

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: NATIONAL ORGANIZATION FOR WOMEN, INC.,
ETC., ET AL., Petitioners v. JOSEPH
SCHEIDLER, ET AL.

CASE NO: 92-780

PLACE: Washington, D.C.

DATE: Wednesday, December 8, 1993

PAGES: 1-54

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IN THE SUPREME COURT OF THE UNITED STATES

~~ORAL ARGUMENT OF~~ -X

PAGE

NATIONAL ORGANIZATION FOR WOMEN, :

INC., ETC., ET AL. the Petitioners:

MIGUEL A. Estrada, Petitioners :

v. amicus curiae, supporting: No. 92-780

JOSEPH SCHEIDLER, ET AL. :

~~RESPONSE OF~~ -X

REBUTTAL ARGUMENT OF Washington, D.C.

FAY CLAYTON, ESQ. Wednesday, December 8, 1993

On The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:01 a.m.

APPEARANCES:

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

MIGUEL A. ESTRADA, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington D.C.; as
amicus curiae, supporting the Petitioners.

G. ROBERT BLAKEY, ESQ., Notre Dame, Indiana; on behalf of
the Respondents.

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MS. CLAY PROCEEDINGS Honor. It's
seeking to protect the rights of its women members (10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
first this morning in No. 92-780, National Organization
for Women, Inc. v. Joseph Scheidler.
similarly Ms. Clayton.

Your ORAL ARGUMENT OF FAY CLAYTON
ON BEHALF OF THE PETITIONERS

MS. CLAYTON: Thank you, Mr. Chief Justice, may
it please the Court:

QUESTION: Ms. Clayton, before you start, could
I ask precisely whom you represent here?

MS. CLAYTON: Yes, Your Honor. I represent the
National Organization for Women in its capacity as a
representative of its female members who might use the
clinic service -- the clinic services, and not in its own
capacity on the RICO claim. We did have NOW in its
individual capacity on the antitrust, which may have given
some confusion. Of course, in addition I also represent the
clinics, Delaware Women's Health Center and Summit, who
have standing in their own right and who also represent a
class of all similarly situated clinics.

QUESTION: So NOW, using the initials, is
definitely a party to this proceeding here.

1 MS. CLAYTON: Yes, it is, Your Honor. It's
2 seeking to protect the rights of its women members. And
3 in particular it's just seeking the injunctive relief,
4 it's not seeking damages for those women. The clinics, of
5 course, are seeking damages for themselves and all
6 similarly situated clinics.

7 Your Honors, this case involves forcible violent
8 conduct by a highly structured enterprise called PLAN, an
9 enterprise with a very clearly defined goal, to force
10 every women's health center that offers abortion out of
11 business by whatever means are necessary, including
12 terrorist tactics.

13 Our case arises under RICO, which doesn't say a
14 word about economic motive, and the question before this
15 Court is whether to apply the statute that Congress wrote
16 or amend it judicially to add this unstated requirement.

17 I'd like to discuss three points this morning.
18 First, that the text and structure of RICO do not allow
19 for an economic motive requirement. Second, that to apply
20 the statute as Congress wrote it easily comports with the
21 First Amendment. And third, that an economic motive
22 requirement would be bad policy in any event.

23 Starting with the text, we bring our case under
24 section 1962(c) of RICO, which doesn't mention economic
25 motive, and neither do the two terms where the lower court

1 claimed to find this requirement. Both "racketeering
2 activity" and "enterprise" are terms that Congress
3 expressly defined. They're terms that this Court has
4 called broad.

5 And in the Sedima case, this Court pointed out
6 that "racketeering activity" consists of the commission of
7 the predicate acts, no more and no less. And in H.J. the
8 Court recognized that this generous definition would
9 purposefully attract a broad array of perpetrators.

10 We know that Congress did not want to limit
11 racketeering activity to only those crimes that were
12 economically motivated, because when Congress chose the
13 30-some-odd crimes to include in RICO as the predicate
14 acts, it included numerous crimes that have no necessary
15 relation to money at all. In fact, three of the first
16 four, arson, kidnap, and murder, have no necessary
17 relation to money. And none of the predicate acts is any
18 less a crime if it's committed for some other reason like
19 power, hatred, or revenge.

20 QUESTION: Kidnapping is usually done for money,
21 isn't it?

22 MS. CLAYTON: Your Honor, it sometimes is and it
23 sometimes isn't. The news the other night indicated
24 there's a new theory about the Lindbergh kidnapping, and
25 it's my suggestion that if it turns out that it was a

1 relative who did it because of a spurned love affair, that
2 would be just as much kidnapping as if it were Mr.
3 Hauptmann who had done it for the ransom.

4 The fact is that kidnapping doesn't require
5 money. That's not an element of the crime. It sometimes
6 includes it, it sometimes doesn't. Sometimes even
7 organized crime, in terms of mobsters, kidnap people to
8 protect their turf or to avenge an insult, or for some
9 other reason.

10 QUESTION: Ms. Clayton, it isn't really the
11 predicate acts so much that we're concerned about, as the
12 organization which allegedly is supposed to have committed
13 the predicate acts.

14 MS. CLAYTON: Well, Your Honor, that is the
15 alternate source that the lower court --

16 QUESTION: Right. And Congress does use the
17 word "enterprise" for that.

18 MS. CLAYTON: It certainly does, Your Honor.

19 QUESTION: And one of the popular proposals
20 that's given political discussion nowadays is so-called
21 enterprise zones. What do you think they relate to, 4-H
22 Clubs, voluntary associations, or commercial associations
23 essentially?

24 MS. CLAYTON: Well, as used in the enterprise
25 zones that we have in Chicago, they relate to commercial

1 businesses. But Congress defined the term --

2 QUESTION: And free enterprise, the term "free
3 enterprise" is used the same way. It doesn't mean, you
4 know, freedom to associate; it means freedom to conduct
5 business activities.

6 MS. CLAYTON: Enterprise has many definitions,
7 including that, Your Honor, that's correct.

8 QUESTION: One of -- one of the meanings of
9 "enterprise" at least, one of the possible meanings of
10 "enterprise" does have a commercial element to it.

