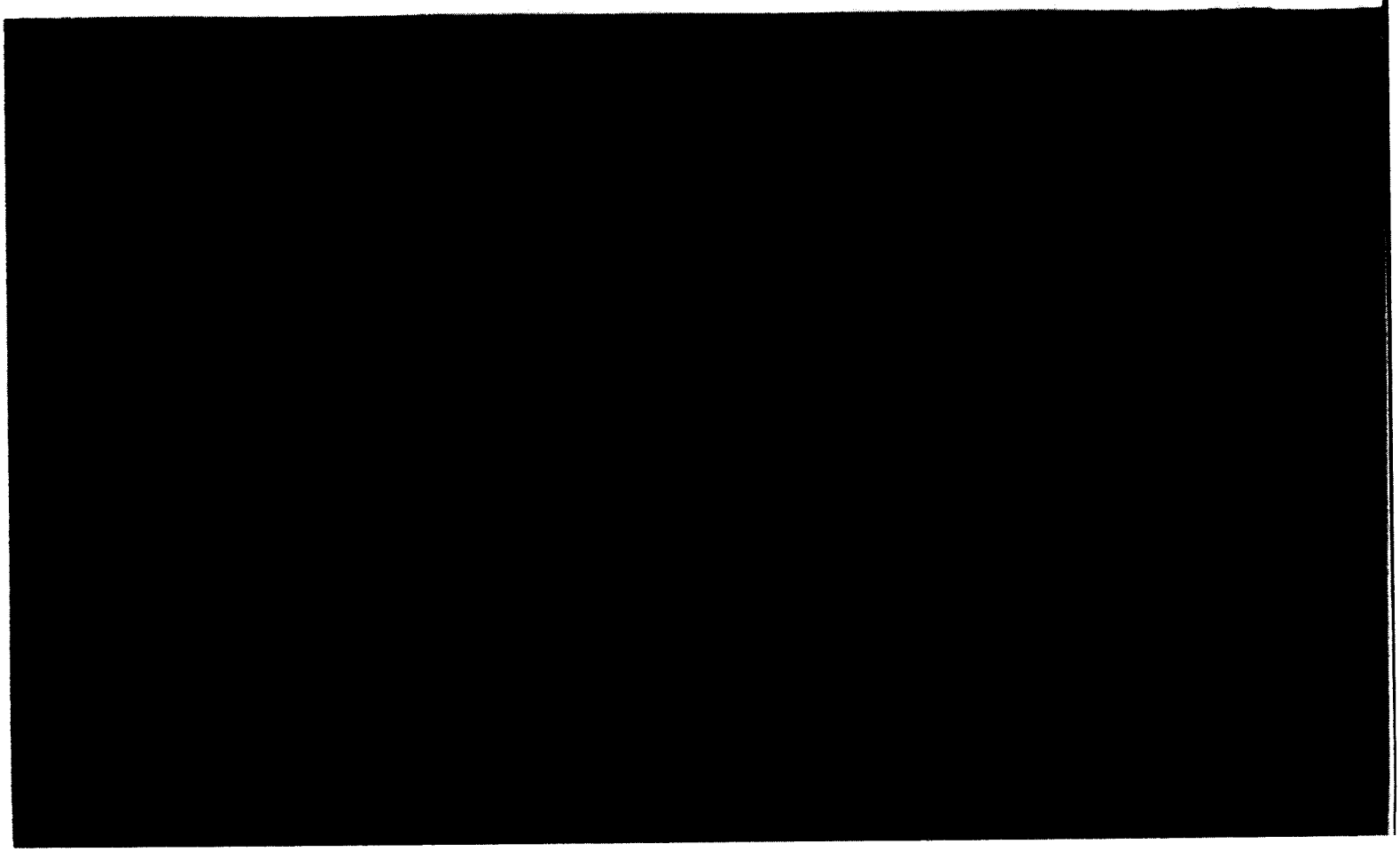

QUESTIONS PRESENTED

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.

