposition.

Joseph Scheidler and the Prolife Action League, Inc. were among the original defendants. Timothy Murphy and Andrew Scholberg were added as defendants in amended complaints. For purposes of brevity in this Brief in Opposition, "Respondents" refers to Joseph Scheidler, the Pro-life Action League, Inc., Timothy Murphy, and Andrew Scholberg, unless otherwise indicated. Pursuant to this Court's Rule 29.1, the Pro-Life Action League, Inc. has no parent company or subsidiary.

Sherman Act allegations, and added prayers for treble damages. The first amended complaint also added a host of new defendants, including Vital-Med Laboratories and Conrad Wojnar, alleged new conspiracies, and added three new pendent state claims. The conspiracy allegations were so broadly drawn that Petitioners later claimed that they embraced hundreds of thousands of co-conspirators.

After nearly three years of discovery, Petitioners filed a second amended complaint on September 22, 1989 (hereinafter "the Complaint") (*See* Appendix 1a). The Complaint alleged that Respondents conspired to "drive every clinic in the United States . . . out of business" (Complaint, § 26) and that they had engaged in "unlawful, concerted action, including repeated acts of trespass, extortion and vandalism directed at women's health centers. . . ." (¶ 27). Petitioners also alleged the theft of fetal remains and their use in a media campaign against abortion clinics. They alleged that Respondents and other defendants, and one or more employees of defendant Vital-Med, "conspired to steal fetal remains located in Vita-Med's research laboratory in Northbrook, Illinois," stole some 4,000 specimens over a period of 10 months, and conspired to "use the specimens as part of their drive to disrupt the operations of health clinics generally. . . ." (¶¶ 64-66). Among the alleged uses were "actions designed to intimidate and harass clinics by focusing attention on the stolen specimens" including "highly publicized" funeral masses and burials (¶¶ 37, 64-78). Petitioners alleged that the purpose of Respondents' actions "is to force all clinics that perform abortions out of business and to eliminate the choice of abortion for women who are pregnant." (¶ 85).

The only allegations about "competition" are contained in ¶¶ 2, 17-19, and 80-91. Paragraph 2 alleged:

> In furtherance of their conspiracy, defendants and their co-conspirators have, inter alia . . . established

> competing pregnancy testing and counseling facilities in the vicinities of the clinics, sometimes in the same buildings where clinics are located, homes for pregnant women and, on information and belief, prenatal and delivery services, foster homes and private adoption agencies.

(App. 2a). Paragraph 11 also alleged that Randall Terry "runs a pregnancy testing and counseling center in Binghamton, New York" and ¶ 13 alleged that Conrad Wojnar "runs a number of anti-abortion women's medical clinics in the Chicago area. . . ." In addition, the "business" of the Pro-Life Action League, Inc. (¶ 17), the Pro-Life Direct Action League, Inc. (¶ 18), and Operation Rescue (¶ 19) is alleged to "consist[] of disrupting and closing women's health centers that perform abortions through the use of illegal activity."

Count I, brought by N.O.W. and the abortion clinics, alleged that the actions of various defendants were designed and threatened to restrain interstate trade, had "an anti-competitive effect," increased expenses and costs, made it more difficult for women to obtain abortions, damaged the abortion businesses, interfered with "ongoing business and contractual relationships" and threatened to increase the risk of medical complications "by exposing . . . women to a pattern of harassing and intimidating conduct designed to create stress and to stop them forcibly from exercising their choice to have an abortion" (¶¶ 80-91). Petitioners asked for declaratory relief "that the actions of" Respondents "have violated the rights of" the clinics and their patients to be free of restraints of trade and for injunctive relief to enjoin Respondents both "from carrying out a concerted effort to drive women's health centers . . . out of business" and "from using unlawful means to drive women's health centers . . . out of business." (¶¶ 79-93).

The RICO claims were brought only by the abortion clinics, also as purported class actions. Count II is a RICO

§ 1962(a) claim. Petitioners alleged that Respondents formed enterprises "with common purposes, including driving all clinics that provide abortion services out of business" (¶¶ 95-96). The sole RICO predicate act alleged is extortion, described as:

> Defendants conspired to, attempted to or did wrongfully use threatened or actual force, violence or fear to induce or attempt to induce the employees of affected clinics to give up their jobs; doctors involved with affected clinics to give up their economic right to practice medicine at the plaintiff clinics; patients of affected clinics to give up their right to obtain services at the plaintiff clinics; and prospective patients of clinics to give up their constitutional right to decide whether and where to obtain medical services free from fear of violence or threatened or actual force.

(¶¶ 97-98). Petitioners made no allegations that any defendant or co-conspirator attempted to obtain, or obtained, any property or thing of value from any clinic, doctor, patient, or prospective patient.