11 MS. CLAYTON: Unquestionably. But Congress
12 defined the term "enterprise." It didn't leave it to our
13 imagination. It didn't even leave it to dictionary
14 definitions.

15 QUESTION: Define it. Now, it defines a number
16 of terms in 1961 where it says "racketeering activity
17 means," and it says what racketeering activity means. But
18 for enterprise it says "enterprise includes" --

19 MS. CLAYTON: That's right, Your Honor.

20 QUESTION: And then it lists a number of things
21 it includes: an individual partnership, corporation,
22 association, and so forth.

23 MS. CLAYTON: And as this Court said in
24 Turkette, that word "includes" means that there are no
25 restrictions on the word "enterprise." It includes any

1 association, in fact.

2 QUESTION: Well, but suppose the -- suppose the
3 word -- just to make the point I'm asking you about
4 clearer, suppose that the phrase used were not
5 "enterprise" alone but "business enterprise."

6 MS. CLAYTON: We'd have a very different
7 situation then, Your Honor.

8 QUESTION: Yes, but -- yeah, and if that were
9 the case and you had this same what you call definition in
10 1961(4), suppose it read, "business enterprise" includes
11 any individual partnership, corporation, association, and
12 whatnot, would you think that to say it included all of
13 those things would mean that it read out the business, the
14 word "business"?

15 MS. CLAYTON: Your Honor, I would suggest that
16 if Congress had defined the term that way, that would have
17 been an ambiguous definition. We know that in a
18 predecessor --

19 QUESTION: Well, but that depends on whether you
20 think enterprise --

21 MS. CLAYTON: Not at all, Your Honor.

22 QUESTION: -- Has a business connotation to it
23 or not.

24 MS. CLAYTON: Not at all, Your Honor. I would
25 suggest that in Your Honor's hypothetical, business

1 enterprise seems a little inconsistent with associations,
2 in fact which, as this Court pointed out, is an
3 unambiguous term. The Court has said that.

4 The predecessor draft of RICO did use -- one of
5 the predecessor drafts, in fact three of them used the
6 term "business enterprise." Not as part of a definition,
7 I think that would have been confusing; they used it as
8 part of the statutory text. If 1962(c) said business
9 enterprise, we couldn't be here, there's no question. But
10 that particular language was dropped by Congress. It was
11 dropped from Senate bill 1623. It was dropped from Senate
12 bill 2048 and 2049. And the version that Congress
13 enacted, Your Honor, doesn't have "business" in it.

14 QUESTION: My point is that if you believe that
15 "enterprise" means the same thing as "business enterprise"
16 --it doesn't say it as strongly, but it means the same
17 thing -- you acknowledge by what you've just said that
18 1961(4) alone would not eliminate the business connotation
19 of it.

20 MS. CLAYTON: Your Honor, I do not concede that
21 business means -- that enterprise means business. It
22 includes business enterprises, it includes nonbusiness
23 enterprises. In fact, the argument that Your Honor is
24 articulating is so much like the one that this Court
25 rejected in Turkette, where it refused to limit RICO's

1 enterprises to legitimate enterprises.

2 The argument was meant -- the argument was made
3 that the enterprise definition meant only legitimate
4 enterprises, but this Court said if Congress had wanted to
5 limit the statute to only legitimate enterprises, it could
6 have used the word. Here not only did Congress not
7 include the word "business enterprise" in either the
8 statute itself or the definition, Justice Scalia, it
9 actually dropped that term. And that shows, one, that
10 Congress knows how to use the words when it wants to limit
11 a statute. And, two, it made the decision not to do that.

12 QUESTION: Maybe it didn't want -- it didn't
13 business there because they didn't think it had to be a
14 business, but it had to -- still had to have a commercial
15 motivation, which is what "enterprise" connotes.

16 MS. CLAYTON: Well, Your Honor, Congress didn't
17 say --

18 QUESTION: You had an antitrust claim below,
19 didn't you?

20 MS. CLAYTON: We did, Your Honor, and we --

21 QUESTION: Now, the antitrust laws don't say
22 anything about commercial motivation either, do they?

23 MS. CLAYTON: They certainly don't. And it's
24 absolutely --

25 QUESTION: But do we -- do we apply them

1 against, let's say, grape boycotts -- restraint. It requires

2 effects. MS. CLAYTON: Your -- It requires in section

3 1964(c) QUESTION: -- If a group of citizens for part in

4 political reasons wants to boycott grapes, that's business

5 certainly a contract combination or conspiracy in the

6 restraint of trade. Do we apply the antitrust law to

7 them? It doesn't appear anywhere.

8 MS. CLAYTON: Your Honor, the answer to your
9 question is no, but not because of the definition of what
10 antitrust covers, but because of the First Amendment. The
11 First Amendment doesn't let the antitrust laws or any laws
12 cover protected speech like a boycott, like a nonviolent
13 boycott. Another reason that we should not infer an

14 economic QUESTION: A boycott's not speech. It's an
15 action. of one is RICO's liberal construction clause. This

16 clause says MS. CLAYTON: Your Honor, the antitrust laws are
17 crystal clear that nonprofit organizations are covered.
18 This Court said that in D.C. Lawyers, it said it in for a
19 Professional Engineers, and it said it from time to be
20 immemorial. The antitrust laws are clearly applicable to
21 nonprofit organizations.

22 QUESTION: Of course, the words "trade or
23 commerce" have a business aspect to them too, don't they?

24 certainly MS. CLAYTON: They do, Your Honor. And you know
25 something, it's very important, Justice Stevens, to h. but

1 remember that RICO does have one requirement. It requires
2 effects on business or property. It requires in section
3 1964(c) that for a plaintiff to come before this Court in
4 a private case it must have been injured in its business
5 or property. Congress spelled that out right in the statute
6 statute, unlike this missing motive requirement which
7 doesn't appear anywhere. And by the way, Justice Stevens, that economic
8 effect is something that even the lower court recognized
9 we unquestionably have, because this nationwide campaign
10 of terror has caused and continues to cause enormous
11 business and property damages to our plaintiffs.