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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-

man Act" than the railroad activities in *Noerr*. *Id.* at 1312. Likewise, in *Henry v. First Nat'l Bank of Clarksdale*, 595 U.S. F.2d 291 (5th Cir. 1979), *cert. denied sub. nom., Claiborne Hardware Co. v. Henry*, 444 U.S. 1074 (1980), the court held that state antitrust laws could not be used to enjoin boycotts intended to achieve political results. *Id.* at 303-304. (*Henry* derived from the same factual situation as *Claiborne Hardware*, 458 U.S. at 890 n.5.) Numerous cases support the same proposition.[7]

Petitioners' Complaint cannot survive on the allegation that Respondents sell books or tapes or obtain voluntary contributions (¶ 100). The clear purpose of the sale of books and tapes is educational, and the gathering and expenditure of funds and resources to publicize political views are clearly protected by the First Amendment. *Riley v. Nat'l Fed. of the Blind*, 488 U.S. 781 (1988); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Murdoch v. Pennsylvania*, 319 U.S. 105, 110-111 (1943) ("But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise.").

Petitioners' reliance on ¶ 2 of their Complaint to save their case from dismissal fails. It states in relevant part:

[7]*Parker v. Brown*, 317 U.S. 341, 351 (1943) (Sherman Act "prevented only 'business combinations'"); *Allied Int'l, Inc. v. Int'l Longshoreman's Assn.*, 640 F.2d 1368, 1380-81 (1st Cir. 1981), *aff'd on other grounds*, 456 U.S. 212 (1982); *Council for Employment and Economic Energy Use v. WHDH Corp.*, 580 F.2d 9 (1st Cir. 1978), *cert. denied*, 440 U.S. 945 (1979); *Franklin Music Co. v. Am. Broadcasting Companies*, 616 F.2d 528, 556 (3d Cir. 1979) (Sloviter, J., concurring); *Proctor v. General Conference of Seventh-Day Adventists*, 651 F. Supp. 1505 (N.D.Ill. 1986); *Barr v. National Right to Life Committee*, 1981-2 Trade Cases ¶ 64,315 (M.D.Fla. 1981); *Miller & Son Pav. Co. v. Wrightstown Tp. Civ. Assn.*, 443 F. Supp. 1268, 1271 (E.D.Pa. 1978) ("Congress intended its proscription to be limited to commercial transaction. . . The political nature of the Defendants' activities in this case . . . is . . . fatal to the Plaintiffs' antitrust claim.").

> defendants and their co-conspirators have . . . 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.

The district court found this to be the "sole allegation in the complaint of the commercial nature of defendants' activities" but held that it was not a sufficiently "plain statement" under FRCP 8(a) to state a claim. 765 F.Supp. at 940-41 n.1. Even accepting the allegations of ¶ 2 as true, they beg the question: while the parties may be ideological or political "competitors," no well pled facts are present that they are commercial competitors. Petitioners are required to plead an antitrust conspiracy with specificity. *Associated General Contractors v. Carpenters*, 459 U.S. 519, 528 n.17 (1983). The Complaint alleges that Randall Terry "runs a pregnancy testing and counseling center in Binghamton, New York . . ." (¶ 11) and that Conrad Wojnar "runs a number of anti-abortion women's medical clinics in the Chicago area and is the director of the Des Plaines Pro-Life Women's Center." (¶ 13) No allegation is made that Terry's "center" or Wojnar's "clinics" are engaged in any commercial or business related competition, that these centers "compete" with the Petitioners in any other sense than ideologically or politically, that these "centers" have any effect on business or commerce, that these "centers" have any anti-competitive effect on the business of abortion clinics, or that Terry's "center" or Wojnar's "clinic" has any impact on any local, state, or national market. These allegations, in short, are insufficient to state a claim for relief under the antitrust laws. Should this Court adopt Petitioners' construction that the Sherman Act applies to every non-commercial, political protest merely because

of the effect on business, the federal courts will be very busy indeed.[8]

III. THERE IS NO CONFLICT IN THE CIRCUITS ON THE COURT OF APPEALS' HOLDING THAT RICO REQUIRES THAT EITHER THE ENTERPRISE OR THE PREDICATE ACT BE ECONOMICALLY MOTIVATED.