Counts III and IV are RICO § 1962(c) and (d) claims. They alleged that Respondents and other defendants are associated with one of the enterprises, Pro-Life Action Network (PLAN), and "participated in PLAN's affairs through a pattern of racketeering activity" (¶ 109), namely the extortion alleged in ¶¶ 97-98. Petitioners alleged that Respondents engaged in a conspiracy to "use the income they received from a pattern of racketeering activity . . . to establish or operate PLAN" and "agreed to the commission of the extortionate acts from which the above-mentioned income would derive" (¶¶ 112-113). The remaining counts alleged pendent state claims.

On August 30, 1990, Respondents filed a motion to dismiss the Complaint or in the alternative for a more definite statement in the form of a RICO cases statement. Petitioners filed a RICO cases statement on March 18, 1991, including 29 pages of text and two appendices of 41

and 36 pages respectively, alleging numerous acts of violence, including even arson and bombing by Respondents' co-conspirators. The Complaint alleged sporadic acts of trespass, vandalism, assault, battery, and theft by Respondents, other defendants, or unnamed co-conspirators (¶¶ 2, 27, 40, 42, 46-50, 61, 64, 67, 74, 97-98). There are no allegations in the Complaint of bombing or arson by any Respondent, other defendants, or their "co-conspirators."

Two months later, on May 28, 1991, the district court granted Respondents' motion to dismiss, holding that Petitioners failed to state a claim under either the antitrust laws or RICO, and dismissed the case in its entirety. *National Organization of Women v. Scheidler*, 765 F. Supp. 937 (N.D. Ill. 1991). The court of appeals unanimously affirmed. 968 F.2d 612 (7th Cir. 1992). A petition for rehearing was filed and denied on August 4, 1992, with "no judge in active service" requesting a vote on the suggestion for rehearing en banc (Pet. App. G-2). The Petitioners filed their petition for certiorari on November 2, 1992. An extension of time to December 23, 1992 to file Briefs in Opposition was granted to all Respondents.

REASONS FOR DENYING THE WRIT

From the founding, political protest has played an integral role in shaping public opinion and policy in American life. Our nation was born of the political "demonstrations" and "riots" instigated in response to the Stamp Act of 1765. J. Ferling, *John Adams: A Life* 41-42 (1992). The "crisis caused many in the colonies to rethink ingrained attitudes" and "transformed the constitutional and ideological outlook of many within the colony." *Id.* at 42. Seventy-five years later, abolitionists pursued a strategy to rescue slaves from their owners in cities both north and south. Rescue—to prevent loss of freedom or life—has a venerated place as a part of

political expression in American history. L. Filler, *The Crusade Against Slavery: 1830-1860* (1960). More recently, the Reverend Martin Luther King, Jr. and the civil rights movement pursued "non-violent direct action," including picketing, marches, leafletting, boycotts, and sit-ins. *See e.g., Taylor v. Louisiana*, 370 U.S. 154 (1962); *Garner v. Louisiana*, 368 U.S. 157 (1961). Such sit-ins were criticized as "violent" because "they created 'a great deal of tense pushing and shoving, in an atmosphere that is electric with restrained violence and hostility.'" S. Oates, *Let the Trumpet Sound: The Life of Martin Luther King, Jr.* 161 (1985). The demonstrators sought to create "tension" to induce change and to bear witness to the evils against which they were protesting.[2]

Under Petitioners' theory of this case, these Americans were racketeers and antitrust violators, not patriots or social reformers. Those who dumped British tea in Boston Harbor "extorted" the right to do business under "force, threat or fear" and made it harder to "compete" with other tea merchants. Those who rescued slaves "extorted" the right to trade slaves and made it harder to "compete" by increasing costs. The civil rights demonstrators of the 1960's "extorted" the right to serve food to whites only at lunch counters and had an "anti-competitive effect" by boycotting white merchants.

Here, Petitioners bootstrap what are, at most, state torts and misdemeanors through elaborately contrived interpretations of the Sherman Act and RICO in an attempt to obtain federal jurisdiction and a nationwide

[2] Oates at 216 ("The purpose of direct action, King said, was 'to create such a crisis and foster such a tension that a community which has constantly refused to negotiate is forced to confront the issue.") 218, 287, 327, 397; D. Garrow, *Bearing the Cross: Martin Luther King, Jr. and the Southern Christian Leadership Conference* 236 (Vintage Books 1988) ("'If you create enough tension, you attract attention to your cause and get to the conscience of the white man,' King explained."), 246-47, 273-74.

injunction against their ideological opponents, pro-life demonstrators. This case does not warrant this Court's review because the decision below was clearly correct and presents no conflicts with other circuits. The Sherman Act was not intended to apply to non-commercial, political protest by demonstrators not involved in the commercial marketplace. Likewise, RICO requires that the predicate act or enterprise be economically motivated. Furthermore, the judgment below could be affirmed on three alternative grounds. First, the *Noerr-Pennington* doctrine immunizes these political demonstrators. Second, no Hobbs Act extortion was properly pled in this case because Petitioners did not, and cannot, charge that the demonstrators obtained any property of the Petitioners or their patients. Third, Petitioners were subject to a heightened pleading burden which they repeatedly spurned, seeking relief against First Amendment-protected activity. Accordingly, the petition should be denied.