12 Another reason that we should not infer an
13 economic motive requirement into a statute that is totally
14 devoid of one is RICO's liberal construction clause. This
15 clause shows that Congress purposefully chose breadth over
16 narrow constructions. And as the Court pointed out in
17 Russello, this is an unusual provision, particularly for a
18 criminal statute, and it shows Congress' choice to be
19 expansive, particularly in the remedial provisions of
20 RICO's application.

21 I would like to address the First Amendment
22 issue. Justice Scalia's question about the antitrust laws
23 certainly brought that into play. And the respondents
24 have argued here that their conduct is really speech, but
25

1 both of the lower courts recognized how false that claim
2 was.

3 PLAN, as we've pled in our complaint, is
4 dedicated, committed to mob violence, to the use of any
5 and all means necessary to force the clinics and patients
6 to give up their protected rights. PLAN ridicules
7 peace-loving opponents of abortion. It calls them wimps.
8 PLAN says it will only answer to higher laws, which are
9 articulated by the leaders of PLAN. It will not --

10 QUESTION: Well those are some of your claims.
11 But you assert that you would -- you would have a right
12 to win here if you -- if you proved acts of extortion --

13 MS. CLAYTON: That's correct.

14 QUESTION: -- Which you would define to include
15 acts which intimidate someone into -- simply into not
16 doing something.

17 MS. CLAYTON: Well --

18 QUESTION: Extortion doesn't even mean you have
19 to get money or property from someone, in your view.

20 MS. CLAYTON: That's right, Your Honor, on the
21 first point at least.

22 QUESTION: But just intimidating them into not
23 doing something.

24 MS. CLAYTON: One does not have to get property.
25 One has to obtain property, which has been interpreted by

1 the courts, meaning to make someone give up property. In
2 Green this Court said the emphasis is on what the victim
3 loses.

4 QUESTION: You're getting it is the same as
5 somebody else giving it up.

6 MS. CLAYTON: Not always, Your Honor. When
7 somebody extorts --

8 QUESTION: Not always, just for purposes of this
9 statute.

10 MS. CLAYTON: In this case, Your Honor, there
11 actually is some gain, because in many cases the clinics
12 run by PLAN and its coconspirators actually get the
13 business opportunities in the form of patients who they
14 take to the -- the antichoice clinics.

15 QUESTION: Well, let's say that I want to stop
16 somebody -- just to take it out of the abortion context,
17 which tends to inflame -- inflame emotions, suppose I want
18 to get somebody to stop selling grapes and I throw pickets
19 across the street. And simply in order to save -- to
20 save -- urging other people to boycott. Simply in order
21 to save money, the supermarket, whoever, says it's just
22 not worth it, we won't sell grapes. They've been
23 intimidated from selling grapes, isn't that right?

24 MS. CLAYTON: It's protected by the First
25 Amendment, Your Honor. And in that example, that conduct

1 is not extortion because First Amendment protected speech
2 can never be extortion. If those same boycott -- if those
3 same protesters took their picket signs and hit the --
4 their -- the grocery store on the head or forcibly
5 blockaded the store so they could not do business and thus
6 deprived them of their property right, then we would have
7 extortion. But peaceful picketing can never be extortion.
8 It can never be a predicate act of any sort under RICO.

9 QUESTION: Ms. Clayton, do we have -- do we have
10 a ruling to review on that issue, as distinguished from
11 the one that you were just discussing with Justice Scalia?

12 MS. CLAYTON: Thank you, Justice Ginsburg. No,
13 we do not. That was offered as a question for review by
14 the respondents, but the Court did not see fit to take
15 that issue.

16 And, in fact, Your Honor, even if the Court were
17 to totally disregarded Hobbs Act extortion, we have so
18 many other predicate acts that arise under Federal
19 pleading standards, that arise from the very same
20 allegations of the complaint -- I mean there's Travel Act
21 violations, State law extortion, section 659, arson,
22 kidnap, a lot of others. So even if we totally put aside
23 the Hobbs Act extortion issue, we have far more than the
24 two required predicate acts.

25 QUESTION: Well, and if -- if we rule as you ask

1 us to in the question presented, that does not prevent the
2 defendants from raising First Amendment defenses below.

3 MS. CLAYTON: Your Honor, of course it doesn't.
4 We treasure the defendants' First Amendment rights like we
5 treasure our own, and we do not want to in any way
6 infringe on those rights. We have tried in the discovery
7 and the district court -- and as the district court
8 recognized, we've drawn such a wide margin around
9 protected speech.

10 When they picket, when they pray, when they
11 leaflet, when they petition Congress, this is protected,
12 this can never be extortion, it can never be a predicate
13 act. But when they give up that protected form of speech
14 and they turn to force and violence and the use of fear of
15 more force and violence, particularly in a context where
16 we have arson, we have killings, we have threatened
17 killings, that -- once and a while their advocacy can
18 cross the line, as this Court explained in Claiborne
19 Hardware and in Meadowmore, it can cross the line --

20 QUESTION: But those issues are not presented
21 here.

22 MS. CLAYTON: They're not, Your Honor. They're
23 not.

24 QUESTION: The question is on the definition of
25 enterprise and pattern of racketeering activity and

1 whether economic motivation is required for those, and
2 that's it, as far what is before us to review this
3 morning.

4 MS. CLAYTON: That's exactly right, Your Honor.
5 Those are the precise issues. And as I -- I believe I've
6 explained, the statute and the structure of RICO do not
7 allow for it. Looking at the structure, we see the
8 Organized Crime Control Act does have some business
9 enterprise limitations, RICO does not. There are a host
10 of policy reasons also for not inferring an economic
11 motive.

