

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   JOSEPH SCHEIDLER, ET AL.,                   :

4                   Petitioners,                   :

5                   v.                   :   No. 04-1244

6   NATIONAL ORGANIZATION FOR WOMEN,                   :

7   INC., ET AL.;                   :

8                   and                   :

9   OPERATION RESCUE,                   :

10                  Petitioner,                   :

11                  v.                   :   No. 04-1352

12   NATIONAL ORGANIZATION FOR WOMEN,                   :

13   INC., ET AL.                   :

14   - - - - - x

15                                   Washington, D.C.

16                                   Wednesday, November 30, 2005

17                   The above-entitled matter came on for oral

18   argument before the Supreme Court of the United States at

19   10:03 a.m.

20   APPEARANCES:

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22                   Petitioners.

23   LISA S. BLATT, ESQ., Assistant to the Solicitor General,

24                   Department of Justice, Washington, D.C.; for United

25                   States, as amicus curiae, supporting the Petitioners.

1 ERWIN CHEMERINSKY, ESQ., Durham, N.C.; on behalf of the  
2 Respondents.

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P R O C E E D I N G S

[10:03 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Scheidler versus National Organization for Women, and Operation Rescue versus National Organization for Women.

Mr. Untereiner.

ORAL ARGUMENT OF ALAN UNTEREINER

ON BEHALF OF PETITIONERS

MR. UNTEREINER: Mr. Chief Justice, and may it please the Court:

In 2003, this Court, to all appearances, brought this case to an end by holding that all of predicate RICO counts found by the jury must be reversed, that the liability judgment must be reversed, and that the injunction must be vacated. On remand, however, a panel of the Seventh Circuit found a way to keep this case alive. It held that 4 of the 121 RICO predicates somehow survived this Court's decision, and it strongly suggested that the Hobbs Act punishes acts or threats of physical violence that have no connection to either robbery or extortion.

Today, we are asking this Court to reverse the erroneous decision below and remand with very explicit instructions that judgment be entered in favor of

1     Petitioners.

2                 Reversal is warranted because of three separate  
3     legal errors made by the Seventh Circuit. First, the  
4     lower court failed to obey the clear holdings and remand  
5     instructions of this Court. Second, the Seventh Circuit  
6     erroneously held, in conflict with two other Circuits,  
7     that the Hobbs Act plausibly can be read to cover  
8     freestanding acts or threats of physical violence. And,  
9     third, the Seventh Circuit erred in its previous decision,  
10    in 2001, in holding that the racketeering law, RICO,  
11    authorizes private injunctive relief.

12                JUSTICE O'CONNOR: Counsel, if we were to agree  
13    with you on any one of the three questions, would that end  
14    the case?

15                MR. UNTEREINER: That's correct, Justice  
16    O'Connor. Because of what the Seventh Circuit also said,  
17    that a new trial is not in the cards and the damages  
18    verdict is gone and nothing more remains to be done except  
19    for the two issues that it outlined, that's correct. If  
20    the Court rules in our favor on any issue, the case is  
21    over.

22                Let me turn to our first point. The Seventh  
23    Circuit's decision is inconsistent with this Court's  
24    previous holdings. This Court's 2003 opinion left no  
25    doubt that, quote, "all," unquote, of the RICO predicates

1 must be reversed. But --

2 JUSTICE GINSBURG: Yes, but there was a theory  
3 that was put to the jury -- and it's right there on the  
4 special interrogatories -- one category was violent acts  
5 that obstruct commerce with no connection at all to  
6 extortion. That was there. And I have a question about  
7 your characterization of what the Seventh Circuit did. It  
8 was puzzled. It says, "Extortion, they all go." But here  
9 are these four that don't involve extortion, and there's  
10 no ruling from the Court on those. Was the Court supposed  
11 to assume that the Court made a question -- decided a  
12 question of statutory interpretation by silence?

13 MR. UNTEREINER: No. No, Justice Ginsburg, but  
14 the argument was made in this Court, at the petition stage  
15 the last time around, that those four counts were, in  
16 fact, included in the petitions. At that time, of course,  
17 there was no contrary authority. The Yankowski opinion of  
18 the Ninth Circuit made clear, and I think the language of  
19 the Hobbs Act makes clear, that freestanding acts or  
20 threats of violence are not covered. So, we argued, at  
21 the petition stage, that those counts were covered. And  
22 then, at the merits stage, the Petitioners asked this  
23 Court to reverse and remand for entry of judgment in our  
24 favor on all claims and all counts. The Respondents, at  
25 that point, did not argue --

1 JUSTICE STEVENS: Was there any argument on the  
2 merits as to those four counts?

3 MR. UNTEREINER: No, Justice Stevens.

4 JUSTICE STEVENS: Yes. Yes. Is it conceivable  
5 that we overlooked that point?

6 MR. UNTEREINER: Well, we take the Court to mean  
7 what it -- what it says.

8 JUSTICE STEVENS: But if I just -- do you think  
9 it's conceivable that we just didn't realize those four  
10 points were at issue?

11 MR. UNTEREINER: I think it's possible. But if  
12 the Court did overlook those, I think that would have been  
13 something that should have been raised in a rehearing  
14 petition in this Court.

15 JUSTICE STEVENS: And do you think we resolved  
16 the statutory construction issue that you're now arguing  
17 very carefully at this time?

18 MR. UNTEREINER: There's no indication, in the  
19 court's opinion, that it resolved it. It may have assumed  
20 that we were right, because we made the argument at the --

21 JUSTICE STEVENS: They may assume it --

22 MR. UNTEREINER: -- petition stage --

23 JUSTICE STEVENS: -- but there's nothing in the  
24 opinion to give any --

25 MR. UNTEREINER: That's correct. That's

1 correct, Justice Stevens.

2 JUSTICE O'CONNOR: If it's possible, at least,  
3 that we just overlooked that aspect in the issuance of our  
4 opinion, would it be more helpful to move on to the other  
5 two questions at issue here, since they would be  
6 determinative? It's --

7 MR. UNTEREINER: I'd be happy to --

8 JUSTICE O'CONNOR: -- it's disturbing to think  
9 that some court below deliberately was trying to defy what  
10 this Court said. And I'm not sure there is any indication  
11 of that. It may have thought that those issues -- those  
12 other acts were overlooked, and, therefore, they had some  
13 right to deal with it. But I wonder if we shouldn't focus  
14 on the other two legal issues here.

15 MR. UNTEREINER: I'd be happy to move on,  
16 Justice O'Connor, to those two issues.

17 Our second argument is that the Hobbs Act does  
18 not punish freestanding acts or threats of violence. By  
19 "freestanding," we mean unconnected to either robbery or  
20 extortion. And I think that's apparent from the language  
21 of the Hobbs Act, which has three clauses. And the third  
22 clause covers acts or threats of violence, quote, "in  
23 furtherance of any plan or purpose to do anything in  
24 violation of this section," unquote. So, there needs to  
25 be a connection. There needs to be a violation of this



1 section. And our position is that that refers back to the  
2 principal offenses under section 1951, robbery or  
3 extortion.

4 Now, the Respondent's position is that the mere  
5 act of obstructing commerce, or affecting commerce, or, I  
6 suppose, even delaying commerce, is a violation of the  
7 Hobbs Act. And I don't think it's possible to read the  
8 statutory language that way. So, we think that argument  
9 is clearly foreclosed. Now, if there's any doubt about  
10 that, based on the language of the Hobbs Act, as amended  
11 in 1948, one need only look back to the 1946 version of  
12 the Hobbs Act, as originally passed. And there, it --  
13 there's no debate that Congress intended to cover acts or  
14 threats of physical violence only if undertaken in  
15 furtherance of a plan or purpose to commit robbery or  
16 extortion.

17 So, Respondent's position rises or falls on the  
18 proposition that in 1948, when Congress recodified and  
19 revised all of Title 18 of the U.S. Code, it dramatically  
20 expanded the Hobbs Act. This Court, in reviewing revision  
21 and recodification statutes, applies special rules of  
22 construction. It requires a clear statement -- or clear  
23 expression of intent to make a substantive change; and, if  
24 there isn't one, it assumes that no substantive change was  
25 intended.

1           If you look at the revisor's notes to section  
2   1951(a) in the 1948 revision, it's clear that there is no  
3   intent to make any substantive change. So, I think the  
4   Court really doesn't need to go any further on that second  
5   issue to rule in the Petitioner's favor.