Petitioners' contention that decision below conflicts with the Third Circuit's decision in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), is illusory. The court below held that "RICO requires either an economically motivated enterprise or economically motivated predicate acts." 968 F.2d at 614. The Third Circuit did not address that question. Instead, it looked at the separate issue of whether extortion under the Hobbs Act requires an economic benefit or motivation. The Third Circuit cited *United States v. Cerilli*, 603 F.2d 415 (3d Cir. 1979), for the unremarkable and quite different proposition that "a person may violate the Hobbs Act without *himself* receiving the benefits of his coercive actions." 868 F.2d at 1350 (emphasis added). That is not the issue addressed by the court below.

Petitioners' claim is even more illusory that the decision below conflicts with the Eighth Circuit's decisions in *United States v. Clark*, 646 F.2d 1259 (8th Cir. 1981), or *United States v. Ellison*, 793 F.d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986). Their casual reference to these cases is particularly telling. The Eighth Circuit's seminal RICO case, involving bribery by Arkansas county judges, was *United States v. Anderson*, 626 F.2d 1358 (1980). The key RICO issue was the breadth of the "enterprise" concept. The *Anderson* court adopted a somewhat limited definition of "enterprise," requiring more than simply an association in fact, and held that "enterprise" includes "only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts. . . ." *Id.* at 1372. Subsequently, *Clark* also involved bribery by a Arkansas county judge, which, by its very nature, had an economic motive. The *Clark* court held that "enterprise" included the office of county judge and rejected the contention that "enterprise" was limited to private business organizations. 646 F.2d at 1264-65 & n.11 (noting that *Anderson* did not conflict). The *Clark* court did not address the question of economic motive in the enterprise or predicate act, the issue addressed here by the court below.

Finally, *Ellison* involved a leader of a paramilitary, white supremacist organization (CSA) involved in two predicate acts of arson. Ellison contended that the Government failed to prove "that there was any connection between one of the two arsons charged in the RICO count and any interest of CSA as an enterprise." 703 F.2d at 949. Following this Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985), the Eighth Circuit rejected Ellison's claim that the Government had to prove that the racketeering activity "benefitted the enterprise" and required the Government to prove "only that the predicate acts *affected* the enterprise." 793 F.2d at 950 (emphasis in original) (citing *United States v. Cauble*, 706 F.2d 1322, 1332-33 n.24 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984)). Although the Eighth Circuit found "no direct financial benefit to CSA," it did

[8] The judgment below may also be affirmed on the alternative ground that the Respondents are immune from antitrust liability under *Noerr-Pennington*. The right to petition is not limited to lobbying the legislative branch. As the First Amendment states, it is "the right . . . to petition the Government for a redress of grievances." Political protest is traditionally viewed as part and parcel of the right to petition. *Brown v. Louisiana*, 383 U.S. 131 (1966). The Eighth Circuit stated in *Missouri v. NOW*, 620 F.2d at 1317, "the right to petition is of such importance that it is not improper interference even when exercised by way of a boycott."

sustain the finding that the arsons "affected" the enterprise and benefitted individual members. *Id.* The case did not involve the issue of economic motive and the court had no reason to consider it.

As such, no conflict exists, much less a conflict that is worthy of this Court's consideration. Clearly, the issue has not received the necessary consideration by the lower federal courts that calls for this Court's review.[9]

IV. THE COURT OF APPEALS WAS CLEARLY RIGHT IN HOLDING THAT RICO REQUIRES THAT THE PREDICATE ACT OR THE ENTERPRISE MUST BE ECONOMICALLY MOTIVATED.

Petitioners object to the holding of the court of appeals that "RICO requires either an economically motivated enterprise or economically motivated predicate acts." 968 F.2d at 614. Yet, the court of appeals relied on a clear, consistent series of cases. *United States v. Ferguson*, 758 F.2d 843 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985); *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983); *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983).

