

SCHEIDLER v. NOW: THE SUPREME COURT HOLDS THAT ABORTION PROTESTERS ARE NOT RACKETEERS

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I. INTRODUCTION

The First Amendment is still in force!¹

A shocking decision!²

The reaction from the parties after the U.S. Supreme Court handed down the decision in *Scheidler v. National Organization for Women*³ could not have been more disparate. This response is not surprising because the viewpoints espoused by the parties in the litigation that began seventeen years ago, and even a prior Supreme Court decision,⁴ are also conflicting. *Scheidler* is not a traditional abortion case, but rather an abortion protest case; even so, it evokes nearly as strong reactions as the act of abortion itself. On February 26, 2003, just over thirty years after *Roe v. Wade*,⁵ the Supreme Court held eight to one that abortion protesters are not racketeers under RICO⁶ because the abortion protesters did not commit the underlying predicate act of extortion.⁷ This

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¹ Eric J. Scheidler, *Scheidler Victory in the Supreme Court*, at <http://www.prolifeaction.org/nowvscheidler/victory.htm> (last visited Sept. 22, 2003). The Reverend Flip Benham, National Director of Operation Rescue, another defendant, stated, "The 8-1 decision is an overwhelming 'Amen' by the Justices that the First Amendment to the Constitution applies to Christians and their message." *Giant Win for Christ and His Unborn Children*, at <http://www.operationsaveamerica.org/press/press/030226giant-win-for-christ.htm> (Feb. 26, 2003).

² Kim Gandy, *NOW v. Scheidler Ruling Not the End: Feminists Vow to Continue Fighting for Women's Lives*, at <http://www.now.org/press/02-03/02-26.html> (Feb. 26, 2003). Gandy applauds Justice Stevens's dissent. *Id.*

³ *Scheidler v. NOW*, 123 S. Ct. 1057 (2003). See *infra* notes 56-87 and accompanying text.

⁴ *NOW v. Scheidler*, 510 U.S. 249 (1994). See *infra* notes 32-39 and accompanying text.

⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

⁶ 18 U.S.C. § 1962(a), (c)-(d) (2000). See *infra* text accompanying notes 20-25. RICO is an acronym for Racketeer Influenced and Corrupt Organizations. 18 U.S.C. § 1962(a) (2000).

⁷ *Scheidler v. NOW*, 123 S. Ct. 1057, 1067 (2003). In pertinent part, RICO reads:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by

does not mean, however, that abortion protesters are now free to block access to abortion clinics; the federal Freedom of Access to Clinic Entrances law (FACE) remains in place.⁸ In addition, abortion protesters are still subject to state trespass laws.

robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

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

18 U.S.C. § 1951 (2000).

⁸ 18 U.S.C. § 248 (2000). In pertinent part, that statute reads:

(a) Prohibited activities. Whoever—

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

(2) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship,

shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

(b) Penalties. Whoever violates this section shall—

(1) in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

(2) in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than 3 years, or both

Id. Civil remedies including civil statutory damages and injunctions may be granted. 18 U.S.C. § 248(c) (2000). See generally Regina R. Campbell, Comment, "Face"ing the Facts: Does the Freedom of Access to Clinic Entrances Act Violate Freedom of Speech?, 64 U. CIN. L. REV. 947 (1996); Angela Marie Hubbell, Comment, "Face"ing the First Amendment: Application of RICO and the Clinic Entrances Act to Abortion Protestors, 21 OHIO N.U. L. REV. 1061 (1995); Carolyn J. Lockwood, Comment, Regulating the Abortion Clinic Battleground: Will Free Speech be the Ultimate Casualty?, 21 OHIO N.U. L. REV. 995 (1995).