6           JUSTICE GINSBURG: The question is whether the  
7   Court should rule on it, as in a matter of first decision.  
8   We are a Court of review. There was no determination of  
9   whether the Hobbs Act included such a category in the  
10  Seventh Circuit. So, the difficulty, the impediment to  
11  addressing your position is that however strong it may be,  
12  it wasn't resolved below, so why shouldn't we follow the  
13  natural order that first the District Court speaks, and  
14  then the Court of Appeals, and then it comes here?

15          MR. UNTEREINER: Justice Ginsburg, I understand  
16  the concern, but the Seventh Circuit did everything but  
17  resolve the issue. It said it wasn't resolving the issue,  
18  but it -- at the same time, it said that it rejected our  
19  argument based on the rule of lenity. It rejected our  
20  argument based on the over-federalization of State crimes.  
21  It said that both -- it rejected our plain-language  
22  argument. It went on and on to reject all the same  
23  arguments we're making in this Court.

24          So, I think if the case were remanded to the  
25  District Court --

1 JUSTICE SCALIA: Excuse me. How could the --  
2 how could the Court of Appeals not have resolved this  
3 issue? How could it possibly have rendered its judgment  
4 without resolving this issue?

5 MR. UNTEREINER: Well, what the -- what the  
6 Court --

7 JUSTICE SCALIA: Did you raise this issue below?

8 MR. UNTEREINER: Yes, we did, Your Honor. We  
9 raised it both in the -- at the rehearing petitions in the  
10 Seventh Circuit and in the initial appeal. It did resolve  
11 the issue, insofar as it held that the Hobbs Act may  
12 plausibly be read to cover freestanding acts for threats  
13 of violence. And that holding is in conflict with the  
14 decision of the Ninth Circuit and the Sixth Circuit.

15 JUSTICE SCALIA: Excuse me. Is that how we  
16 apply statutes, that if they may plausibly be read a  
17 certain way, that's what they mean?

18 MR. UNTEREINER: Well, that is what the --

19 JUSTICE SCALIA: I don't understand how that's a  
20 resolution of the question.

21 MR. UNTEREINER: The Seventh Circuit went out of  
22 its way to say it was not finally resolving the question.  
23 But, Justice Scalia, it, again and again, went through  
24 our arguments and rejected them. And then, at the end of  
25 its opinion, it said it would be better to read the

1 statute at -- take the statute at face value, and that, it  
2 suggested, was what Respondent's position was. So, I think  
3 it went as far as it possibly could to resolve the  
4 question and reject all of the arguments that are being  
5 made here. So, I think it -- to go back to the District  
6 Court, it would be a foregone conclusion, and it would  
7 just result in further delay. This case has gone on for  
8 almost --

9 JUSTICE KENNEDY: Well, I'm with you --

10 MR. UNTEREINER: -- 20 years.

11 JUSTICE KENNEDY: -- up to the point where you  
12 say it went as far as it possibly could. As Justice  
13 Scalia indicates, why didn't it say, "This is the way the  
14 Act must be interpreted," period? So, it didn't go as far  
15 as -- I'm just quibbling with your -- I'm just quibbling  
16 with your statement that it went as far as it possibly  
17 could. I don't think it did. That's the problem.

18 MR. UNTEREINER: Well, yes, it did leave open  
19 the possibility that a court might come to the opposite  
20 conclusion. But I think if you're the District Court  
21 reading the opinion of the Seventh Circuit, I think it's  
22 clear which way you're going to have to come out.

23 JUSTICE GINSBURG: Why?

24 JUSTICE KENNEDY: We got you off of --

25 JUSTICE GINSBURG: Were you --

1 JUSTICE KENNEDY: We got you off of your first  
2 point, but I'd like to just loop back to that for a  
3 minute, at this point. Is this imprecision, this  
4 ambiguity, grounds for our reading -- our insisting on  
5 reading our earlier remand and judgment literally and  
6 saying that there are no predicate acts -- there are no  
7 predicate acts that support this judgment?

8 MR. UNTEREINER: Well --

9 JUSTICE KENNEDY: Do -- is there some prudential  
10 argument for us not to reach this issue and just insist on  
11 the wording of our earlier mandate?

12 MR. UNTEREINER: The Court could certainly come  
13 out that way on prudential grounds as a reason to avoid  
14 deciding a Hobbs Act issue. But, in our view, the Hobbs  
15 Act question is a fairly easy and straightforward one.  
16 And the Seventh Circuit's opinion is going to create  
17 mischief if left untouched.

18 JUSTICE GINSBURG: I'm concerned about your  
19 characterization, not only of suggesting that there was  
20 some attempt to force a particular decision, but I'm  
21 reading the Seventh Circuit's remand to the District  
22 Court. It went through your argument, which it said was a  
23 substantial one, that no change was intended in the  
24 codification. And it said, "While these revisions were  
25 intended to be formal stylistic changes, it is not beyond

1 the realm of the possible that the revisers may have made  
2 certain substantive changes." That doesn't sound like  
3 they were ruling on it definitively, but they were tipping  
4 their hand. "Not beyond the realm of the possible." That  
5 was --

6 MR. UNTEREINER: The Seventh Circuit did  
7 everything it could to make it seem like a plausible  
8 issue, as opposed to a very clear issue that should be  
9 resolved in our favor. It went out of its way to do that.

10 JUSTICE SCALIA: I don't understand how they --  
11 how they could dispose of the case without resolving that.  
12 That's my puzzlement.

13 MR. UNTEREINER: Well --

14 JUSTICE SCALIA: How -- I mean, can we do that  
15 in a case that comes up here, and just say, "There are  
16 good arguments on both sides, it's quite plausible," and  
17 remand the case without resolving the issue?

18 [Laughter.]

19 JUSTICE GINSBURG: They asked the District Court  
20 to resolve it. They said the District Court should  
21 resolve it in the first instance, and then they would  
22 review it, presumably.

23 MR. UNTEREINER: That's right, Justice Ginsburg.

24 But I do think a premise of the remand for further  
25 proceedings in the District Court is that it's plausible

1 to read the statute this way. And I think the Court  
2 could, and should, reverse that aspect of the Seventh  
3 Circuit's decision.

4 JUSTICE STEVENS: Of course, the reason they  
5 said it was plausible is that -- and you may well be  
6 right, on the bottom line, and the Government agrees with  
7 you, but there are -- there's a redundancy in the statute.  
8 There's a phrase in there that could be taken out, and  
9 the statute would have exactly the same meaning, if you're  
10 correct.

11 MR. UNTEREINER: We don't agree that there --  
12 well, perhaps Your Honor could elucidate --

13 JUSTICE STEVENS: It seems to me those words --  
14 I forget what the -- "commit threats of physical  
15 violence." So, take those words. The statute will have  
16 the same meaning.

17 MR. UNTEREINER: I don't think that's right. I  
18 don't think that's right --

19 JUSTICE STEVENS: Oh, really?

20 MR. UNTEREINER: -- Justice Stevens. I think  
21 that that does add something. The argument is being made  
22 in this case that those words are superfluous under our  
23 reading, but I don't think that's correct.

24 JUSTICE STEVENS: What function do they perform?  
25 What case would it cover that would not otherwise be

1 covered?

2 MR. UNTEREINER: It would cover preparatory acts  
3 of violence that do not rise to an attempt. We gave  
4 several examples --

5 JUSTICE STEVENS: That do not rise to an  
6 obtaining?

7 MR. UNTEREINER: No, do not rise to an attempt,  
8 an attempted extortion or robbery. The example we gave --  
9 we gave several examples in our blue brief. One of them  
10 is a defendant who wants to rob a factory and --

11 JUSTICE STEVENS: Oh, I see what you're saying.

12 MR. UNTEREINER: -- and --

13 JUSTICE STEVENS: You're -- I understand.

14 MR. UNTEREINER: Yes. Yes.

15 If I may, I'd like to turn, in my limited time,  
16 to the third question, which is the -- whether RICO  
17 authorizes private injunctive relief. And we want to make  
18 three basic -- or I'd like to make three basic --

19 CHIEF JUSTICE ROBERTS: No, we didn't reach  
20 that, last time.

21 MR. UNTEREINER: That's correct, Mr. Chief  
22 Justice.

23 CHIEF JUSTICE ROBERTS: Why, if we -- if we  
24 agree with you on the Hobbs Act, I assume you would not  
25 have us reach that third question this time, either.



1                   MR. UNTEREINER: That's correct, there would be  
2 no need for the Court to reach that issue this time,  
3 either.

4                   But I'd like to just say a few words about that  
5 provision, because I think we're right on that issue, as  
6 well. And the Court can pick any one of these three  
7 grounds to rule in our favor. We'd be happy with any of  
8 them.