In claiming that the court of appeals' decision "substantially deviates" from the Second Circuit's decisions, the Petitioners conspicuously fail to cite Judge Friendly's seminal opinion in *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983). *Ivic* involved a conspiracy by Croatian

[9] Petitioners pled a RICO § 1962(a) claim, alleging that Respondents "invested" voluntary donations they received from supporters into their alleged enterprises. The district court dismissed this claim, holding that donations received were not income "derived directly or indirectly, from a pattern of racketeering activity." 765 F. Supp. at 623. The court of appeals affirmed, holding that the Petitioners could not sustain a "but for" test. 968 F.2d at 625. Because Petitioners make no mention of their § 1962(a) claim in their Petition, they have necessarily waived it. Rule 14.1(a).

nationalists to kill or injure a Croation journalist and politician. The court rejected a RICO § 1962(d) count because the enterprise "was neither claimed nor shown to have any mercenary motive" (or economic motivation or financial purpose) because the goal was to advance Croatian independence. 700 F.2d at 59 & n.5, 60-61, 65. Shortly thereafter, the Second Circuit decided that *Ivic* did not absolve another group of Croatian nationalists of RICO liability when the enterprise "perpetrated an extensive international extortion scheme using the United States and foreign mails." *United States v. Bagaric*, 706 F.2d 42, 46, 49 (1983), *cert. denied*, 464 U.S. 840 (1983). When the *Bagaric* defendants adopted an extreme interpretation of *Ivic*—that the "economic motive of the enterpirse must surmount all others"—the *Bagaric* court rejected that construction, noting that *Ivic* did not require that "economic gain must be the sole motive of every RICO enterprise." *Id.* at 55, 53. Contrary to Petitioners' claim, the *Bagaric* court definitely did not conclude that the enterprise in *Bagaric* "lacked an economic motive" (Pet. at 9). Rather, the *Bagaric* court held that the prosecution may show financial purpose "through either the enterprise or the predicate acts of racketeering" (*Id.* at 56) and that the "core of the enterprise was the commission of more than fifty acts of the classic economic crime of extortion. . . ." *Id.* at 57-58.

Subsequently, in *United States v. Ferguson*, 758 F.2d 843, *cert. denied*, 474 U.S. 1032 (1985), involving a series of armed robberies and murders by the Black Liberation Army, the Second Circuit, following *Ivic*, held that there must be " '*some* financial purpose' . . . *either* to the criminal enterprise or the acts of racketeering." (cit. omit., emphasis in original). This was proven by the "economic crimes," including robbery, and the use

of the money obtained from the robbery in the enterpirse. *Id.* at 853.[10]

Accordingly, following *Ivic*, *Bagaric*, and *Ferguson*, the court below concluded that "the use of the term enterprise in §§ 1962(a) and (b) conveys a restriction to economic entities." 968 F.2d at 629. By so doing, as it noted, the court was not "adding elements to the offense, but merely fleshing out the definitions of those elements." *Id.* at 629. The Third Circuit in *McMonagle never mentioned* this line of cases and failed to address the precise issue whether the enterprise or predicate act under RICO must be economically motivated. No conflict exists that warrants this Court's review.

V. THE COURT OF APPEALS' RICO DECISION CAN BE AFFIRMED ON THE ALTERNATIVE GROUND THAT NO COMMON LAW EXTORTION WAS PLED UNDER THE HOBBS ACT.

If this Court granted *certiorari*, the issue whether the RICO enterprise or predicate act must be economically motivated need not be decided, because no predicate act was properly pled. Extortion was not properly pled because Petitioners failed to plead that any Respondent took or obtained any property from Petitioners or their patients. Whether a predicate act is properly pleaded logically precedes the question whether a predicate act, validly pled, requires an economic motivation. Because no conflict exists in the circuits on the extortion issue, no RICO issue is raised in this case that is worthy of this Court's consideration.