FACE was passed after the Supreme Court's decision in *Bray v. Alexandria Women's Health Clinic*, 506 U. S. 263 (1993), which held that the Ku Klux Klan Act did not apply to abortion protesters. See generally Sherri Snelson Haring, *Bray v. Alexandria Women's Health Clinic: Rational Objects of Disfavor as a New Weapon in Modern Civil Rights*

This essay will examine *Scheidler v. NOW* from its filing in 1986 through the Supreme Court's decision in 2003⁹ and will include an analysis of Chief Justice Rehnquist's majority opinion, Justice Ginsburg's concurring opinion, and Justice Stevens's dissenting opinion.¹⁰ This essay will also discuss the impact of the decision on RICO and its implications for protesters.

II. SCHEIDLER V. NOW

A. The First Trip to the Supreme Court

In 1986, the National Organization for Women (NOW) and two women's health centers filed suit against antiabortion protesters. Among the defendants were Joseph Scheidler and Randall Terry, several pro-life groups, including Pro-Life Action League and Operation Rescue, and a pathology testing lab, Vital-Med. NOW claimed these defendants violated the Sherman Antitrust Act,¹¹ RICO,¹² and pendent state claims.¹³ The complaint alleged that all the defendants except the laboratory engaged in activities such as extortion, intimidation, threats, trespass, blockades, telephone calls to tie up the phone lines, false appointments, and tortious interference with business relationships.¹⁴

Litigation, 72 N.C. L. REV. 764 (1994); Sue Mota, *Bray v. Alexandria Women's Health Clinic: Abortion Protestors Are Not Liable Under the Ku Klux Klan Act*, 35 CATH. LAW. 381, 388-89 (1994); Toni Driver, Note, *Individuals Obstructing Ingress and Egress to Abortion Facilities Do Not Violate a Woman's Federal Rights Within 42 U.S.C. 1985(3)*: *Bray v. Alexandria Women's Health Clinic*, 25 ST. MARY'S L.J. 753 (1994).

⁹ The procedural history of *Scheidler* merits a brief explication at the forefront of this article. It will be described in detail in the text. In 1986, the case was filed in the General District Court of Illinois. *NOW v. Scheidler*, 765 F. Supp. 937, 938 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (7th Cir. 1992), *rev'd*, 510 U.S. 249 (1994). The case was then appealed to the Seventh Circuit, which affirmed the holding. *NOW v. Scheidler*, 968 F.2d 612 (7th Cir. 1992), *rev'd*, 510 U.S. 249 (1994). The Supreme Court granted certiorari and ultimately reversed and remanded the case for a jury trial. *NOW v. Scheidler*, 510 U.S. 249 (1994). The jury trial resulted in convictions that led to an injunction being issued. The Seventh Circuit Court of Appeals then heard this issue together with related challenges. *NOW v. Scheidler*, 267 F.3d 687 (7th Cir. 2001), *rev'd*, 123 S. Ct. 1057 (2003). Upon the Seventh Circuit's decision affirming the district court's holding, the Supreme Court once again granted certiorari and reversed the lower courts' holdings. *Scheidler v. NOW*, 123 S. Ct. 1057 (2003). This most recent decision by the Supreme Court comprises the majority of this article's discussion.

¹⁰ *Scheidler v. NOW*, 123 S. Ct. 1057 (2003); *id.* at 1069 (Ginsburg, J., concurring); *id.* at 1069 (Stevens, J., dissenting).

¹¹ 15 U.S.C. § 1 (2000).

¹² 18 U.S.C. § 1962(a), (c)-(d) (2000). See *infra* text accompanying notes 20-22.

¹³ *NOW v. Scheidler*, 765 F. Supp. 937, 938 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (7th Cir. 1992), *rev'd*, 510 U.S. 249 (1994).

¹⁴ *NOW v. Scheidler*, 968 F.2d 612, 615 (7th Cir. 1992), *rev'd*, 510 U.S. 249 (1994). In addition, the complaint alleged that defendant Scheidler distributed a manual, "Closed: 99 Ways to Stop Abortion," which advocated unlawful methods to close abortion clinics.