I. THERE IS NO CONFLICT IN THE CIRCUITS ON THE COURT OF APPEALS' HOLDING THAT THE SHERMAN ANTITRUST ACT DOES NOT APPLY TO NON-COMMERCIAL PROTEST.

Petitioners' claimed conflict in the circuits on the antitrust holding is illusory. It is based on a misreading of the court of appeals' opinion and on a 1920 Eighth Circuit case that is distinguishable and is no longer good law. Neither warrants review by this Court.

Petitioners' claim that the court of appeals created a "good motives exemption" to the Sherman Act is spurious. The court of appeals did not conclude that Respondents had "good motives"; indeed, the court exercised judicial restraint by finding no Sherman Act liability despite its comment that the demonstrators' actions (merely alleged) were "reprehensible." 968 F.2d at 621, 630. Rather, the court held that the Sherman Act was not intended to apply to non-commercial public opposition and demonstration, notwithstanding an impact on business. *Id.* at 614, 617, 622. The Sherman Act was "intended to prevent business competitors from making restraining arrangements for their own ecoonmic advantage." *Id.* at 621.

The sole alleged conflict that Petitioners can identify is between the decision below and a 1920 case from the Eighth Circuit, *Council of Defense v. International Magazine Co.*, 267 F. 390 (8th Cir. 1920). This case is distinguishable upon the facts and the holding. There, a state-created committee implemented a boycott to affect the competition between "patriotic" and "unpatriotic" magazines by trying to persuade newsdealers to cancel contracts with an "unpatriotic" magazine owned by William Randolph Hearst. The aim was to single out and destroy Hearst's business. *Id.* at 411. However, commercial relationships and activities were directly at issue and, unlike Respondents here, the Council of Defense did not seek to ban the market altogether.[3]

More important, the Seventh Circuit's conclusion that *Council of Defense* is no longer good law is clearly correct. It was significantly limited by the Eighth Circuit in *Missouri v. NOW*, 620 F.2d 1301, 1304 n.4, 1315 n.16 (8th Cir. 1980). Moreover, it precedes this Court's clearly controlling decisions in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), on which the Seventh Circuit extensively relied. *Apex Hosiery* clearly establishes that "the Sherman Act was directed only at those restraints whose evil consequences are derived from the suppression of competition in the interstate market,

[3] It is apparent from the face of the Complaint that Respondents sought to eliminate abortion, that is, not to monopolize the market but to ban it. Similar protest has been targeted against numerous industries (Pet. App. A-17). This is a classic example of "decommodification" (Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849 (1987)) or an "inalienability rule." Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).

so as 'to monopolize the supply, control its price or discriminate between its would-be purchasers.'" 310 U.S. at 511 (cit. omit.). In light of the clear consistency between *Apex Hosiery* and the decision below, *Council of Defense* creates no conflict that is worthy of this Court's consideration.

II. THE COURT OF APPEALS' ANTITRUST DECISION WAS CLEARLY RIGHT BECAUSE PETITIONERS FAILED TO ALLEGE THAT THE DEMONSTRATORS ENGAGE IN BUSINESS ACTIVITY IN THE COMMERCIAL MARKETPLACE, ARE COMMERCIAL COMPETITORS, HAVE ANY MARKET POWER, HAVE ANY COMMERCIAL MOTIVE, OR ENGAGE IN ANY COMMERCIAL CONSPIRACY.

Political activity intersects antitrust analysis at two distinct points. First, if the activity is essentially political, rather than commercial, the activity is not subject to the reach of the Sherman Act just because it affects business. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959); *Parker v. Brown*, 317 U.S. 341 (1943); *Apex Hosiery v. Leader*, 310 U.S. 469 (1940). Second, if commercial competitors employ political activities to influence any branch of government, their commercial activity—which might otherwise be subject to antitrust regulation—may be immunized. *Eastern Railroad v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). In this case, the political and non-commercial nature of Respondents' motive and activity serves to both absolve and immunize them.

Petitioners filed this antitrust case against political demonstrators who consider Petitioners' abortion business to be inherently evil and, therefore, seek to suppress it through political protest. The court of appeals focused on the intent and legislative history of the Sherman Act and concluded that it was not meant to "outlaw any contract, combination or conspiracy that restrains trade."