9                   Our principal argument on RICO is that RICO's  
10 civil-remedies provisions were drawn from the antitrust  
11 laws, from the Clayton Act and from the Sherman Act before  
12 it. In fact, the treble-damages provision of RICO is  
13 taken almost verbatim from the Clayton Act and Sherman Act  
14 provisions. This Court, in a long line of cases, held  
15 that the Sherman Act does not authorize private injunctive  
16 relief. And that holding -- those holdings were based on  
17 the provisions on which these RICO remedial provisions  
18 were modeled. And so, we think when Congress took that  
19 language, which is essentially identical, at least in the  
20 -- in the -- in the treble-damages provision, from the  
21 antitrust laws, that it was entitled to assume that they  
22 would be read the same way in RICO.

23                  JUSTICE STEVENS: But, of course, at the time  
24 they did that, the Clayton Act had already been passed.

25                  MR. UNTEREINER: That's true, Justice Stevens.

1 But I think those provisions were carried forward, and  
2 Congress -- and this Court's cases, again and again, have  
3 relied on Congress's use of the -- of the Clayton and  
4 Sherman Act models. You've said that's a dominant strand  
5 in the legislative history.

6 CHIEF JUSTICE ROBERTS: Your argument's a little  
7 inconsistent with the Franklin case, though.

8 MR. UNTEREINER: I'm sorry.

9 CHIEF JUSTICE ROBERTS: Gwinnett -- Franklin  
10 versus Gwinnett County.

11 MR. UNTEREINER: Mr. Chief Justice, we think  
12 that Franklin is distinguishable. There are two lines of  
13 this Court's cases. Franklin falls into one line. That's  
14 a case where this Court finds a -- or acknowledges a  
15 private right of action, but where, necessarily, there's  
16 no guidance from Congress of what the remedies are. And  
17 in that situation, the Court does apply a presumption that  
18 all available remedies are -- will be -- will be imputed.

19 In this -- in the second line of cases, which is  
20 what this case is all about, Congress sets forth a  
21 detailed remedial scheme. And in those cases, I think  
22 it's inappropriate -- and this Court has said that  
23 repeatedly -- for courts to add remedies to those schemes  
24 which Congress is -- has selected. Now, this is  
25 especially true in this case, because Congress relied on

1 those antitrust precursors. And, beyond that, section 16  
2 of the Clayton Act, which expressly authorizes private  
3 injunctive relief, is -- has no analog in RICO. Now,  
4 Congress thought about including a provision like section  
5 16 of the Clayton Act when it considered RICO. Again and  
6 again, proposals were made, but Congress did not adopt  
7 those proposals either during the consideration of RICO or  
8 shortly thereafter.

9 If there are no further questions, I'd like to  
10 reserve the balance of my time for rebuttal.

11 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

12 Ms. Blatt.

13 ORAL ARGUMENT OF LISA S. BLATT

14 FOR UNITED STATES, AS AMICUS CURIAE,

15 SUPPORTING THE PETITIONERS

16 MS. BLATT: Thank you, Mr. Chief Justice, and  
17 may it please the Court:

18 It is the position of the United States that the  
19 physical-violence clause of the Hobbs Act requires an  
20 intended robbery or extortion, and that private parties,  
21 under RICO, cannot obtain injunctive relief.

22 JUSTICE STEVENS: Would you not --

23 JUSTICE O'CONNOR: Would you tell us what --  
24 which one of these questions, in your view, we ought to  
25 address, first and foremost? If the answer to any of them

1 is favorable to Petitioner's position, I guess that's the  
2 end of the case.

3 MS. BLATT: That's right. We think what would  
4 be appropriate is to recognize that the -- this Court's  
5 decision last time around did contain a sweeping statement  
6 at the end that all the predicate acts must be reversed.  
7 At the same time, the issue of the physical-violence  
8 clause was not briefed by the parties, it was not  
9 discussed in this Court's opinion, it was not discussed in  
10 the Seventh Circuit's opinion. And "law of the case" type  
11 principles are discretionary, and this Court has the  
12 discretion to reach the two other issues in the case.

13 Now, the RICO issue is more squarely presented,  
14 because there's an actual holding by the Seventh Circuit  
15 on that point. It's also an issue on which the Circuits  
16 are divided. It's important and recurring, and it's been  
17 before this Court twice. At the same time, the Court also  
18 has discretion to clean up, or clarify, the Hobbs Act  
19 issue. There was a remand. And although there's no  
20 holding by the Seventh Circuit, there was a remand that  
21 was predicated and based on an assumption that the  
22 plaintiffs had raised at least a substantial question.  
23 And this Court has discretion to say that was an error of  
24 law, because, under the plain language, the physical-  
25 violence clause is linked to robbery or extortion. That's

1 plain on the statute, because it requires that the  
2 physical violence be in furtherance of a violation.

3 JUSTICE GINSBURG: Even though two U.S.  
4 attorneys, years back, did predicate cases on there being  
5 a discrete crime of obstructing commerce through violent  
6 means.

7 MS. BLATT: That's correct. And those  
8 prosecutions were inconsistent with the written guidance  
9 of the Department of Justice in a longstanding  
10 interpretation of the Hobbs Act, at least since 1965, that  
11 it required an intended robbery or extortion.

12 JUSTICE STEVENS: Ms. Blatt --

13 MS. BLATT: And --

14 JUSTICE STEVENS: -- can I identify a concern?  
15 I'd like you to help me out on it. I -- that language, if  
16 you construe it the way the other side does, it would  
17 cover certain violent conspiracies that would merely  
18 obstruct interstate commerce that we could all be  
19 concerned about today. Are there other criminal statutes  
20 on the book that fill that gap?

21 MS. BLATT: Yes. 18 U.S.C. 2332(b), subsection  
22 (g), is a laundry list of Federal statutes, and it's a  
23 good source of reference for the type of Federal statutes  
24 that cover violence where there's a distinct Federal  
25 interest.

1 JUSTICE STEVENS: So that you're saying, in  
2 substance, that you don't need to read the Hobbs Act the  
3 way they do in order to protect the public from the kind  
4 of harms that the -- they would read the statute as  
5 covering.

6 MS. BLATT: That's correct. There's a lot of  
7 statutes on the books that apply to bombing in public  
8 places, violence against communication facilities,  
9 computer, transportation, energy, airports, any kind of  
10 mass transportation. And that -- 18 USC 2332 -- it's a  
11 long list of statutes. There's also the arson statute and  
12 the bombing statute, the use of any explosives in a -- in  
13 a -- in a facility that's used in interstate commerce.

14 And the Government has brought thousands and  
15 thousands and thousands of Hobbs Act prosecutions, and,  
16 but for those two, the only two that we can identify, all  
17 of our prosecutions have been linked to robbery or  
18 extortion.

19 And if I could address the superfluous point, we  
20 don't think the clause is superfluous either, for two  
21 reasons. It applies to a defendant who injures innocent  
22 bystanders during a robbery. Now, the defendant has  
23 committed the crime of robbery, but he's also committed  
24 the separate crime of using violence against any person in  
25 furtherance of that robbery. So, there could be

1 cumulative punishment based on that offense, and there  
2 would be --

3 JUSTICE KENNEDY: What do you mean? It's a  
4 separate --

5 MS. BLATT: -- two separate offenses.

6 JUSTICE KENNEDY: -- a separate offense?

7 MS. BLATT: It's a separate offense for --

8 JUSTICE KENNEDY: So you charge two counts for  
9 violating the same section?

10 MS. BLATT: Yes, because there's two distinct  
11 harms. There's not only the business, as the victim of  
12 the robbery, but there's the innocent bystanders who were  
13 injured or killed during the course of that robbery, and  
14 that would be two separate -- and then there's another way  
15 it's not --

16 JUSTICE KENNEDY: Two separate violations, each  
17 of which violates the same statute?

18 MS. BLATT: Yes, that's right.

19 JUSTICE BREYER: Is it -- you just -- on your  
20 list, I had the impression, but tell me if I'm right or  
21 wrong, that there's a specific statute dealing with  
22 abortion clinics now, though there wasn't when this case  
23 began.

24 MS. BLATT: Yes, the --

25 JUSTICE BREYER: So that if --

1 MS. BLATT: -- FACE Act.

2 JUSTICE BREYER: -- Operation Rescue did the  
3 same kind of thing now that they did then, the Petitioners  
4 in -- the plaintiffs in this case would be able to get  
5 relief under that statute. Is that right or wrong?

6 MS. BLATT: That's absolutely correct. The FACE  
7 Act, which was passed in 1994, gives private parties a  
8 right for damages and injunctive relief for blocking  
9 access to clinics. That would -- that would cover this  
10 specific case, and then there's the more general statutes  
11 I was speaking about earlier. But there is a specific  
12 right to injunctive relief, and I think the plaintiffs in  
13 this case tried to add claims under the FACE Act, but they  
14 were -- they were denied the ability to do that.