For example, two defendants were accused of stealing approximately 4,000 aborted fetuses from a Vita-Med laboratory. According to defendant Scheidler, these aborted fetuses were individually packaged and labeled with the names of the mothers, doctors, dates and places where the abortions were performed. These remains were eventually buried by pro-life activists in several states.¹⁵

The district court dismissed the federal claims, thereby relinquishing jurisdiction over the pendent state claims as well.¹⁶ The district court rejected the antitrust claim,¹⁷ finding that the Sherman Antitrust Act was not intended to cover the alleged conduct¹⁸ because the defendants' actions were neither financially nor commercially motivated.¹⁹ The plaintiffs' final claim alleged three RICO violations: deriving income from a pattern of racketeering;²⁰ conducting an enterprise's affairs through a pattern of racketeering activity;²¹ and conspiring to commit racketeering.²² Concerning the first RICO allegation, the district court held that the receipt of donations from supporters did not constitute income derived from a pattern of

The complaint also alleged that the defendants engaged in "blitzes," or mass demonstrations and blockades which resulted in the arrest of hundreds of demonstrators under state charges. *Id.* One defendant was arrested over 300 times. *Id.* The complaint did not seek to bar legal picketing, debate, meetings, prayers, and other activity protected by the First Amendment. *Id.* at 616.

¹⁵ *Id.*

¹⁶ *NOW v. Scheidler*, 765 F. Supp. 937, 944-45 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (7th Cir. 1992), *rev'd*, 510 U.S. 249 (1994).

¹⁷ The applicable statute is 15 U.S.C. § 1 (2000), which prohibits, among other things, contracts, combinations in the form of a trust, and conspiracies in restraint of trade.

¹⁸ *NOW v. Scheidler*, 765 F. Supp. at 939.

¹⁹ *Id.* at 940-41. The court reasoned that a woman's right to abortion is one of the most "complex and contentious" *social or political* issues in America. *Id.* at 940.

²⁰ 18 U.S.C. § 1962(a) (2000) states in pertinent part:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Id.

²¹ 18 U.S.C. § 1962(c). The statute provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Id.

²² 18 U.S.C. § 1962(d). The statute states that it shall be unlawful for any person to conspire to violate any prior subsections of this section. *Id.*

racketeering, in this case extortion. Thus, the first RICO claim failed.²³ The district court similarly held that the second RICO claim failed because “[t]he economic motive requirement would lose all meaning should the courts consider an enterprise to be economically motivated solely because that enterprise happens to receive voluntary donations to support the continuation of racketeering activities directed toward a non-financial objective.”²⁴ Since the third RICO claim required a conspiracy to commit one of the first two claims, it failed as well.²⁵

On appeal in 1992, the Seventh Circuit “reluctantly” affirmed, finding both that antitrust laws were not intended to apply to the defendants’ activities and that RICO requires either an economically motivated enterprise or economically motivated predicate acts.²⁶ Examining the Sherman Antitrust Act’s legislative history, the appellate court was convinced that statute was intended to prevent business competitors from making restraining arrangements for their own economic advantage.²⁷ Therefore, the plaintiffs were barred from pursuing that claim. The appellate court held that the first RICO claim failed since the defendants’ income was not derived from racketeering activity.²⁸ The court found that the plaintiffs did not satisfy the economic motive component of the second RICO claim, so it also failed.²⁹ As a result, the conspiracy claim failed again as well. Thus, the Seventh Circuit affirmed the district court.³⁰

On certiorari to the U.S. Supreme Court, Chief Justice Rehnquist stated the Court was “required once again” to interpret the provisions of RICO, and, specifically, to determine whether the statute requires proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose.³¹ In contrast to the Seventh Circuit’s holding, Chief Justice Rehnquist, expressing the

²³ *NOW v. Scheidler*, 765 F. Supp. at 941.

²⁴ *Id.* at 944.

²⁵ *Id.*

²⁶ *NOW v. Scheidler*, 968 F.2d 612, 614 (7th Cir. 1992), *rev’d*, 510 U.S. 249 (1994).

²⁷ *Id.* at 621. The court quotes Senator Sherman stating that temperance societies, churches, school houses, or any other kind of moral or educational association that may be organized are not in any sense combinations that legally interfere with interstate commerce. *Id.* at 619 (quoting 21 CONG. REC. 2658-59 (1890)).