12 If the Court doesn't have any further questions,
13 I would like to save my remaining time for rebuttal.

14 QUESTION: Very well, Ms. Clayton.

15 And Mr. Estrada, we'll hear from you.

16 ORAL ARGUMENT OF MIGUEL H. ESTRADA

17 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

18 SUPPORTING THE PETITIONERS

19 MR. ESTRADA: Thank you, Mr. Chief Justice, and
20 may it please the Court:

21 For three reasons, RICO does not require a
22 prosecutor or a plaintiff to prove an economic motive.
23 First, there is no textual basis for such a requirement.
24 Second, this Court has already rejected similar nontextual
25 limitations on the scope of RICO which were also claimed

1 to derive from Congress' purpose in passing the statute.
2 And third, the economic motive requirement is elusive and
3 really has little to do with the societal effects of
4 systematic ongoing crime, which is what the statute is
5 about.

6 As to our first point, the respondents in this
7 Court have not identified the single one textual home of
8 the economic doctrine.

9 QUESTION: Just -- but Justice Scalia just did.
10 What do you say about the word "enterprise?"

11 MR. ESTRADA: The word "enterprise," Justice
12 Stevens, is defined by statute, and it is not new to this
13 Court. The notion that the word "enterprise" can include
14 this doctrine really comes from the Ivic case in the
15 Second Circuit, where the Government tried to use the
16 statute to prosecute terrorism in New York City. And in
17 that case, the Court did point to that word as a -- as a
18 basis for the doctrine. Everything --

19 QUESTION: In an opinion by --

20 MR. ESTRADA: Judge Friendly.

21 QUESTION: By Judge Friendly, and a pretty good
22 panel. Judge Oaks, right, and who was the third one,
23 Judge Feinberg, Chief Judge Feinberg?

24 MR. ESTRADA: They're all good judges, Justice
25 Scalia.

1 (Laughter.)

2 MR. ESTRADA: And even good judges sometimes get
3 it wrong.

4 (Laughter.)

5 MR. ESTRADA: Everything the court said, Judge
6 Friendly and all, in the Ivic case had been foreclosed by
7 this Court in the Turkette case. There is practically no
8 argument in the Ivic opinion that does not have a
9 counterpart in this Court's opinion in Turkette.

10 And the failure of the enterprise element to
11 give content to this doctrine I think is not only
12 demonstrated by what the Court said in the Turkette case,
13 but also by what the Second Circuit itself did with the
14 doctrine 3 months later in the Bagaric case.

15 QUESTION: What did Turkette say about
16 enterprise?

17 MR. ESTRADA: The Court in that case noted that
18 the definition by Congress is very broad, and it certainly
19 includes any entity or group of individuals associated in
20 fact, which, the Court noted, includes any group that
21 associates for a common purpose. The Court said nothing
22 about what the nature of that purpose must be, and that's
23 all the Court said.

24 And, in fact, as the lower courts have
25 recognized, pinning this doctrine on the enterprise

1 element would really cripple the role that Congress
2 thought RICO would play. It would take out of the reach
3 of RICO Government entities, courts, nonprofit
4 organizations, all of which have uniformly been recognized
5 by the lower courts to be RICO enterprises, and which even
6 Respondent Scheidler, I think, at page 14 of his brief
7 concedes are RICO enterprises.

8 In addition, one of this Court's cases, the
9 H.J., Inc. case, had a Government agency as a claimed RICO
10 enterprise, and that certainly gave no pause to the Court
11 in ruling that the complaint in that case was sufficient.
12 Now --

13 QUESTION: How do you -- how do you, Mr.
14 Estrada, explain our more limited scope accorded to the
15 Sherman Act?

16 MR. ESTRADA: Well --

17 QUESTION: Not expanding that to the limit of
18 the meaning of its words.

19 MR. ESTRADA: Well, there is a difference in the
20 Sherman Act, Justice Scalia, in that it really does tend
21 to make unlawful things that in the absence of the act
22 could be done lawfully. RICO takes a different tack, and
23 it starts with conduct that is already criminal. And
24 while Congress said that as to the civil side of RICO, it
25 was looking to the antitrust model, this Court has

1 recognized that that is not a model that the Court should
2 follow in all contexts.

3 For example, in the Sedima case a claim was made
4 that based on the antitrust laws which called for some
5 form of antitrust injury, there should be a requirement in
6 RICO that there be racketeering injury. And this Court
7 turned down that argument, saying that racketeering
8 activity is nothing more and nothing less than the
9 commission of the predicate crimes.

10 Thus while Congress did have the antitrust model
11 of civil damages in mind, I don't think this Court has
12 ever ruled that it -- that every aspect of RICO is ruled
13 by what Congress has done in the antitrust areas. They're
14 similar to some extent, but they're not identical.

15 That brings me --

16 QUESTION: The Government supports the
17 interpretation of extortion that the court below adopted
18 as well, doesn't it?

19 MR. ESTRADA: We haven't briefed --

20 QUESTION: That is to say you don't have to
21 obtain property?

22 MR. ESTRADA: We have not briefed the issue,
23 Justice Scalia, but it -- because it is not the question
24 on which the Court granted cert. And in our view,
25 whatever --

1 QUESTION: Well, it is -- it is an issue which,
2 if -- if supported, would sustain the judgment below,
3 isn't it?

4 MR. ESTRADA: No --

5 QUESTION: And therefore we could entertain it.

6 MR. ESTRADA: You could entertain it. But if
7 ruled on by the Court, and even if ruled on favorably to
8 the respondents, it would not, in the end, support the
9 judgment, because in our view the facts pled in the
10 complaint, though not the legal theory, do show other
11 predicate acts like arson and other crimes that are
12 predicate acts under RICO, which though not pled as a
13 legal theory, are pled as facts and which would be -- and
14 which, in our view, would be sufficient to support the
15 judgment on the pleadings.

16 Though we have not briefed the Hobbs Act issue,
17 I should say that it is far from clear that nothing was
18 obtained in this case, taking the claims in the complaint
19 in the light most favorable to the plaintiffs. In the
20 Green case, this Court essentially held that if I put a
21 gun to your head and have you give your wallet to the
22 first person who comes down the street, that is extortion
23 under the Hobbs Act, even though I get nothing physically.