15 The second way it's not superfluous is the  
16 example given by Petitioners, in that it applies to a  
17 defendant, for instance, who tries to enlist another  
18 person in a robbery, but the neighbor, or the -- excuse  
19 me, that person just refuses. The physical-violence  
20 clause would apply to that situation regardless of whether  
21 that conduct also qualifies as an attempt.

22 JUSTICE GINSBURG: Ms. Blatt, your time is  
23 almost over, so, on the injunction part, what remedies are  
24 available to the United States under your reading of the  
25 provision? Injunctive relief, yes. What about -- is



1     there any monetary relief that the United States can seek  
2     under RICO?

3             MS. BLATT:   Well, 1964(a) addresses equitable  
4     relief, and the Government can get things like  
5     disgorgement under (a).  But as far as damages are  
6     concerned --

7             JUSTICE GINSBURG:  Yes.

8             MS. BLATT:  -- no.  This Court held, in the  
9     Cooper case, which is an antitrust case that was talked  
10    about in the Flamingo decision recently, the United States  
11    is not a person who is able to sue under the antitrust  
12    laws, because -- the general background principle that the  
13    United States is not a person.  And we think it's highly  
14    relevant that, after this Court repeatedly held that  
15    private parties cannot get injunctive relief, that the  
16    United States cannot get damages under the antitrust laws,  
17    Congress, in the Clayton Act, passed two express  
18    provisions: a Government damages action -- that was in  
19    1955, and now it's a treble-damages action -- as well as  
20    an express private injunctive action.  And, thus, there  
21    was this menu of remedies in the antitrust laws of express  
22    Government equitable, express Government damages, express  
23    private treble damages, and then Government damages.  But  
24    Congress, in RICO, only picked up two of them.  It picked  
25    up an express, a right for the attorney general to seek

1 injunctive relief and other equitable relief, and it  
2 picked up an express right for private parties only to  
3 seek treble damages.

4 In light of the holding after holding after  
5 holding, we identified six cases that were -- that were  
6 rendered before the passage of RICO, and the Cooper  
7 decision, which said the Government cannot seek damages.  
8 We think it's very clear that when Congress borrowed from  
9 the antitrust laws, but did not pick up those two express  
10 rights, that the governing principle is that when Congress  
11 borrows a statute that's been definitively construed,  
12 Congress adopts that judicial construction along with the  
13 statute. And it's particularly relevant because of those  
14 two express provisions.

15 And RICO is -- just contains that structure that  
16 was there in the Sherman Act, with the express public  
17 equitable action and the express private treble-damages  
18 action.

19 If there are no questions, we'd ask the Court to,  
20 if it wants, to reach --

21 JUSTICE KENNEDY: I have -- just have one  
22 question. If we were to adopt the Petitioner's first  
23 suggestion that we should simply have a strict reading of  
24 our mandate, would that cause problems, so far as people  
25 interpreting our precedent and indicating that, by

1     implication, we've reached this Hobbs Act question?

2             MS. BLATT:  No, I don't think so.  I think in  
3     the -- I don't think so.  The Court could apply just  
4     straightforward "law of the case" principles and say,  
5     "Regardless of whether we actually reached the four  
6     predicate acts, our judgment spoke clearly that the  
7     injunction had to be vacated."

8             JUSTICE STEVENS:  Regardless of whether we knew  
9     what we were doing, we said it.

10            [Laughter.]

11            MS. BLATT:  And that's why we think it's  
12     appropriate for the Court to say, just like the Court did  
13     in the recent per curiam Eberhart, that generally courts  
14     are supposed to follow this Court's mandates, and they're  
15     supposed to articulate their concerns to facilitate  
16     resolution by this Court, and then leave it up to this  
17     Court to clarify an earlier decision.

18            JUSTICE SCALIA:  Except if they think we didn't  
19     know what we were doing.  I --

20            MS. BLATT:  I think that the Court of Appeals --

21            JUSTICE SCALIA:  -- they ignore it if they -- if  
22     they think that we didn't know what we were doing.

23            MS. BLATT:  Well, they could have --

24            JUSTICE STEVENS:  Only when it's perfectly clear  
25     that we didn't know it.

1 [Laughter.]

2 MS. BLATT: We do think that the judgment did  
3 sweep more broadly than the circumstances --

4 JUSTICE STEVENS: You don't think there's even  
5 an arguable basis for saying we resolved the statutory  
6 question that's presented now, do you?

7 MS. BLATT: No, because usually the Court  
8 doesn't decide important -- the construction of a Federal  
9 statute, a Federal criminal statute, without discussing  
10 it. It was -- I don't want to say "buried in footnotes,"  
11 but it was mentioned in the footnotes at the petition  
12 stage the second time around, and then it dropped out of  
13 the case. And even the United States didn't discuss it --

14 JUSTICE STEVENS: But it's not mentioned in the  
15 opinion.

16 MS. BLATT: It's not mentioned in the opinion.  
17 It's not mentioned in the briefs, at the merits stage. It  
18 was not mentioned by the Seventh Circuit. At the same  
19 time, the court, at the end, did say that all of the  
20 predicate acts had to be reversed.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, Ms. Blatt.  
23 Mr. Chemerinsky.

24 ORAL ARGUMENT OF ERWIN CHEMERINSKY

25 ON BEHALF OF THE RESPONDENTS

1                   MR. CHEMERINSKY: Good morning, Mr. Chief  
2 Justice, and may it please the Court:

3                   The Seventh Circuit did exactly the right thing  
4 in this case. It sent the case back to the District Court  
5 and asked the District Court to determine whether an  
6 injunction could remain, based on the four counts of  
7 physical violence and threats of violence. It asked the  
8 District Court to determine whether or not the Hobbs Act  
9 applies to physical violence and threats of violence apart  
10 from extortion and robbery. This made great sense. No  
11 court, in this long litigation, had yet discussed the  
12 meaning of the Hobbs Act and whether it applies to  
13 physical violence and threats of violence apart from  
14 extortion and robbery.

15                  There's already been a good deal of discussion  
16 about what this Court meant in its prior decision. I  
17 think you find clarification if you look at page 399 of  
18 your prior decision, where the Court lists the predicate  
19 acts that it was considering. And if you add up the  
20 numbers, it adds to 117 predicate acts, but if you go to  
21 the jury's verdict, the special interrogatories, they  
22 found 121 acts. What was omitted from the Supreme Court's  
23 listing last time were the four counts of physical  
24 violence and threats of violence in violation of the Hobbs  
25 Act.

1 JUSTICE SOUTER: Well, that's true, but don't  
2 you have the further difficulty that we didn't merely  
3 reverse with respect to the -- to the Hobbs Act  
4 violations, or to the listed ones. We made it clear. We  
5 said, expressly, that the judgment had to be reversed,  
6 which seems to sweep everything within it, doesn't it?

7 MR. CHEMERINSKY: No, Your Honor. What this  
8 Court did was reverse and remand for further  
9 consideration, consistent with the decision of this Court.  
10 Since this Court had not considered the --

11 JUSTICE SOUTER: But, I mean, that's what we  
12 always say. And it may be that there is absolutely  
13 nothing to do, at that point, except enter judgment for  
14 one side and be done with it.

15 MR. CHEMERINSKY: But this Court has been clear  
16 that it only decides the issues that it speaks to. It's  
17 not plausible, Your Honor, that this Court was deciding a  
18 major unresolved issue of Federal criminal law without  
19 ever speaking to the question --

20 JUSTICE SOUTER: Well, I think -- I think, you  
21 know, your argument is fine, but the trouble is, if the  
22 question is, "Did the Seventh Circuit honor the judgment  
23 of this Court?" I think there's a pretty good argument  
24 that it not -- that it did not, based upon the fact that  
25 we, in effect, summed up everything we were purporting to

1 say with the phrase that the judgment itself had to be  
2 reversed.

3 MR. CHEMERINSKY: Except, Your Honor, this Court  
4 has said that it doesn't decide issues that weren't  
5 presented to it. And if you look at page 397 --

6 JUSTICE SCALIA: He's not talking about the  
7 deciding of issues; he's talking about reversing a  
8 judgment. You don't have to go into what the issues are  
9 in order to follow that instruction. The judgment is  
10 reversed. And if there were issues that should have been  
11 resolved in order to reverse the judgment, and that  
12 weren't, it would seem to me that your remedy would not be  
13 to say to the Court of Appeals, "Well, the Supreme Court  
14 didn't mean what it said," or, "didn't know what it was  
15 doing," but, rather, to move for reconsideration here.