²⁸ *NOW v. Scheidler*, 968 F.2d 612, 625 (7th Cir. 1992), *rev’d*, 510 U.S. 249 (1994).

²⁹ *Id.* at 630.

³⁰ *Id.* at 630-31. See generally Karen Beretsky, Note, *Civil RICO and Anti-Abortion Protest: Must Protestors Profit?*; *NOW, Inc. v. Scheidler*, 30 CAL. W. L. REV. 119 (1993); Gregory A. Sebastian, Note, *NOW v. Scheidler: The Beginning or End of Civil RICO Applicability to Abortion Protesters?*, 45 MERCER L. REV. 1109 (1994); Frans J. von Kaenel, Comment, *The Seventh Circuit Bestows Immunity from RICO Prosecutions upon Anti-Abortion Protestors: National Organization for Women v. Scheidler*, 71 WASH. U. L.Q. 175 (1993).

³¹ *NOW v. Scheidler*, 510 U.S. 249, 252 (1994).

unanimous view of the Court, opined that *no* economic motivation was necessary under RICO.³² First, the Court determined affirmatively that it had standing to hear the case.³³ The Court then concluded that the use of the term “enterprise” does not automatically lead to an inference that a profit motive is required.³⁴ While an enterprise would normally have a profit motive, RICO also includes any activities that affect interstate or foreign commerce.³⁵ Predicate acts, such as the alleged extortion by the defendants, may not benefit the protesters financially, but, according to the Court, may still drain money from the economy.³⁶

Justice Souter, joined by Justice Kennedy, concurred, stating that “the First Amendment does not require reading an economic motive-requirement” into RICO.³⁷ The concurrence was tempered by a cautionary warning that when applying RICO, a First Amendment issue could be at stake.³⁸ The court of appeals was reversed³⁹ on the narrow issue before it, and the case was remanded to the district court for a jury trial.

B. The Second Time Around

At trial, the plaintiffs introduced evidence that the defendants engaged in the following (and other) predicate acts under RICO: blocking

³² *Id.* RICO does not require proof that either the racketeering enterprise or the predicate acts of racketeering be motivated by an economic purpose. *Id.* This decision resolved a conflict among the appellate courts. *Id.* at 255.

³³ *Id.*

³⁴ *Id.* at 259.

³⁵ *Id.* (citing 18 U.S.C. § 1962(c) (2000)). The enterprise is the vehicle through which the unlawful pattern of racketeering activity is committed, and not the victim of that activity. *Id.*

³⁶ *NOW v. Scheidler*, 510 U.S. 249, 260 (1994).

³⁷ *Id.* at 263 (Souter, J., concurring).

³⁸ *Id.* at 265 (Souter, J., concurring).

³⁹ *Id.* at 262 (Souter, J., concurring). See generally Jay Alan Sekulow and Walter M. Weber, *NOW v. Scheidler: An Inside Look*, 21 OHIO N.U. L. REV. 959 (1995); Michael Vitiello, *Criminal Law: Has the Supreme Court Really Turned RICO Upside Down?: An Examination of NOW v. Scheidler*, 85 J. CRIM. L. & CRIMINOLOGY 1223 (1995); David Baarlaer, Note, *National Organization for Women v. Scheidler*, 21 OHIO N.U. L. REV. 1085 (1995); Jennifer Bullock, Note, *National Organization for Women v. Scheidler: RICO and the Economic Motive Requirement*, 26 CONN. L. REV. 1533 (1994); Carole Golinski, Note, *In Protest of NOW v. Scheidler*, 46 ALA. L. REV. 163 (1994); Audra K. Hamilton, Note, *RICO, The Unexpected Protector Unveiled in National Organization for Women, Inc. v. Scheidler*, 48 ARK. L. REV. 851 (1995); Bryn K. Larsen, Note, *RICO's Application to Noneconomic Actors: A Serious Threat to First Amendment Freedoms*, 14 REV. LITIG. 707 (1995); Steven Schriver, Note, *Applying Civil RICO to Antiabortion Demonstrators: National Organization for Women v. Scheidler*, 65 MD. J. CONTEMP. LEGAL ISSUES 179 (1995); Suzanne Wentzel, Note, *National Organization for Women v. Scheidler: RICO a Valuable Tool for Controlling Violent Protest*, 28 AKRON L. REV. 391 (1995); Joel A. Youngblood, Note, *NOW v. Scheidler: The First Amendment Falls Victim to RICO*, 30 TULSA L.J. 195 (1994).