Just last term, in *Evans v. United States*, 112 S.Ct. 1881 (1992), despite differences on other issues, all Justices of

[10] There is no parallel allegation in this case that Respondents obtained any property from Petitioners (or the clinics, employees, or patients) or used any such property obtained from them in any enterprise.

this Court unanimously agreed that "extortion" under the Hobbs Act must be interpreted in light of its common law meaning. The Court held that Congress "intended to adopt" the common law meaning of extortion in the Hobbs Act. *Id.* at 1885. The Court emphasized that the Hobbs Act definition of extortion was derived from New York law, which defined extortion as "the obtaining of property from another . . . with his consent, induced by a wrongful use of force or fear . . . ," and from the Field Code, which defined extortion as "the obtaining of property from another, with his consent, induced by a wrongful use of force or fear. . . ." *Id.* at 1886 n.9. The Court also noted that, at common law, extortion was defined "as the corrupt taking or receipt of an unlawful fee. . . ." *Id.* at 1887 n.14.

The allegations of "extortion" in the Complaint disregard the common law requirement of "taking" or "obtaining." Petitioners alleged that the Respondents "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." ¶ 98d (emphasis added). Respondents are alleged to "commit extortion by using threatened or actual force or fear to induce the Ladies Center's employees, doctors, patients, and prospective patients to *relinquish* their economic rights and property interests." (¶¶ 97-98 (emphasis added)).

Petitioners' Complaint failed to allege extortion within the meaning of the Hobbs Act, and thus as a predicate act of RICO, because no allegations were made that any Respondent "obtained," "took," or "received" any prop-

erty of the clinics, doctors, patients, or prospective patients. Petitioners alleged merely that the clinics, doctors, or patients were *deprived* of something. Extortion is a larceny-type offense, not a malicious destruction of property-type offense. Respondents were not alleged to have wanted to obtain, have, or take anything from the clinics, doctors, or patients, much less that any Respondent in fact obtained, took, or received any property from them. These allegations in the Complaint are insufficient, therefore, as a matter of law because the crime of extortion, like robbery and larceny, under the common law and under RICO, requires "the obtaining of property from another . . . ," as this Court recognized in *Evans v. United States*, 112 S.Ct. 1881 (1992).[11]

No conflict in the circuits is raised on this application of the Hobbs Act. Although this common law extortion argument was raised in the district court (R.336, p. 27) and in the court of appeals, neither the district court nor the court of appeals expressly addressed it, but assumed that extortion was properly pled. The court of appeals merely stated that "[t]he racketeering activity is extortion under the Hobbs Act . . ." and proceeded to address the district court's economic motive rationale. 968 F.2d at 623.

No pressing need is present in this case for the Court to resolve a conflict in the circuits on whether RICO contains an economic motive requirement. If this Court granted certiorari to address whether RICO contains an economic motive requirement, the Court could affirm the judgment of the court of appeals on the alternative rationale that no common law extortion within the meaning of the Hobbs Act or RICO was properly pled. This

[11] *See People v. Ryan*, 232 N.Y. 234, 133 N.E. 572 (1921); 31A Am.Jur.2d *Extortion* § 42 (1989) (citing *People v. Squillante*, 18 Misc.2d 561, 185 N.Y.S.2d 357 (1959)); *People v. Whaley*, 6 Cow. 661, 663 (N.Y. 1853); Annot., *Exortion*, 135 A.L.R. 728, 732 (1941) (citing *People v. Griffin*, 2 Barb. 427 (N.Y. 1848)).

is a question that is more clearly presented on the face of the Complaint and more clearly resolved by this Court's precedents and the common law meaning of extortion, but it is an issue that does not require this Court's review at this time. Thus, whether RICO contains an economic motive requirement is not squarely presented in this appeal.

Moreover, this case is hardly the appropriate context to resolve a perceived conflict in the circuits as to whether RICO contains an economic motive requirement. It was hardly the purpose of Congress in enacting RICO to address demonstrations against abortion clinics. The facts are highly unusual and not typical of the economic crimes to which RICO was directed. They do not provide an appropriate factual basis to resolve any supposed conflict on an economic motive requirement under RICO.[12]

VI. THE COURT OF APPEALS' DECISION CAN BE AFFIRMED ON THE ALTERNATIVE GROUND THAT THE PETITIONERS FAILED TO PLEAD RICO AND ANTITRUST CLAIMS WITH SPECIFICITY WHEN THE COMPLAINT TOUCHES A BROAD RANGE OF FIRST AMENDMENT RIGHTS AND POLITICAL ACTIVITIES.