16 MR. CHEMERINSKY: No, Your Honor. Rehearing is  
17 to issues that were decided by this Court. This Court  
18 clearly did not speak to the meaning of the Hobbs Act.  
19 And so, it was completely appropriate for the Seventh  
20 Circuit to say that this Court considered the issues, in  
21 terms of what extortion was about, whether the injunction  
22 is permissible under civil RICO. If you look at the --

23 JUSTICE SCALIA: Are you saying you couldn't --  
24 you couldn't file a motion for rehearing on the ground  
25 that the Court neglected to address four points that were

1 made very -- you made nothing of them in the -- in the  
2 argument or in the briefs. It was almost not considered  
3 at all. You mean that when a judgment is issued that  
4 is so clearly, in your view, erroneous, you can't come to  
5 the Court and say, "The judgment is erroneous, you forgot  
6 to address these issues"? I hope you can do that in a  
7 motion for rehearing.

8 MR. CHEMERINSKY: But, Your Honor, it's not  
9 required to present it that way. And I think what's  
10 incorrect about your phrasing is, it was Petitioners that  
11 did not present this. It was the same Petitioners last  
12 time. They presented to this Court the questions as to  
13 the meaning of "extortion" and whether injunctions were  
14 permissible under civil RICO. In fact, if you look at  
15 page 397 of your prior decision, it clearly states that  
16 there were two issues presented, what "extortion" means  
17 under the Hobbs Act and whether injunctions are  
18 permissible under civil RICO. I think it was completely  
19 appropriate, then, for Respondents to say this Court  
20 didn't deal with the four issues in -- concerning whether  
21 violence and threats of violence are separately from the  
22 Hobbs Act. And it was then permissible to say to the  
23 Seventh Circuit, "These remain as a basis for relief."

24 JUSTICE SCALIA: They would have to say not just  
25 that. They would have to say, "The court did not deal



1 with those four issues, and, therefore, its judgment was  
2 erroneous." They would have to say that in order to -- in  
3 order to act the way they did --

4 MR. CHEMERINSKY: Your Honor --

5 JUSTICE SCALIA: -- because our judgment was  
6 "reverse."

7 MR. CHEMERINSKY: Your Honor, if this Court had  
8 entered judgment for Petitioners, which it could have,  
9 then you would be correct. But, instead, what this Court  
10 did, as I said, is reverse and remand for consideration.  
11 And the Seventh Circuit --

12 CHIEF JUSTICE ROBERTS: Do we look -- do we --  
13 do we typically enter judgment, ourselves?

14 MR. CHEMERINSKY: No, typically you don't. But  
15 it is certainly permissible and possible for this Court to  
16 do so.

17 CHIEF JUSTICE ROBERTS: When was the last time  
18 we did that?

19 MR. CHEMERINSKY: I don't know the answer to  
20 that, Your Honor, other than, of course, as a court, this  
21 Court obviously could enter judgment for Petitioners. The  
22 fact that this Court said --

23 JUSTICE STEVENS: Well, I don't think we would  
24 actually enter judgment. We'd -- we might reverse with  
25 instructions to have the lower court enter judgment, but

1 we wouldn't enter the judgment ourselves.

2 MR. CHEMERINSKY: Your Honor, the Court could  
3 certainly, and, more likely, would do what you say. It  
4 could also affect the judgment --

5 JUSTICE STEVENS: The mandate, in this case,  
6 remanded, is that what you --

7 MR. CHEMERINSKY: That's correct, Your Honor.

8 JUSTICE STEVENS: So further proceedings --

9 MR. CHEMERINSKY: That's right.

10 JUSTICE STEVENS: -- consistent with the  
11 opinion.

12 MR. CHEMERINSKY: And my only point is, since  
13 this Court clearly said it was dealing with 117 of the  
14 acts, and clearly did not mention the four counts of  
15 violence and threats of violence under the Hobbs Act --

16 CHIEF JUSTICE ROBERTS: Well, it also said, in  
17 the last paragraph, "all of the predicate acts supporting  
18 the jury's verdict."

19 MR. CHEMERINSKY: That's right. And the  
20 question, of course, is, What does "all" refer to here?  
21 And I would say, if you go back to page 399, it lists the  
22 predicate acts that it's referring to and there --

23 CHIEF JUSTICE ROBERTS: No, it says --

24 MR. CHEMERINSKY: -- are 117 listed --

25 CHIEF JUSTICE ROBERTS: -- "all the predicate

1 acts supporting the jury's finding of a RICO violation."

2 MR. CHEMERINSKY: But, Your Honor --

3 CHIEF JUSTICE ROBERTS: So, it's quite clear  
4 what "all" was referring to.

5 MR. CHEMERINSKY: But, Chief Justice Roberts,  
6 then the assumption would have to be that this Court was  
7 deciding the four counts, in terms of violence and threats  
8 of violence, even though it wasn't presented in the cert  
9 petition, even though it wasn't briefed, and even though  
10 it was never discussed in this Court's opinion. And I  
11 think it was quite logical for the Seventh Circuit to say  
12 the appropriate thing to do is to let the District Court  
13 decide whether any injunctive relief was appropriate,  
14 based on those four counts; and, if so, what that  
15 provision of the Hobbs Act means.

16 JUSTICE GINSBURG: Mr. Chemerinsky, if we turn  
17 from what this Court did, or did not, think about last  
18 time around to what those four counts were, would I look  
19 to find out what were those four acts of violence that  
20 remain in the case? I could not find, in any of the  
21 papers before us, any specific definition of what those  
22 acts of violence were. I mean, the jury was given -- I  
23 don't know what -- was it a dozen possibilities? And they  
24 found four. But which four, we have no idea.

25 MR. CHEMERINSKY: But, Your Honor, that would be

1 a reason why this case should go back to the District  
2 Court, because that's the judge who tried the case.

3 JUSTICE GINSBURG: But he -- but wasn't this  
4 tried to a jury? That was a jury that made those  
5 findings.

6 MR. CHEMERINSKY: Yes --

7 JUSTICE GINSBURG: And the jury is no longer  
8 sitting.

9 MR. CHEMERINSKY: But the judge presided over  
10 the jury trial, and the judge could identify if there were  
11 four acts of violence and threats of violence to obstruct  
12 interstate commerce.

13 JUSTICE GINSBURG: He knows that there were four  
14 acts. He knows that he -- under his instructions, the  
15 jury could pick 12. How could he know which four the jury  
16 homed in on?

17 MR. CHEMERINSKY: But, Justice Ginsburg, he  
18 doesn't need to know which four. What he needs to  
19 determine is, Did the record that was presented to the  
20 jury support the finding that there were four acts of  
21 violence and threats of violence? And we'd suggest that  
22 --

23 JUSTICE GINSBURG: But does it -- when what  
24 turns on that finding is injunctive relief, the judge  
25 might very well be influenced by what those particular

1 acts were. He might say one set of four was not adequate  
2 to issue this injunction, but another set of four would  
3 be. And we just don't know -- we don't know what those  
4 acts were. The jury is not to be called back. The  
5 Seventh Circuit said "no more evidence." So, if we get  
6 down to those four acts, how can we say those are  
7 sufficient to uphold an injunction, when we don't even  
8 know what the acts were?

9 MR. CHEMERINSKY: But the traditional rule is to  
10 interpret the jury's verdict in a way that's most  
11 favorable to its conclusion. And so, here what the judge  
12 has to decide is, based on the record, were there four  
13 acts of violence or threats of violence to obstruct  
14 interstate commerce? And we'd suggest it would be quite  
15 easy for the judge to identify four such acts.

16 JUSTICE SCALIA: Well, you say "most favorable  
17 to its conclusion," but did the jury conclude that there  
18 should be an injunction?

19 MR. CHEMERINSKY: No, of course, but --

20 JUSTICE SCALIA: That's up to the judge.

21 MR. CHEMERINSKY: -- but the jury --

22 JUSTICE SCALIA: So, I mean, the principle that  
23 you interpret a verdict in the manner most favorable to  
24 its conclusion has no application here at all.

25 MR. CHEMERINSKY: But, Your Honor, the jury did

1 find, in special interrogatory 4(e), that there was  
2 violence and threats of violence and in final interrogatory  
3 8 that it was to obstruct interstate commerce.