doorways to abortion clinics with their bodies or chaining their bodies to doorways; entering abortion clinics and destroying medical equipment; pressing four abortion clinic staff members against a glass entranceway to a clinic for hours; and calling for a "Christmas truce" under which every abortion provider in the Chicago area would shut down on Christmas Day.⁴⁰ The jury agreed with the plaintiffs, finding the defendants committed twenty-five state extortion violations, twenty-five acts of conspiracy to violate the law, twenty-three violations of the Travel Act, twenty-three attempts to violate the Travel Act, twenty-one Hobbs Act violations, and four acts or threats of physical violence.⁴¹

The jury awarded damages, which were trebled under RICO, resulting in awards of over \$163,000 to one abortion clinic and over \$94,000 to the other.⁴² The district court then issued a permanent nationwide injunction against

interfering with the rights of the class clinics to provide abortion services, or with rights of the class women to receive those services, by obstructing access to the clinics, trespassing on clinic property, damaging or destroying clinic property, or using violence or threats of violence against the clinics, their employees and volunteers, or their patients.⁴³

In 2001, the Court of Appeals for the Seventh Circuit affirmed the lower court's disposition of the case;⁴⁴ this time, however, the decision was enthusiastically upheld.⁴⁵ The defendants argued that RICO does not permit private plaintiffs to seek injunctive relief, relying on the only other appellate court decision addressing the issue directly.⁴⁶ The Seventh Circuit, however, disagreed with the Ninth Circuit and sided with the plaintiffs, holding that the text of RICO is unambiguous and allows for private injunctions.⁴⁷ The court also addressed the defendants'

⁴⁰ NOW. v. Scheidler, 267 F.3d 687, 694-95 (7th Cir. 2001), *rev'd*, 23 S. Ct. 1057 (2003).

⁴¹ *Id.* at 695.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 693.

⁴⁵ NOW v. Scheidler, 968 F.2d 612, 614 (7th Cir. 1992), *rev'd*, 510 U.S. 249 (1994); *see supra* note 26 and accompanying text.

⁴⁶ Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1081 (9th Cir. 1986).

⁴⁷ NOW v. Scheidler, 267 F.3d 687, 700 (2001), *rev'd*, 123 S. Ct. 1057 (2003). The statute states in pertinent part:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to . . . imposing reasonable restrictions on the future activities . . . of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, . . . or ordering dissolution or

First Amendment arguments, but concluded that the jury's verdict was not based on activities prohibited by the First Amendment, and that the remedies respected the line between protected expression and unprotected conduct.⁴⁸ Thus, while the Seventh Circuit affirmed the district court in all respects,⁴⁹ the resulting split in the circuits set the stage for the Supreme Court to grant certiorari.

The Supreme Court granted certiorari to address two issues: whether petitioners committed the RICO predicate act of extortion under the Hobbs Act, and whether respondents, as private litigants, could obtain an injunction under RICO.⁵⁰ The Supreme Court held, eight to one, that petitioners did not commit extortion because they did not obtain property as required by the Hobbs Act. Because this decision rendered the other RICO predicate acts insufficient, the second issue was never addressed by the Court and the lower courts were reversed⁵¹ without resolving the split in the circuits concerning the availability of private injunctive relief under RICO.⁵²

While NOW and other respondents argued that the petitioners committed predicate acts of extortion under the Hobbs Act, they also claimed that even without those acts the judgment was fully supported

reorganization of any enterprise, making due provision for the rights of innocent persons.