In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), this Court unanimously threw out overbroad conspiracy judgments against civil rights boycotters and demonstrators.[13] The Court held:

[12] To avoid duplication, Respondents incorporate by reference the additional grounds for denying the Petition raised in the Briefs in Opposition filed by Respondents Randall A. Terry, Project Life, Operation Rescue, John P. Ryan and the Pro-Life Direct Action League.

[13] In *Claiborne*, a local chapter of the NAACP organized a boycott of white merchants and enforced the boycott by several means, including a number of acts of violence directed primarily at blacks not honoring the boycott, such as the firing of gunshots into their homes (on at least three occasions), slashing of tires, throwing a

> "[c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group possessed unlawful goals and that the individual held a specific intent to further those illegal aims. 'In this sensitive field, the state may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." ' ".

Id. at 920 (cit. omit.). The First Amendment requires "precision of regulation." *Id.* at 921.

> A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply be reference to the ephemeral consequences of relatively few violent acts.

Id. at 933. Here, no such specific allegations of antitrust or RICO violations, or conspiracies, are contained in the Complaint, nor is the relief sought so narrowly tailored.

First Amendment expression permeates the activities of Respondents. Although Petitioners portray Respondents as forming one monolithic entity, engaged in one common activity ("trespass, extortion, and vandalism"), Respondents use many different methods and widely diverse styles to suppress abortion on demand and to communicate to the public their opposition to abortion policy in this country. The centerpiece of the Complaint is Joseph Scheidler's manual on protest activities, *Closed: 99 Ways to Stop Abortion* (1985) (¶¶28-29, 77; R.109) [hereinafter *Closed*]. The activities alleged in the Complaint include sidewalk counseling, picketing, press conferences, leafletting, demonstrations and counter-

brick through a windshield of a car, stealing whiskey purchased from a white merchant, and placing threatening phone calls. *Claiborne*, 458 U.S. at 902-06.

demonstrations, "blitzes," rallies, marches, advertising, burials of dead unborn children and religious services, blockades, and sit-ins. ¶¶ 2, 11, 35, 38, 40, 48-50, 55-56, 59-60, 73, 98(j), 125.[14]

The court of appeals' comment that "the complaint does not attempt to bar all anti-abortion activities" ignored the sweep of the Complaint on its face and in its prayers for relief. 968 F.2d at 616. Indeed, the Complaint is directed indiscriminately at the Respondents' "actions" and is thus overbroad. It is this overbreadth Respondents assail as a violation of the First Amendment. Respondents do not argue that "violence, criminal trespass, and vandalism are protected by the First Amendment." *Id.* at 621.

Rather, the Complaint was properly dismissed because Petitioners failed to make any distinction between legal or illegal activity when they sought injunctive relief aimed at enjoining 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." ¶ 93 (emphasis added). As this Court pointed out in *Claiborne*, "the term 'concerted action' encompasses unlawful conspiracies and constitutionally protected assemblies." 458 U.S. at 888. *See also*, Complaint ¶¶ 1, 26, 41. Petitioners' Complaint

[14] Most, if not all, of these activities are protected under the First Amendment free speech and press clauses. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940) (proselytizing in public places); *City of Houston, Texas v. Hill*, 482 U.S. 451 (1987) (verbal challenges to activities of another); *DeBartolo v. Florida Gulf Coast Bldg. & Const.*, 485 U.S. 568 (1988) (union's hand-billing against businesses in shopping mall); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) (distribution of literature); *Gregory v. City of Chicago*, 394 U.S. 111 (1969) (gathering to march, sing, and chant); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (same). Legislation that would attempt to regulate such activities must be "narrowly tailored" as to time, place and manner. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

focused on the *impact* on access to abortion—which can be caused by picketing, leafletting, or sit-ins—rather than the legality of the expressive conduct under antitrust laws, RICO, or the First Amendment. Similarly, Respondents were indiscriminately alleged to commit "extortion" merely because their activity allegedly prevented women from having abortions, deterred women from soliciting abortion clinics, or induced personnel to stop doing abortions. (¶ 98(d)). The allegations of damage, and the declaratory relief sought, were broadly and indiscriminately targeted at "the actions" of the Respondents (¶ 83-93). These "actions" were deemed illegal because they allegedly invoke "fear" or "intimidation" among patients or clinic personnel (¶ 97). The RICO allegations were targeted at Respondents' "activities" (¶ 105). Likewise, the pendent state claim was vaguely directed at "the unlawful acts described above" (¶ 117).