4 Also here, remember the judge held a separate  
5 hearing after the jury verdict, before issuing injunction.

6 And if, on the basis of the evidence that he heard during  
7 the trial and that special hearing, he found four acts of  
8 violence and threats of violence, he then has to decide  
9 what injunctive relief is appropriate. And, of course, he  
10 would also, consistent --

11 JUSTICE SCALIA: Excuse me. You mean it's up --  
12 I don't understand that. The judge, in order to issue the  
13 injunction, becomes a second fact-finder, and he can find  
14 four -- he can pick four out of the twelve, perhaps four  
15 that the jury had not picked?

16 MR. CHEMERINSKY: Your Honor, since this is an  
17 injunction, he is allowed to consider the evidence that he  
18 heard, since he was sitting in an equitable matter. And  
19 so, there were actually two presentations --

20 JUSTICE SCALIA: So, he can -- he can actually  
21 make a finding. And it -- and it could be that the jury  
22 found that eight of them weren't valid, and the judge, in  
23 order to issue an injunction, can contradict the jury and  
24 say, "You know, I find that other four"?

25 MR. CHEMERINSKY: Well, when it comes to

1 injunctive relief, the judge can hold a separate hearing,  
2 and that's exactly what happened here. And I believe the  
3 issue for the judge on remand would be, Were there four  
4 acts of violence or threats of violence to obstruct  
5 interstate commerce? And I think the record clearly  
6 indicates there were. The judge said, here, "There is  
7 enough evidence, to fill this courtroom, of illegal acts  
8 by the Respondents."

9 JUSTICE GINSBURG: But the Seventh Circuit in  
10 its most recent expression said, "It may well be that the  
11 judge will decide that those 4 predicate acts" -- as  
12 opposed to 121 going in, 4 -- "were not sufficient to  
13 support certainly a nationwide injunction, but perhaps not  
14 any injunction."

15 MR. CHEMERINSKY: That's correct, Your Honor.  
16 That's why it was appropriate for the Seventh Circuit to  
17 remand the case to the District Court, because if the  
18 court were to conclude that an injunction is not  
19 appropriate, then anything that would be said about the  
20 meaning of the Hobbs Act or about civil RICO would then  
21 just be an advisory opinion. And that's why this Court,  
22 we believe, should also send the case back to the District  
23 Court. But if it reaches the meaning of the Hobbs Act or  
24 civil RICO, we believe that this is a situation there the  
25 plain meaning of the statute clearly controls.

1 CHIEF JUSTICE ROBERTS: Is there anything that  
2 -- under your reading of the Hobbs Act, that isn't covered  
3 by the FACE Act?

4 MR. CHEMERINSKY: Well, yes, Your Honor. The  
5 nature of the relief is certainly different under the  
6 Hobbs Act than under the FACE Act. Also, of course, at  
7 the time this action was brought, 19 years ago, the FACE  
8 Act didn't exist.

9 CHIEF JUSTICE ROBERTS: No, I know. But in  
10 terms of the -- we now have specific legislation addressed  
11 to the specific context. And all of the acts that you're  
12 complaining of in the original suit are actionable under  
13 the FACE Act, aren't they?

14 MR. CHEMERINSKY: That's correct, Your Honor.

15 JUSTICE BREYER: I'd like you to get to the  
16 meaning of the Hobbs Act.

17 MR. CHEMERINSKY: Yes, sir.

18 JUSTICE BREYER: And I'll try to focus my own  
19 thoughts on this by saying two objections to what you're  
20 arguing, related, that when they passed the Hobbs Act, it  
21 had a section 2, and section 2 said that, "This is an Act  
22 that forbids robbery and extortion, all involving  
23 interstate commerce. And robbery/extortion involve  
24 property." Then it had a section 5. And section 5 said,  
25 "This Act forbids physical violence or threats of violence



1 related to section 2." Now, all that happened since then  
2 is, there was a recodification. And the recodification  
3 wasn't meant to change anything substantive.

4 Second and related point: Enmons. For 35 years,  
5 working people in this country have thought they had a  
6 right to strike, free of the Hobbs Act. And your  
7 interpretation, as the AFL-CIO points out, will gut the  
8 right to strike.

9 Now, those are two strong arguments against you,  
10 and I'd like to hear your response.

11 MR. CHEMERINSKY: Thank you. And I'll address  
12 them, first and then second.

13 As to the first point, you correctly quote the  
14 1946 statute, but the 1948 revision was approved by  
15 Congress, and it specifically says "robbery or extortion  
16 or attempts so to do," comma, "or physical violence or  
17 threats of violence." This Court has said, in cases like  
18 United States versus Ron Pair, that commas have to be  
19 given meaning. This Court, in many cases, such as FCC  
20 versus Pacifica, said, "or" must be given meaning. There  
21 is --

22 CHIEF JUSTICE ROBERTS: Well, we've also said  
23 that we don't assume a substantive change from a  
24 recodification.

25 MR. CHEMERINSKY: But, Your Honor -- the statute

1 has been approved by Congress. It is that which is  
2 authoritative. And this Court has said, in other cases,  
3 like United States versus Wells, and State Farm versus  
4 Tashire, that revisers notes are often erroneous. This  
5 Court has said the cardinal rule of statutory construction  
6 is that the plain language must be followed.

7 CHIEF JUSTICE ROBERTS: So, your argument  
8 requires us to assume that Congress intended a substantive  
9 change when it recodified the Hobbs Act.

10 MR. CHEMERINSKY: That's right. This -- my  
11 argument is that the plain language makes clear that  
12 Congress did enact a substantive change. And, indeed, to  
13 interpret the law as Petitioner suggests, would render the  
14 words about "physical violence or threats of violence" as  
15 mere surplusage. And so, for example, some of the  
16 illustrations that were mentioned earlier, one was about  
17 the possibility of a planned pride and attempt. But, in a  
18 model penal code, section 5.01, it's clear that any  
19 substantial step is sufficient for an attempt that --

20 CHIEF JUSTICE ROBERTS: Who -- who's enacted the  
21 model penal code?

22 MR. CHEMERINSKY: I mention the model penal code  
23 as just something that's regarded as an authoritative  
24 definition with regard to criminal law. There's many  
25 jurisdictions around the country, including at the Federal

1 level, consistently saying a substantial step is  
2 sufficient for an attempt.

3 Another example that was mentioned was the  
4 subordinate enforcer. But the subordinate enforcer  
5 would be likely considered part of a conspiracy or an  
6 accomplice.

7 JUSTICE GINSBURG: Mr. Chemerinsky, the problem  
8 that I have, and Justice Breyer expressed, is, we have the  
9 reviser's notes that suggest, "I was just getting rid of  
10 extra words. I was making this a tighter provision." And  
11 there's not anything to indicate that Congress considered  
12 any change in the substance of the Act.

13 MR. CHEMERINSKY: Your Honor, there is almost no  
14 legislative history for the 1948 revision. All there is,  
15 as you rightly say, is the reviser's notes. But this  
16 Court has said that the reviser's notes are not  
17 authoritative. And this Court has said, on so many  
18 occasions, that --

19 JUSTICE GINSBURG: But here's a -- the reviser  
20 telling us, "I did this, and I did this to clean up the  
21 Act, to make it less wordy."

22 MR. CHEMERINSKY: Yes. But even if that's  
23 regarded as authoritative, this Court has so often said  
24 legislative history cannot justify ignoring plain meaning.  
25 And, given the comma and the word "or" and the fact that,

1 otherwise, the words "by physical violence" would have no  
2 meaning --

3 JUSTICE SCALIA: Let me --

4 MR. CHEMERINSKY: -- that's the plain meaning.

5 JUSTICE SCALIA: -- let me talk --

6 JUSTICE SOUTER: Well --

7 JUSTICE SCALIA: -- about the comma. I don't --  
8 I don't -- I don't understand your argument on that point.

9 I mean, it says, "Whoever, in any way or degree,  
10 obstructs, delays, or affects commerce or the movement or  
11 any article or commodity in commerce by robbery or  
12 extortion or attempts or conspires to do so," comma --  
13 that's the comma you're talking about?

14 MR. CHEMERINSKY: Yes.

15 JUSTICE SCALIA: -- "or threatens physical  
16 violence to any person or property," but it continues, "in  
17 furtherance of a plan or purpose to do anything in  
18 violation of this section." Now, the only thing that this  
19 section has, prior to that statement, said to be a  
20 violation is obstructing/delaying by robbery, extortion,  
21 or attempt or conspiracy to robbery or extortion.

22 MR. CHEMERINSKY: No, Your Honor. Two points  
23 here. First, it says "a plan." It's clear, there is --  
24 it's a plan to obstruct, interfere, or affect commerce.  
25 The others, Your Honor, you quickly skipped over --

1 JUSTICE SOUTER: No, but --

2 JUSTICE SCALIA: "Plan to do anything in  
3 violation of this section," which is not just obstructing  
4 commerce, but obstructing it by robbery, extortion, or  
5 attempt or conspiracy to robbery or extortion.