18 U.S.C. § 1964(a) (2000).

⁴⁸ *NOW v. Scheidler*, 267 F.3d at 700. The appellate court distinguished the defendant's protected speech from the unprotected illegal conduct which may be regulated. *Id.* at 701-702. Similarly, the appellate court held that the injunction was not vague or overbroad because it states:

This injunction does not prohibit or preclude activities that are constitutionally protected, including but not limited to the following conduct: a. Peacefully carrying picket signs on the public property in front of any Plaintiff Clinic; b. Making speeches on public property; c. Speaking to individuals approaching the clinic; d. Handing out literature on public property; and e. Praying on public property.

Id. at 705.

⁴⁹ *Id.* at 710. See generally Fay Clayton and Sara N. Love, *NOW v. Scheidler: Protecting Women's Access to Reproductive Health Services*, 62 ALB. L. REV. 967 (1999); Leslie Gielow Jacobs, *Applying Penalty Enhancements to Civil Disobedience: Clarifying the Free Speech Clause Model to Bringing the Social Value of Political Protest into the Balance*, 59 OHIO ST. L.J. 185 (1998); Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L. REV. 853 (1999); Christopher P. Keleher, Comment, *Double Standards: The Suppression of Abortion Protesters' Free Speech Rights*, 51 DEPAUL L. REV. 825 (2002); Brian J. Murray, Note, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691 (1999).

⁵⁰ *Scheidler v. NOW*, 535 U.S. 1016 (2002). The U. S. Supreme Court granted certiorari on the latter issue but did not address it in the decision. *Scheidler v. NOW* 123 S. Ct. 1057 (2003).

⁵¹ *Scheidler v. NOW*, 123 S. Ct. at 1061-62.

⁵² See *supra* text accompanying notes 44-49.

by the finding of *state* law predicate acts of extortion.⁵³ The petitioners argued that the Hobbs Act does not punish every interference with contractual rights or the right to control property.⁵⁴ They argued that the Seventh Circuit's broad definition of extortion was inconsistent with the text, legislative history, and structure of the Hobbs Act and that "property" under the Hobbs Act is not the same as any "right" or "interest" in property.⁵⁵

The Court agreed in essence with the petitioners. The Hobbs Act defines "extortion" as the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."⁵⁶ The Court did not decide what the outer boundaries of "obtaining property" were under the Hobbs Act's definition of extortion; it did find petitioners' actions well beyond whatever those outer boundaries would be.⁵⁷ In his analysis, Chief Justice Rehnquist examined the two sources of law used as models for the Hobbs Act. Both the Penal Code of New York and the Field Code defined extortion as "the obtaining of property from another with his consent induced by a wrongful use of force or fear or under color of official right."⁵⁸ The Court also recognized that the "obtaining" requirement of extortion under New York law entailed both deprivation

⁵³ Brief of Respondents NOW et al. at 33, *Scheidler v. NOW*, 123 S. Ct. 1057 (2003) (Nos. 01-1118 and 01-1119). Amici who filed briefs in support of respondents included, among others: several states, Brief for the States of California, New York, Connecticut, Maryland, Massachusetts, Montana, Nevada, Washington, and West Virginia as Amici Curiae, *Scheidler*, (Nos. 01-1118 and 01-1119); The Feminist Majority Foundation and Planned Parenthood of America, Brief of the Feminist Majority Foundation et al. as Amici Curiae, *Scheidler*, (Nos. 01-1118 and 01-1119); Motorola Credit Corp., Brief of Amicus Curiae Motorola Credit Corp., *Scheidler*, (Nos. 01-1118 and 01-1119); NARAL, Brief of the NARAL Foundation et al. as Amici Curiae, *Scheidler*, (Nos. 01-1118 and 01-1119); The Religious Coalition for Reproductive Choice, Brief of Amici Curiae Religious Coalition for Reproductive Choice et al., *Scheidler*, (Nos. 01-1118 and 01-1119).

⁵⁴ Reply Brief of Petitioners Joseph Scheidler et al. at 1, *Scheidler*, (Nos. 01-1118 and 01-1119).