968 F.2d at 617. "Congress did not intend to reach every activity that might affect business" (*Id.* at 620) and the Sherman Act was "intended to prevent business competitors from making restraining arrangements for their own economic advantage." *Id.* at 621. The court concluded that "[d]efendants are not involved in business, and have no ability to concentrate economic power." *Id.* As the district court succinctly put it, the antitrust laws were not intended to apply to a case "which involves political opponents, not commercial competitors, and political objectives, not marketplace goals." 765 F.Supp. at 941.

The absence of commercial competition and marketplace goals is apparent on the face of the Complaint. The substance of Petitioners' antitrust claim is contained in ¶¶ 1, 2, 11, 13, 79-93. They allege that there is an "agreement" between Respondents to "restrain interstate trade" and that their activities have restrained trade (¶ 81); that the agreement and activities have "an anti-competitive effect" (¶ 82); that abortion clinics have been "damaged" by reason of the activities (¶ 83); that the activities force clinics out of business and increase costs (¶¶ 86-87); that the activities make it "more difficult for women to obtain abortions" (¶ 88); that abortion clinics "are less able to compete with other facilities offering the same or similar services" (¶ 89); that the activities "interfere with the on-going business and contractual relations" (¶ 90); and that these violate Petitioners' rights to be free of restraints of trade (¶ 93).[4] These say no more than that anti-abortion protests have affected the abortion industry.

[4] Petitioners' contention that the "lower courts agreed that the conspirators' goal was to lessen competition" is false. No evidentiary hearings were held in the lower courts, and no findings of fact were made. Petitioners' Appendix at D-3 shows that the district court was merely describing the Complaint as alleging that Respondent Wojnar's activities "were . . . intended to . . . lessen competition by putting them out of business."

While it is clear on the face of the Complaint that the parties are "competitors," their competition is ideological. No facts are well pled that indicate that Respondents are engaged in business, that the parties are commercial competitors, that Respondents have employed any commercial means to suppress Petitioners' business, or that Respondents are engaged in any commercial conspiracy that is cognizable under the antitrust laws. The Complaint alleges that Respondents engage in a wide variety of activities, including "block[ing] ingress and egress to clinics," "invad[ing] clinics and damaged property," and trespass (¶ 2). Each of these activities may have an impact on the business of the clinics. But that does not mean that the activities have an "anti-competitive effect" within the meaning of the antitrust laws. "Anti-competitive" is a term of art which assumes commercial activity within the market. No allegation is made, or can be, that Respondents are manufacturers, purchasers, suppliers, retailers, or dealers, or that the parties are engaged in any horizontal or vertical relationship. The antitrust laws, however, are concerned about eliminations of commercial, not ideological, rivalry. In order for there to be "competition," there must be competitors, and in order for there to be "competitors," they must be rivals in the business. R. Bork, *The Antitrust Paradox* 49 (1978).[5] The only "marketplace" in which the parties are jointly involved is the "marketplace of ideas." *Schachar v. American Academy of Ophthalmology*, 870 F.2d 397, 400 (7th Cir. 1989). Commercial, and not ideological, competition is the subject of the Sherman Act, as is clear from even a passing reference to basic antitrust precedents.[6] As a matter of law, these allegations, therefore, fail to state a claim under the antitrust laws.

[5] "Competition is inherently a process in which rivals seek to exclude one another." Bork at 49. Competition involves the "effectiveness of rivalry in the general marketplace." Bork at 340.

[6] *See e.g., United States v. General Motors Corp.*, 384 U.S. 127, 146 (1966) ("where businessmen concert their actions in order to deprive others of access to merchandise which the latter want to sell to the public, we need not inquire into the economic motivations underlying their conduct."); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959) ("The Court in *Apex* recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives."); *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 553 (1944) (Act "aimed at combinations of business and capital organized to suppress commercial competition.").

The court of appeals' decision that an antitrust defendant must have a commercial motive or means of action is supported by substantial caselaw. The seminal case is *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), involving a sit-down strike, where this Court held that the Sherman Act was "directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions. . . ." *Id.* at 493. *Apex Hosiery* made clear, "The Sherman Act was not enacted . . . to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to monopolize the supply, control its price, or discriminate between its would-be purchasers.'" *Id.* at 512. Moreover, in *Missouri v. NOW*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980), the Eighth Circuit held that "it was competitors in commerce that Senator Sherman had in mind as the concern of his bill" and "the activities that were meant to be covered are competitive activities by competitors with some self-enhancement motivation . . . ." *Id.* at 1309. The court found that NOW's boycott for ratification of the ERA was "further afield from the central focus of the Sher-