24 And the reason for that has to be that because
25 even though I have not myself obtained your wallet, I have

1 obtained the right to control the disposition of your
2 wallet which is, in itself, a property right. You have a
3 right to give your wallet to whom you please, or even keep
4 it yourself, and that's what you usually do all the time.
5 But if I put a gun to your head and make you give your
6 wallet to the first person who comes down the street, I
7 have taken to you a right to control who should have your
8 wallet. I have chosen the person who should have your
9 wallet.

10 And that, in itself, is an important right of your
11 property right to your wallet and is itself a property
12 right. So even though we have not briefed it --

13 QUESTION: Mr. Estrada, why I'm concerned about
14 it is that the combination of that broad interpretation of
15 extortion, plus the interpretation of RICO that the
16 petitioners favor here, leaves one in a situation where
17 any -- any national organization which has adherents and
18 hangers-on who may commit a tort, hitting someone with a
19 picket sign or trespassing upon property, by committing an
20 unlawful act can be charged with committing extortion even
21 though they're not trying to get money.

22 And this means that any -- any national
23 organization demonstrating for some political cause
24 exposes itself to lawsuits nationwide -- which they may
25 win, but they may lose, but it's an enormous amount of

1 expense -- by people claiming that that is the very
2 purpose of the organization, to extort.

3 And it makes -- if it were applied to the NAACP
4 in the days of civil rights activism, it would have been
5 very debilitating. Does it not concern you that the
6 combination of the two can have that effect?

7 MR. ESTRADA: Justice Scalia, I don't think that
8 anyone here has said anything different about the
9 governing constitutional standards, and I don't think
10 anyone views them any differently as the case comes to the
11 Court. And there is no question that, as with every other
12 area, there will be issues at the margins. However, the
13 issue here is whether an economic motive doctrine should
14 be implied to take that danger out of RICO. And in our
15 view, it would be a poor proxy for that danger and it's
16 not really the issue at this stage on the pleadings.

17 Thank you.

18 QUESTION: Thank you, Mr. Estrada.

19 Mr. Blakey, we'll hear from you.

20 ORAL ARGUMENT OF G. ROBERT BLAKEY

21 ON BEHALF OF THE RESPONDENTS

22 MR. BLAKEY: Mr. Chief Justice, and may it
23 please the Court:

24 This appeal is about a misguided effort by two
25 clinics to invoke two Federal statutes, two powerful

1 Federal statutes, the Hobbs Act and RICO, in the context
2 of a social protest movement. Under their construction of
3 the statute, it would be applicable not only to a Gotti or
4 a King, but to a Ghandi or a Chavez. That's a result the
5 Congress specifically intended to avoid in 1970. This
6 appeal runs squarely into four -- three rock-like noes:
7 no extortion, no economic motive, and no standing.

8 ~~plaintiff~~ Let me turn first to the question of extortion.

9 ~~not have~~ QUESTION: Mr. Blakey, I assume that you're
10 going to deal, both with respect to what you said about
11 standing and what you said about no extortion, with our
12 function as a court of review rather than as a court of
13 first view. And as I understand it, there was no ruling
14 on standing in the district court or in the court of
15 appeals. ~~shed from its position as an antitrust claimant.~~

16 MR. BLAKEY: Let me answer your second question
17 first, Your Honor. The question of standing is always
18 before this Court. It is jurisdictional. Even if not
19 raised below, you must face it here. ~~first, of NOW because~~

20 ~~it is not~~ QUESTION: You are quite right that it's ~~the~~
21 jurisdictional. But it's usual that we have the benefit
22 of a prior decision on that question. It's not common
23 that this Court makes the ruling for the first time on an
24 issue of standing. Was this raised in the district court?

25 MR. BLAKEY: To my knowledge -- Your Honor, the

1 posture of this case changed over time. For example, at
2 the time it was in the circuit court NOW was a plaintiff
3 under the antitrust statute and had standing.

4 When this Court declined to grant cert on the
5 antitrust question, NOW then no longer was a plaintiff in
6 the antitrust count, and its lack of standing in this
7 Court is directly related to the fact that it is not a
8 plaintiff in the RICO count. That's something that could
9 not have been raised in the lower court simply because
10 their lack of standing on RICO was not involved in their
11 original petition.

12 QUESTION: I thought that Ms. Clayton had
13 explained, in answer to Justice Blackmun's question, the
14 capacity in which NOW is appearing at this stage, as
15 distinguished from its position as an antitrust claimant.

16 MR. BLAKEY: Well, if it is appearing as a
17 representative of either the -- she is appearing as a
18 representative of the two clinics. NOW has no standing.
19 We would quarrel with the standing, first, of NOW because
20 it is not a RICO plaintiff. We would quarrel with the
21 standing of NOW in behalf of anyone else. This case was
22 not certified as a class. They must first --

23 QUESTION: Was -- there was no ruling on that
24 question.

25 MR. BLAKEY: That is correct, Your Honor.

1 QUESTION: So it's not as though you're here
2 after there has been a denial of certification. At this
3 stage, mustn't we assume that question in the light most
4 favorable to the plaintiff?

5 MR. BLAKEY: Yes, but even on the face of this
6 complaint, and certainly in light of the facts set out in
7 the RICO cases statement, NOW has no standing, neither of
8 these clinics have standing. And it is not only
9 appropriate, but it's a duty on us, as an advocate of this
10 Court, to draw that lack of standing to this Court's
11 attention.

12 QUESTION: I appreciate that, Mr. Blakey, and I
13 don't want to belabor this point. But you know that even
14 for jurisdictional questions, this Court generally sits as
15 a court of review.

16 MR. BLAKEY: Yes. Let me answer the first part
17 of your question. The grant of cert -- contrary to Ms.
18 Clayton's position is we did not seek a grant of cert.
19 What we merely pointed out in our brief was that if this
20 Court took the RICO question, it would face necessarily
21 the question of extortion. And since we are respondents
22 and not petitioners, we may defend the court below, the
23 judgment of the court below, on any ground whether it was
24 raised below or not, and in this case it was.