⁵⁵ *Id.* at 2-3. Petitioner Operation Rescue argued separately that NOW abandoned the theory on which the judgment below rested by conceding that nonviolent sit-ins are not extortion, and further argued that NOW's other extortion arguments were also meritless. Reply Brief for Petitioner Operation Rescue at 10, 18, *Scheidler v. NOW*, 123 S. Ct. 1057 (2003) (Nos. 01-1118 and 01-1119). Petitioners were supported by a range of groups from social conservatives to civil libertarians as well as People for the Ethical Treatment for Animals. Anti-war activist Martin Sheen praised the outcome as well. *The Right to Choose Protest*, WALL ST. J., Feb. 27, 2003, at A12.

⁵⁶ 18 U.S.C. § 1951(b)(2) (2000).

⁵⁷ *Scheidler v. NOW*, 123 S. Ct. 1057, 1064 (2003).

⁵⁸ *Id.* at 1064-65. (citing 4 Report of the Commissioner of the Code, Proposed Penal Code of the State of New York § 613 (1865) (reprint 1998) (Field Code); N.Y. PENAL LAW § 850 (1909)).

and acquisition of property.⁵⁹ Applying this maxim to the present case, the majority stated, "There is no dispute in these cases that petitioners interfered with, disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights."⁶⁰

Even if petitioners achieved their goal of shutting down an abortion clinic, this would not be extortion, according to the Court, since petitioners did not obtain respondents' property.⁶¹ Petitioners may have deprived or sought to deprive the right of exclusive control of business assets, but they neither pursued nor received anything of value from respondents over which they could exercise control or transfer.⁶² According to the Court, "[t]o conclude that such actions constituted extortion would effectively discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion."⁶³ Thus, since the Court found that the petitioners did not obtain nor attempt to obtain property from the defendants, there was no basis to find extortion under the Hobbs Act.⁶⁴

Since petitioners did not obtain or attempt to obtain property, the state claims of extortion and attempt to commit extortion also failed.⁶⁵ The Travel Act claims similarly failed because they were committed in furtherance of conduct not deemed extortionate.⁶⁶ Since all predicate acts under RICO failed, the Court did not reach the second issue concerning the private injunction; even so, the Court vacated the district court's injunction.⁶⁷

Justice Ginsburg, joined by Justice Breyer, concurred. Justice Ginsburg was also persuaded that the Seventh Circuit's decision gave "undue breadth" to RICO, and the Court was rightly reluctant to extend RICO further by affirming the Seventh Circuit's expansive definition of

⁵⁹ *Scheidler v. NOW*, 123 S. Ct. 1057, 1065 (2003) (citing *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973)).

⁶⁰ *Id.*

⁶¹ *Id.* at 1066.

⁶² *Id.*

⁶³ *Id.* Eliminating the requirement that property must be obtained for extortion would both conflict with the express requirement of the Hobbs Act and the recognized distinction between the crimes of extortion and coercion. According to the majority, coercion, or the use of force or threat of force to restrict another's freedom of action, more accurately describes petitioners' actions. *Id.*

⁶⁴ *Id.* at 1068.

⁶⁵ *Id.* at 1069. The Court said, "Accordingly, where as here the Model Penal Code and a majority of States recognize the crime of extortion as requiring a party to obtain or to seek to obtain property, as the Hobbs Act requires, the state extortion offense for purposes of RICO must have a similar requirement." *Id.* at 1068-69.

⁶⁶ *Id.* at 1069.

⁶⁷ *Id.*

extortion.⁶⁸ Justice Ginsburg quoted the Solicitor General's statement at oral argument that the acts in question could even be used in civil rights sit-ins "if illegal force or threats were used to prevent a business from operating."⁶⁹

Justice Stevens, the sole dissenter, called the majority opinion "murky."⁷⁰ While the majority, citing precedent or the Hobbs Act, stated that since the Hobbs Act was a criminal statute it must be strictly construed,⁷¹ Justice Stevens stated that "property" has been given an expansive interpretation which encompasses the intangible right to exercise exclusive control over the lawful use of business assets.⁷² Justice Stevens also argued that since this construction of the Hobbs Act was so uniform, only a few cases merited discussion.⁷³ One such case, *United States v. Tropicano*,⁷⁴ held that threats of physical violence to prevent owners of a competing trash removal company from soliciting customers violated the Hobbs Act and that the right to do business was a property right.⁷⁵