Although Petitioners asserted that the objective of driving abortion clinics out of business is *per se* illegal (¶ 93), the use of protest to influence merchants and their business is squarely protected by the First Amendment. *DeBartolo v. Fla. Gulf Coast Blg.*, 485 U.S. 568, 576 (1988) (union handbilling against businesses in shopping mall); *Thornhill v. Alabama*, 310 U.S. 88, 99 (1940) (picketing intended "to induce the customers not to patronize the employer."). Likewise, Petitioners charged that Respondents created an "intimidating" climate outside of abortion clinics (¶¶ 19, 56, 91, 97-98), thereby interfering with abortion clinic business, but picketing and handbilling are squarely protected by the First Amendment (*Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965) and "[s]peech does not lose its protected character, however, simply because it may embarrass others or coerce them into action." *Claiborne Hardware*, 458 U.S. at 910.[15]

[15] *See also, Claiborne Hardware*, 458 U.S. at 921 ("To the extent that the court's judgment rests on the ground that 'many' black citizens were 'intimidated' by 'threats' of 'social ostracism, vilification, and traduction,' it is flatly inconsistent with the First Amendment."); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("The claim that the expressions were intended to exercise a coercive impact on respondent [a realtor] does not remove them from the reach of the First Amendment."); *Watts v. United States*, 394 U.S. 705, 708 (1969) ("[t]he language of the political arena . . . is often vituperative, abusive, and inexact"); *Cox. v. Louisiana*, 379 U.S. 536, 551-52 (1965) (" 'a function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger' " (cit. omit.); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("profound national commitment to the people that debate on public issues should be uninhibited, robust and wide open"); *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

Petitioners charged that Respondents are part of a "conspiracy" to shut down abortion businesses but "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). Even if Petitioners could charge that some of the alleged coconspirators had engaged in assault or battery, "the right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *Claiborne Hardware*, 458 U.S. at 908, 925 n.68.[16]

Because the Complaint touches clear First Amendment activity, the allegations are subject to a heightened pleading burden, which Petitioners did not sustain

[16] Petitioners have abused the "chameleon-like" character of conspiracy law that Justice Jackson criticized in *Krulewitch v. United States*, 336 U.S. 440, 447-49 (1949), and it should not be allowed to persist when the Complaint, on its face, touches First Amendment activity.

> [I]n any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.

Franchise Realty v. S.F. Loc. Joint Exec. Bd., 542 F.2d 1076, 1082-83 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977). *See generally*, P. Areeda, Antitrust Law ¶ 203.4b (1982 Supp.). This Court "has consistently recognized the sensitivity of First Amendment guarantees to the threat of harassing litigation, and has erected barriers to safeguard those guarantees." *Franchise Realty*, 542 F.2d at 1082. Likewise, the courts uniformly conclude "that the cost to society of permitting some unprotected speech to go unpunished was outweighed by the danger that protected speech might be deterred by an overly broad prohibition." *Herzbrun v. Milwaukee County*, 504 F.2d 1189, 1197 (7th Cir. 1974) (Stevens, J., concurring). Petitioners attempted exactly what *Claiborne Hardware* said cannot be done: Respondents' collective efforts "cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts." 458 U.S. at 933.

Petitioners must allege *with precision* the exact conduct of Respondents that has no First Amendment protection and is subject to challenge under the antitrust laws or RICO. *Claiborne Hardware*, 458 U.S. at 921. Because Petitioners could not, or would not, meet this basic requirement—even in their Second Amended Complaint filed after four years of discovery and after a review of thousands of pages of documents produced and many depositions—their complaint was properly dismissed in its entirety.

CONCLUSION

The petition for a writ of certiorari should be denied.

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December 23, 1992

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