25 Our central and strongest argument is "no

1 extortion." And there is no extortion in this case for
2 two fundamental reasons. This statute, the Hobbs Act, was
3 modeled on New York law. New York law was modeled on the
4 common law. In 1865, the field code commentary carefully
5 explained that the extortion provisions of that code was
6 part of the property loss series: embezzlement, larceny,
7 robbery and extortion. Each requires a common law taking,
8 a trespassory taking.

9 What is happening in this case is they are
10 transposing a clear common law term, extortion, and making
11 it into a modern statutory term, coercion. And they're
12 doing that by taking the concept "property," which starts
13 out to mean tangible property. You can interpret it to be
14 intangible property. You can interpret it to be
15 intangible rights. And finally, the right is not obtained
16 but the other is deprived of it. That particular process
17 of interpretation is not reading a statute, it is
18 redrafting it.

19 QUESTION: Mr. Blakey --

20 QUESTION: Mr. Blakey --

21 QUESTION: Mr. Blakey, I thought we had a case
22 before us that comes here on a motion to dismiss. I mean
23 that's what happened below, pleadings and a motion to
24 dismiss. And I thought that the petitioners -- certainly
25 Mr. Estrada, as amicus, said that there are other

1 allegations of predicate acts other than extortion in the
2 pleadings that would be sufficient to withstand a motion
3 to dismiss.

4 Now, I assume all these things can be addressed
5 in the courts below if it gets back, if it survives the
6 motion to dismiss. I don't understand why we're really
7 addressing that here.

8 MR. BLAKEY: Your Honor, it is correct to say
9 that the lower court dismissed this under Rule 12. But
10 the lower court relied on materials outside of the
11 pleading, to wit, in the RICO cases statement.

12 QUESTION: Well, but do we have to do that? I
13 mean, do we have to do more than look at the pleadings and
14 are petitioners correct that in those pleadings, at least,
15 that there are allegations of arson and kidnapping and one
16 thing and another, that fall within the --

17 MR. BLAKEY: If you confine yourself to the four
18 corners of the complaint.

19 QUESTION: Yeah.

20 MR. BLAKEY: There's not one word about arson,
21 kidnapping, murder, terrorism, or any of the violent acts
22 being alleged here. The underlying facts in this case are
23 no more than, no less than --

24 QUESTION: But is there not -- Mr. Blakey, is
25 there not the counterpart of a bill of particulars here in

1 the RICO statements that were made?

2 MR. BLAKEY: Your Honor, the RICO cases
3 statement that was filed was filed after two motions were
4 made. One was a motion for a more definite statement
5 under Rule 12. That function would be, really, to explain
6 what was already in the complaint. You can't amend a
7 complaint by filing an answer under Rule 12.

8 It was also filed in response to a motion under
9 Rule 16, as to control the docket, and the function of the
10 RICO cases statement here is an admission by a party
11 opponent. And this judge asked, in February these
12 plaintiffs, tell me your facts consistent with Rule 11
13 that you rely on. Tell me the statutes that you rely on.
14 They answered that in the court below, and the only answer
15 they gave was the Hobbs Act.

16 We didn't hear one word about murder. That's
17 outside the record. About terrorism, which happens not to
18 be a predicate offense -- we didn't hear anything about
19 bombing. All we heard was these acts violate the Hobbs
20 Act.

21 QUESTION: But, Mr. Blakey.

22 MR. BLAKEY: Not State extortion, not coercion,
23 but the Hobbs Act.

24 QUESTION: But, Mr. Blakey, just looking briefly
25 at the district court's opinion, the ground of decision

1 both in the district court and in the court of appeals was
2 the lack of an economic motive, as I understand it.

3 MR. BLAKEY: That's correct.

4 QUESTION: And if that's correct, you win and
5 there'd be no leave to amend and the ballgame is entirely
6 over. But if there is a dispute about fringe facts, I
7 would suppose the district judge would let them amend and
8 add these additional things that might not be a complete
9 termination of litigation.

10 MR. BLAKEY: Your Honor, this is after almost 5
11 years of discovery.

12 QUESTION: It's a judgment for the district
13 court.

14 QUESTION: Yes, but on the specific ground that
15 we've granted certiorari to decide, that's -- both lower
16 courts decided that issue, and it's a very important
17 issue.

18 MR. BLAKEY: Whether or not they could amend is
19 not in front of this Court, because they never made a
20 motion to amend below.

21 QUESTION: Because, they were -- they lost on
22 the ground of no economic motive.

23 MR. BLAKEY: Let me turn, Your Honor, if I
24 might, to the economic motive.

25 QUESTION: I wish you would, because that's what

1 we really granted cert to do -- to consider.

2 (Laughter.)

3 MR. BLAKEY: This statute can be summed up in
4 two words, illicit gain. The concept of illicit gain
5 pervades the statute, the title, the findings, the
6 definitions, the operative language in the statute, the
7 criminal remedies, the civil remedies, statutes with which
8 it is in pari materia, and the legislative history.

9 The precise words used in each section varies
10 with the purpose of each section, but this statute can be
11 summed up in two words, illicit gain. Look at the title.
12 This is the label on the bottle. It says Racketeering
13 Influenced and Corrupt Organizations. Racketeer means
14 extortion and fraud. Corrupt means venal. There right in
15 the label of the bottle is the commercial notion of gain.

16 Look at the findings. There are five findings
17 in this statute: the last deals with legal defects; the
18 first two deal with obtaining and utilizing illicit gain;
19 the second two deal with the effects of it when you invest
20 and weaken.

21 Look at the definitions in the statute. The
22 word "person" describes the class who can sue and be sued,
23 or be indicted. It is, by the definition of the statute,
24 limited to people who can hold a beneficial interest in
25 property.

1 Look at the concept of enterprise as it's found
2 in the statute. Enterprise is illustrated in the statute,
3 not defined. It is appropriate therefore to look to its
4 common everyday meaning. Its common everyday meaning is
5 precisely that of a business venture.