Contrary to Justice Stevens's claims, however, *Tropicano* can be effectively distinguished from the Court's decision in *Scheidler*. In *Scheidler*, the defendants did not even attempt to obtain any property rights. In *Tropicano*, however, the defendants attempted to obtain the right to solicit customers.⁷⁶ To fall under the Hobbs Act, the issue seems to be not what the property right is so much as whether the defendant tried to obtain a property right.

Justice Stevens further argued that the lower courts that *have* considered the applicability of the Hobbs Act to abortion protesters adhered to the holdings of cases like *Tropicano*.⁷⁷ Justice Stevens fails to consider the possibility that the cases cited⁷⁸ may have been incorrect in their analysis and in need of the very clarification the majority opinion expressed.

Lastly, Justice Stevens argued that the principal beneficiaries of the Court's dramatic retreat from the historical position will certainly be a

⁶⁸ *Id.* (Ginsburg, J., concurring).

⁶⁹ *Id.*

⁷⁰ *Id.* (Stevens, J., dissenting).

⁷¹ *Id.* at 1067-68 (citing *United States v. Enmons*, 410 U.S. 396, 411 (1973)).

⁷² *Id.* at 1070. (Stevens, J., dissenting).

⁷³ *Id.*

⁷⁴ *United States v. Tropicano*, 418 F.2d 1069 (2d Cir. 1969).

⁷⁵ *Id.* at 1075-76.

⁷⁶ *Id.* at 1076-77.

⁷⁷ *Scheidler v. NOW*, 123 S. Ct. 1057, 1071 (2003).

⁷⁸ *Libertad v. Welch*, 53 F.3d 428, 438 n.6 (1st Cir. 1995); *N. Women's Ctr. v. McMonagle*, 868 F.2d 1342, 1350 (3rd Cir. 1989); *United States v. Anderson*, 716 F.2d 446, 447-50 (7th Cir. 1983).

class of professional criminals whose conduct persuaded Congress that the public needed federal protection from extortion.⁷⁹ This position, however, fails to recognize that the goal of most professional criminals is to obtain property for themselves from the victim, thus clearly falling well within the purview of the Hobbs Act.⁸⁰

III. CONCLUSION

The Court correctly decided *Scheidler v. NOW*, which held that abortion protesters did not commit extortion under the Hobbs Act because they did not obtain property. Since the defendants did not commit predicate acts of extortion under the Hobbs Act, they did not violate RICO. This decision frees civil non-violent protesters from threats of RICO suits and affirms the First Amendment right to protest. All protesters, however, may face civil liability under state law, such as trespass, if they break these laws during the protest or sit-in. Additionally, abortion protesters may still be prosecuted under FACE⁸¹ as Justice Stevens pointed out in his dissent⁸² and Justice Ginsburg cited in her concurrence.⁸³

On the other hand, even the nationwide permanent injunction lifted by the Court in *Scheidler*⁸⁴ did not preclude activities constitutionally protected by the First Amendment, such as peacefully carrying picket signs, making speeches on public property, speaking to individuals, handing out literature, or praying on public property.⁸⁵ Now civil non-violent protesters may freely engage in these and other activities without fear of being labeled a "racketeer."

⁷⁹ *Scheidler v. NOW*, 123 S. Ct. 1057, 1072 (2003).

⁸⁰ 18 U.S.C. § 1951 (2000).

⁸¹ 18 U.S.C. § 248 (2000). *See supra* text accompanying note 8.

⁸² *Scheidler v. NOW*, 123 S. Ct. at 1072.

⁸³ *Id.* at 1069.

⁸⁴ *Id.*

⁸⁵ *NOW v. Scheidler*, 267 F.3d 687, 700 (7th Cir. 2001), *rev'd*, 123 S. Ct. 1057 (2003).