6 MR. CHEMERINSKY: No, Your Honor. I think that  
7 does deprive the comma or the word "or" meaning. And, in  
8 fact, it deprives the title of meaning, because the title  
9 here can be used when the title makes clear that it's  
10 about violence to obstruct interstate commerce. I'd also  
11 point out some words --

12 JUSTICE BREYER: But that's a jurisdictional  
13 hook, isn't it?

14 JUSTICE BREYER: When you see something in a  
15 criminal statute that forbids "affecting commerce by,"  
16 that means that Congress wants to prevent the conduct that  
17 will follow the words "by," and it needs a jurisdictional  
18 hook, so it puts in "affecting commerce." That's how I've  
19 always understood the Federal criminal code. Am I --

20 MR. CHEMERINSKY: Yes.

21 JUSTICE BREYER: -- wrong in that?

22 MR. CHEMERINSKY: Yes, Your Honor. Here, what  
23 it's saying is that Congress is prohibiting "plans to  
24 obstruct commerce by robbery or extortion or physical  
25 violence or threats of violence." And, Justice Scalia,

1    when you read the statute to me, some of the words that  
2    were skipped over quickly were the words "so to do."  
3    Notice it says "with regard to robbery or extortion or  
4    attempts to do so," comma. If they meant violence and  
5    physical violence to only refer to extortion or robbery,  
6    as they did with "attempts," then "so to do" could have  
7    been put into that clause, as well.

8               JUSTICE SCALIA: What is -- what meaning do you  
9    give to the phrase "in furtherance of a plan or purpose to  
10   do anything in violation of this section"? Under your  
11   interpretation, you could just drop that -- drop that  
12   phrase completely.

13              MR. CHEMERINSKY: Not at all, because it makes  
14   clear that Congress didn't mean, here, to criminalize  
15   every act of violence that occurs. It has to be, in order  
16   to be actionable, a "plan of physical violence to obstruct  
17   interstate commerce." That's why this doesn't apply --

18              JUSTICE SCALIA: But that's not a violation of  
19   the section. "Obstructing interstate commerce" is not a  
20   violation of 1951.

21              MR. CHEMERINSKY: No, Your Honor. What is a  
22   violation of 1951 --

23              JUSTICE SCALIA: -- is obstructing it by robbery  
24   or by extortion or attempt or conspiracy to robbery or  
25   extortion.

1           MR. CHEMERINSKY: I disagree, because I think  
2 then it does reduce the words "physical violence or  
3 threats of physical violence" to mere surplusage.

4           JUSTICE O'CONNOR: Well, no, because the --

5           JUSTICE SOUTER: Well, what do you say to the  
6 response --

7           JUSTICE O'CONNOR: -- the counsel for the  
8 Government explained that if, in the course of committing  
9 a robbery, some bystander is physically injured, it's  
10 covered.

11          MR. CHEMERINSKY: No, Your --

12          JUSTICE O'CONNOR: I mean, that's  
13 understandable, isn't it?

14          MR. CHEMERINSKY: No, Your Honor. The reason  
15 is, if somebody is injured in the course of a robbery,  
16 that's already punished as part of the robbery. In fact,  
17 the Federal sentencing guidelines make clear that harms  
18 that are caused while committing a crime are punished as a  
19 part of that crime. You --

20          JUSTICE SCALIA: If you're --

21          MR. CHEMERINSKY: -- don't need to --

22          JUSTICE SCALIA: -- convicted --

23          MR. CHEMERINSKY: -- include that language.

24          JUSTICE SCALIA: -- of the crime, but you cannot  
25 be indicted as a separate crime. This makes it a separate

1 offense.

2 MR. CHEMERINSKY: But, Your Honor --

3 JUSTICE SCALIA: You're saying we -- you can use  
4 it to aggravate the punishment for some other offense, but  
5 this does -- this does something quite beyond that. It  
6 says it is a separate offense.

7 MR. CHEMERINSKY: But, Your Honor, for every  
8 criminal law, injuries that are committed by those who are  
9 engaged in the criminal activity are punished as a part of  
10 that criminal act.

11 Now, Justice Breyer, your second --

12 JUSTICE SOUTER: Well, you say they are punished  
13 as a part of the act, but Justice Scalia's point is still  
14 true, it only goes to punishment. The way this is  
15 written, it may be charged as a separate offense.

16 MR. CHEMERINSKY: But, Your Honor, there would  
17 be no need to charge a separate offense. If you look at  
18 1951(b) --

19 JUSTICE BREYER: Well, I -- I mean, one is --  
20 I'm attempted to say, "Well, tell Congress that." If they  
21 want to create a separate offense, they can do it.

22 MR. CHEMERINSKY: No, Your Honor. If you look  
23 at section 1951(b), where it defines "robbery" and  
24 "extortion," it already includes "violence" in the  
25 definition of "robbery" and "extortion." There would be



1 no need for Congress to separately --

2 JUSTICE BREYER: But isn't the reasonable  
3 reading of that, "violence in the course of achieving --  
4 for the purpose of achieving the object in question," as  
5 opposed to, in effect, a "by-blow against a bystander"?

6 MR. CHEMERINSKY: No, Your Honor, I don't think  
7 so, since the statute defines "robbery" and "extortion,"  
8 in 1951(b), specifically to include acts of violence, then  
9 all the things we're talking about after the crime would  
10 already be part of what's prohibited by the statute.

11 JUSTICE BREYER: Mr. --

12 MR. CHEMERINSKY: It could already be charged --

13 JUSTICE BREYER: -- I want to give you a chance,  
14 because you're quite right in thinking that I'm moved, in  
15 large part -- or worried, in large part -- not about this  
16 language, but about the change in Federal criminal law.  
17 And the change in Federal criminal law, if you're right,  
18 way beyond this case, would transform virtually every  
19 threat of violence made anywhere in the United States into  
20 a serious Federal crime. At the least, it would -- and  
21 make a major change in threats of violence on the picket  
22 line. And those are two aspects of the same thing. And  
23 I'm worried about the upsetting of expectations way  
24 outside the context of this case and making a major change  
25 in Federal labor law, for example.

1           MR. CHEMERINSKY: Let me start labor law and  
2 then go more generally.

3           Section 1951(c) has a specific provision that  
4 makes clear that the Hobbs Act was not meant to change the  
5 protection of labor unions. And, in fact, every one of  
6 the statutory references in 1951(c) is to a statute  
7 protecting labor unions. Enmons specifically says --

8           JUSTICE BREYER: What does it -- 1951(c) says  
9 what?

10          MR. CHEMERINSKY: It lists -- it says "nothing  
11 in this statute is meant to alter the protections of," and  
12 then it lists a whole number of statutes, and those are  
13 all statutes that protect labor unions.

14          JUSTICE BREYER: Yeah, but I -- then perhaps I  
15 -- that's an old statute, 1951(c), isn't it? Is it  
16 something brand new?

17          MR. CHEMERINSKY: Well, this is the Hobbs Act.

18          JUSTICE BREYER: Yeah.

19          MR. CHEMERINSKY: Section 3 --

20          JUSTICE BREYER: All right. What is it --

21          MR. CHEMERINSKY: -- of the Hobbs Act.

22          JUSTICE BREYER: Well, the case that interpreted  
23 the Hobbs Act, which is Enmons --

24          MR. CHEMERINSKY: Right.

25          JUSTICE BREYER: -- seems to rely, for the

1 labor-union exemption, on the fact that a threat of  
2 violence in an effort to obtain legitimate wages is not  
3 within the Act. But if we read "legitimate wages" out of  
4 the Act, then I guess we would be left with "the threat of  
5 violence."

6 MR. CHEMERINSKY: No, Your Honor. And the  
7 reason is, Enmons says there's a special legislative  
8 history of the Hobbs Act specifically about labor. And  
9 Enmons concluded that if the violence is part of a strike  
10 to pursue lawful union activities, it is not actionable  
11 under the Hobbs Act. Nothing that this Court would decide  
12 here would change that specific protection of unions, one  
13 that's codified in the statute.

14 As to your former question, nor would ruling in  
15 favor of Respondents here change the criminal laws you  
16 suggest. The statute would only apply to a plan to  
17 obstruct interstate commerce by physical violence or  
18 threats of violence. Your Honor, this is an  
19 interpretation --

20 JUSTICE BREYER: No, the -- it's not a -- that's  
21 wrong. It says "affect commerce."

22 MR. CHEMERINSKY: Right.

23 JUSTICE BREYER: And, therefore, we have the  
24 instance of any threat of violence that affects commerce  
25 becomes a Federal crime subject to 20 years of

1 imprisonment. And, of course, in today's world, as you  
2 know, I believe almost everything affects commerce. And  
3 if I'm even close to being right, this is a major  
4 incursion of Federal law, serious criminal Federal law,  
5 into what could be fairly minor matters of State criminal  
6 law.