6 QUESTION: Do you agree, though, that if you
7 look specifically at the text of 1262(a), (b), and (c),
8 that in each of those instances it is certainly possible,
9 consistently with those texts, for there to be an
10 enterprise which is not itself devoted to economic gain?

11 MR. BLAKEY: That's correct.

12 QUESTION: Okay.

13 MR. BLAKEY: My point here is precisely that of
14 Justice Cardozo in American Knife. To interpret this
15 statute and understand it, let's take a look at its
16 average case, not the exceptional case. The average case
17 within the statute is going to be a commercial enterprise
18 engaging in commercial activity.

19 There are penumbra issues such as a government,
20 and -- which is clearly within the statute, and was
21 recognized by Judge Kaufman in Anginelli, in the course of
22 the Ivic opinion. Nothing that we say here today should
23 be understood to suggest that governments cannot be
24 enterprises, but only when they engage in or they are
25 utilized to engage in a pattern of racketeering activity

1 that has a commercial dimension.

2 QUESTION: But you're -- again, I don't think
3 you're doing this, but you're not suggesting that the only
4 noncommercial example of an enterprise which might fit
5 under (a), (b), or (c), would be a government.

6 MR. BLAKEY: No, no.

7 QUESTION: That is simply one --

8 MR. BLAKEY: Sheerly that to respond to the
9 Government.

10 Let me go through the text of the statute, the
11 opportunity --

12 QUESTION: I don't understand your test, Mr.
13 Blakey, and both the Government and the petitioner assert
14 that it's -- it's too confusing to work with. What is
15 your test about whether the requirement of commerciality,
16 or whatever you want to call it, is satisfied?

17 MR. BLAKEY: Well, what I think you have to
18 meet, Your Honor, is the language of the statute. What --
19 the phrase commercial dimension is something that pervades
20 the statute as a whole. You have to go -- for example, to
21 recover damages in this case, you must show injury to
22 business or property. The commercial dimension is the
23 injury to business or property.

24 In the example of the criminal sanctions, the
25 characteristic criminal sanction of this statute is a

1 forfeiture. If you take the profit out of crime, you
2 presuppose a profit-making crime.

3 QUESTION: Well, how do I know whether it's an
4 enterprise within the meaning of the act?

5 MR. BLAKEY: It's within the meaning of the act,
6 which means you must sit it in the text as drafted.

7 QUESTION: Of course.

8 MR. BLAKEY: And what we would do --

9 QUESTION: Tell me -- yeah.

10 MR. BLAKEY: What we would do in -- and let's
11 turn right to section 1962(c). Section 1962 says: "Any
12 person employed by or associated with an enterprise that
13 conducts that enterprise's affairs by a pattern of
14 racketeering activity." Wherein lies the commercial
15 dimension? The commercial dimension in that provision
16 lies in the word "affairs." Affairs means commercial or
17 professional business, as a matter of plain meaning. The
18 set --

19 QUESTION: Then, why don't you -- why don't you
20 go the -- why don't you go the whole hog, then, and say
21 that the -- that it is an absolute requirement that the
22 commercial enterprise in fact -- that the enterprise be
23 commercial, but you instead have an alternative
24 definition. You say, well, it would be all right if the
25 acts themselves, if the predicate acts were commercial.

1 Why -- why -- if your argument is as strong as you say it
2 is, why do you have this fallback position?

3 MR. BLAKEY: Your Honor, let me explain it this
4 way. We deal here with the set. The set is activity.
5 The subset is racketeering activity. The sub-subset is
6 racketeering activity in affairs. It is quite possible to
7 have a noncommercial enterprise that engages in
8 noncommercial racketeering activity, but not in its
9 affairs. The affairs is the word of limitation that
10 confines 1962 --

11 QUESTION: The Union Trust Fund would be an
12 example, I presume.

13 MR. BLAKEY: Yes, yes.

14 QUESTION: Which is certainly one of the things
15 they were concerned with.

16 MR. BLAKEY: A benevolent association.

17 QUESTION: Yeah.

18 MR. BLAKEY: A benevolent association may very
19 well have a large pension fund and the mob wants to take
20 it over. That's an enterprise. But the reason they want
21 to take it over and the way they must take it over to fall
22 within RICO is by engaging in, for example, extortion.
23 And extortion is a property-obtaining notion. It's not
24 coercion, which is conduct-forcing notion.

25 And if there were any doubt about the text of

1 the statute, and I think when you see the word "income" in
2 (a), "interest or control" in (b), and "affairs" in (c),
3 there ought not be any doubt --

4 QUESTION: Just a minute, Professor Blakey, let
5 me just be sure I understand. Has the word "affairs" been
6 relied on in the opinions adopting your position?

7 MR. BLAKEY: No.

8 QUESTION: So this is debateable. Thank you.

9 MR. BLAKEY: No. No, Your Honor, wisdom comes
10 so late in the affairs of man.

11 (Laughter.)

12 MR. BLAKEY: That we'll not turn it down simply
13 because it --

14 QUESTION: That doesn't respond to the question
15 Justice Scalia has raised too. That's a concern, is that
16 the Seventh Circuit's original position seemed rather
17 clear, but the Second Circuit seemed over the years to
18 have somewhat withdrawn from the economic test. And it's
19 kind of hard to know exactly what the test is.

20 MR. BLAKEY: Well, if you -- a careful reading
21 of the Seventh Circuit's opinion is that it adopted the
22 Ivic-Bagaric-Ferguson line of opinions. And what happened
23 from Ivic to Bagaric to Ferguson, the use of the word
24 motivation was thought, in retrospect, to be inappropriate
25 because it might deal with subjective motive. Therefore

1 the test changed from Ivic to Bagaric and became an
2 objective characterization.

3 And then the question of degree came up, which
4 the Government has raised. In Ferguson it was clarified
5 to be any. It's not a question of degree, it's a question
6 of kind.