7 MR. CHEMERINSKY: No, Your Honor, because of the  
8 importance of the word "plan." And this goes to my answer  
9 to Justice Scalia earlier. The fact that it has to be a  
10 plan to obstruct or affect interstate commerce is an  
11 important limitation here. And it's key to remember that  
12 this is the position that the United States Government  
13 took for at least 25 years -- from the Franks case, in  
14 1974, to the Milton case, in the Fourth Circuit in 1998,  
15 the Yankowski case, in 1999 -- and it hasn't had those  
16 effects. But if it does, Your Honor, then the appropriate  
17 solution is for Congress to change the statute, but not  
18 for this Court to ignore the plain meaning of the law.

19 The final issue that was presented concerns the  
20 RICO statute. Here, section 1964(a) clearly authorizes  
21 courts to have jurisdiction to issue injunctions. Unlike  
22 the Sherman Act provision that only authorized the  
23 Government to seek injunctive relief, section 1964(a)  
24 allows Federal courts of jurisdiction, in any instance.  
25 This Court has said, in many instances, as Chief Justice

1 Roberts pointed out, such as Franklin versus Gwinnett  
2 County, that when Federal courts have jurisdiction, they  
3 retain equitable power unless Congress expressly stripped  
4 that authority. So --

5 CHIEF JUSTICE ROBERTS: Well, your friend's  
6 answer was that that was an implied right-of-action case;  
7 and, therefore, the remedies had not been spelled out; and  
8 so, you assume the broader remedies. What's wrong with  
9 that answer?

10 MR. CHEMERINSKY: No, Your Honor, because this  
11 Court has said, in any instance, Federal courts have  
12 equitable power unless Congress has expressly stripped it  
13 of that power. United States versus Umansky would be an  
14 example where this Court said that, as well as the  
15 language from Franklin versus Gwinnett County. And that's  
16 especially true here, where Congress, in the RICO statute,  
17 specifically said that it should be broadly construed.  
18 This Court, in Sedima versus Imrex, said especially as to  
19 the remedial provision, section 1964, this should be broad  
20 construction.

21 JUSTICE GINSBURG: As you read it, can a private  
22 party get a preliminary injunction?

23 MR. CHEMERINSKY: No, Your Honor, in terms of  
24 the Government is specifically authorized by 1964(b) to get  
25 a preliminary injunction. And the reason for that is,

1 generally the Government can't get injunctions to stop  
2 criminal activity. 1964(b) was added for that. But I'd  
3 say 1964(a), to go to your specific question, would  
4 authorize anyone to be able to go to the Federal court to  
5 use any of the Federal court's inherent powers.

6 JUSTICE GINSBURG: So, a private party could get  
7 an -- not only permanent, but preliminary --

8 MR. CHEMERINSKY: Yes, Your Honor.

9 JUSTICE GINSBURG: -- injunction.

10 MR. CHEMERINSKY: Yes. 1964(b) was added  
11 because of the traditional common-law rule that the  
12 Government generally can't get such injunctions.

13 Our position is simple. We believe that the  
14 Hobbs Act was changed precisely to deal with the  
15 situations where there might be a radical animal-activist  
16 group that might be blowing up restaurants that serve  
17 meat, or clothing stores, or where there might be  
18 situations where racists were blowing up businesses owned  
19 by blacks or Jews. That's what the Hobbs Act does. And  
20 the RICO statute provides, as Congress intended, a broad  
21 remedial scheme.

22 JUSTICE SCALIA: Mr. Chemerinsky, I -- you said  
23 earlier that our -- that we "reversed and remanded." That  
24 was not in our opinion, though, as it sometimes is,  
25 "Therefore, you know, the case is remanded." It doesn't

1 say that. Our opinion here just says "reversed."

2 MR. CHEMERINSKY: Right. But, Your Honor, this  
3 case --

4 JUSTICE SCALIA: It just says --

5 MR. CHEMERINSKY: -- obviously was sent back --

6 JUSTICE SCALIA: -- "reversed."

7 MR. CHEMERINSKY: -- to the Seventh Circuit.

8 And the Seventh Circuit then had to interpret what this  
9 Court decided. And --

10 JUSTICE SCALIA: I see. And they interpreted  
11 "reversed" to mean "remanded."

12 MR. CHEMERINSKY: Because this Court had not  
13 considered --

14 JUSTICE SCALIA: I see.

15 MR. CHEMERINSKY: -- the four acts --

16 JUSTICE SCALIA: I see.

17 MR. CHEMERINSKY: -- of violence and threats of  
18 violence.

19 JUSTICE SCALIA: So, that enabled them to say  
20 that what we meant was not "reversed," but "reversed and  
21 remanded."

22 MR. CHEMERINSKY: What this -- what the Seventh  
23 Circuit did was look at this Court's opinion and see that  
24 the statement of the issues, on page 397 --

25 JUSTICE SCALIA: They didn't look at the last

1 line of our opinion, which said "reversed."

2 MR. CHEMERINSKY: But, Your Honor, that would  
3 then assume that this Court decided an issue about the  
4 meaning of the Hobbs Act that was never presented in the  
5 cert petitions, never briefed, never addressed in the  
6 opinion.

7 JUSTICE GINSBURG: They made the assumption that  
8 this Court has an obligation to reason why, and there was  
9 no reason why given as to those four counts.

10 MR. CHEMERINSKY: That's right. No discussion  
11 whatsoever, Your Honor.

12 JUSTICE SCALIA: It's a broad principle.  
13 Whenever a Court of Appeals thinks that we haven't really  
14 resolved all the issues in the case, they can ignore our  
15 order that says "reversed."

16 MR. CHEMERINSKY: Of course not, Your Honor.  
17 What the Seventh Circuit had to decide was, What about the  
18 four counts of violence or threats of violence that were  
19 found by the jury? Since they weren't ever discussed, the  
20 Court of Appeals did exactly the right thing, sent it back  
21 to the District Court to decide whether an injunction is  
22 still appropriate; and, if so, what the Hobbs Act means.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Well, Congress never  
25 discussed the change in the Hobbs Act that you're



1 proposing, in 1948.

2 [Laughter.]

3 MR. CHEMERINSKY: That's true. But it's unusual  
4 that, in 1948, Congress actually passed that statute. And  
5 so, that's binding. Here, the Seventh Circuit --

6 JUSTICE STEVENS: We also actually entered a  
7 mandate, too.

8 [Laughter.]

9 MR. CHEMERINSKY: Yes, that's true.

10 Thank you very much.

11 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
12 Chemerinsky.

13 Mr. Untereiner, you have 3 minutes remaining.

14 REBUTTAL ARGUMENT OF ALAN UNTEREINER

15 ON BEHALF OF PETITIONERS

16 MR. UNTEREINER: Thank you, Mr. Chief Justice.  
17 I just want to make a few very quick points.

18 First, I heard Mr. Chemerinsky say that the  
19 third clause was unnecessary in the Hobbs Act, because  
20 robbery and extortion necessarily involve acts or threats  
21 of violence. I just would like to point out that the  
22 Hobbs Act also covers official extortion, which does not  
23 require acts or threats of violence.

24 Secondly, on the Enmons point that Justice  
25 Breyer was asking about, you're quite right, Justice

1 Breyer, that to accept the other side's position would  
2 effectively overrule Enmons. Enmons did not rely, in any  
3 way, on section 1951(c), had nothing to do with the  
4 Court's analysis. If you look at section 1951(c), which  
5 is reprinted in the Scheidler blue brief at page 2(a),  
6 you'll see that it just refers to some labor statutes. It  
7 says that the Hobbs Act is not meant to repeal, modify, or  
8 affect those laws. But those laws don't protect violent  
9 conduct, so that's a red herring.

10 And, number three, I'd just like to point out  
11 that in this Court's last decision in this case, the Court  
12 made clear that coercion is not covered by the Hobbs Act.

13 But under the Respondent's reading, some acts of coercion  
14 would, in fact, be covered by the Hobbs Act.

15 Finally, we'd just like to reiterate our request  
16 that, if the Court rules in our favor, it make very clear,  
17 in remanding the case, that judgment should be entered in  
18 favor of Petitioners.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

21 The case is submitted.

22 [Whereupon, at 11:01 a.m., the case in the  
23 above-entitled matter was submitted.]

24

25