7 QUESTION: The -- one of the cases that troubles
8 me if you're trying to think through this thing, say
9 you've got a terrorist organization -- because we're not
10 just dealing with the abortion situation, but terrorism
11 and other things. And say that their ultimate motive
12 is -- the purpose of the crusade, whatever it is, but
13 they're doing these activities to get some money to help
14 finance purchasing guns that the IRA needs and that sort
15 of thing. Would the mixed motive qualify for -- under
16 your test?

17 MR. BLAKEY: Yes. And the cases are clear.
18 Precisely in Bagaric it was the same basic terrorist group
19 that was involved in Ivic, but in Bagaric they were
20 only -- in Ivic they were only engaging in homicides. In
21 Bagaric they were engaging in classic extortion, it was
22 property obtaining.

23 This statute has been successfully applied to
24 terrorist groups where they engage in commercial activity,
25 for example to raise money. The Order, an antisemitic

1 group in the West that went around -- you may recall,
2 killed Alan Berg simply because he was a Jew.

3 QUESTION: Commercial is really not the right
4 word. I mean, you would also apply it to a -- to a
5 terrorist group that robs banks, I assume, wouldn't you?

6 MR. BLAKEY: The word I would prefer --

7 QUESTION: It seems strange to call that a
8 commercial activity.

9 MR. BLAKEY: Your Honor, I'm kind of stuck with
10 the language in the cases. I would suggest to you that
11 the two words that summarize the statute is illicit gain.
12 In fact, when you find out the sense in which they're
13 using commercial motivation or mercenary purpose or
14 financial purpose, what they, in fact, in the cases have
15 said meets it is some kind of a gain, a robbery that
16 produces money. For example, in the Order case, they were
17 robbing banks and they were prosecuted for robbing banks.

18 QUESTION: But then you have to give away
19 enterprise. You have to give away your enterprise
20 argument. I mean, you can rely on affairs, but you've
21 given away enterprise, because you --

22 MR. BLAKEY: Your Honor, I don't --

23 QUESTION: -- Don't pull a bunch of free
24 enterprises and a bunch of bank robbers. Enterprise zones
25 is not -- is not bank robbers.

1 MR. BLAKEY: Your Honor, I would prefer not to
2 give up anything.

3 (Laughter.)

4 MR. BLAKEY: What I'm suggesting to you, if I
5 may borrow the language of this Court, is the
6 interpretation of this statute is a holistic endeavor.
7 We've got to look at the entire text, the punctuation, the
8 words, the structure.

9 QUESTION: But what if a series of very dramatic
10 illegal acts in support of a cause generate large
11 contributions to the cause from third parties, would that
12 provide the economic requirement that you're talking
13 about?

14 MR. BLAKEY: No.

15 QUESTION: Even though they're publicized and
16 deliberately done for that purpose?

17 MR. BLAKEY: No.

18 QUESTION: Why wouldn't it be? Because it's
19 indirect or in --

20 MR. BLAKEY: Well --

21 QUESTION: Because it would be insufficient to
22 get you over the RICO standing?

23 MR. BLAKEY: Well, there are two answers to it.
24 In this case that argument was made. To show in this case
25 economic motive, you can do it either in the predicate

1 acts or in the enterprise. The predicate act extortion
2 requires the money to be obtained from the victim. Now
3 the question is if the money was obtained merely by
4 donations from third parties, this is a situation where
5 precisely in this record it was held, or it was found that
6 there's no proximate cause relationship between
7 third-party donations and --

8 QUESTION: Well, I'm not suggesting the facts of
9 this case are strong enough, but I was thinking of the
10 hypothetical where they said we are going to burn down a
11 church, or something, to demonstrate our strong feelings
12 about this, and we hope everybody who reads about it will
13 send in \$100 to such and such an address.

14 MR. BLAKEY: As you move in that --

15 QUESTION: Would that qualify --

16 MR. BLAKEY: As you move in that direction --
17 and the question is how far you take me.

18 QUESTION: Yeah.

19 MR. BLAKEY: You will make those third-party
20 donors coconspirators and aid-and-abettors. They're the
21 people who, in effect, are hiring this crime to be done.

22 QUESTION: Even though they send the money in
23 after the fact only?

24 MR. BLAKEY: Well, it's quite possible to ratify
25 a crime. It's certainly possible to join the conspiracy

1 afterwards.

2 Let me take two items in addition to those in
3 the text. I think this is a text-based argument. It
4 rises from a holistic view of the statute, of the actual
5 language employed in each section. Let's look and see
6 whether this is confirmed -- not independently
7 established, but confirmed by the legislative history.

8 Put yourself back in 1970. The issue that
9 burned in this country then was not abortion, not animal
10 rights, not fossil fuels, not fur and the fur industry,
11 but the war in Vietnam. This statute was proposed and it
12 was objected to by the American Civil Liberties Union
13 specifically on the grounds that the definition of
14 racketeering activity was so wide open it might apply to
15 the takeover of the Pentagon and to the takeover of the
16 University at Columbia.

17 Congress immediately turned to narrow that
18 definition, with a specific intent of avoiding the
19 application of RICO to demonstrations. Not abortion
20 demonstrations: what they had in mind was the war in
21 Vietnam. And they selected -- this is now the problem of
22 set and subset again. The set for this are all State and
23 Federal crimes. They didn't put them all in, they
24 selected them. And what was the principle of selection?
25 And this can be determined by looking at the statutes, not

1 the legislative history.

2 QUESTION: But the response to that concern was
3 not any narrowing of this definition of enterprise which,
4 on the face of it, is about as broad as you can get.
5 Includes any -- they didn't -- in response to the concern
6 that you just mentioned, what was the change that was
7 made?

8 MR. BLAKEY: The change was not to the
9 definition of enterprise. But, Your Honor, enterprise
10 sits in a context, and if you don't have a pattern of
11 racketeering activity what good does it do to have an
12 enterprise. And what we're looking at now is what
13 Congress' intention was in 1970. They modified the
14 definition of pattern of racketeering activity
15 specifically to avoid the application of this statute to
16 the demonstrations on the war in Vietnam.

17 QUESTION: And what was the precise
18 modification?

19 MR. BLAKEY: They took the definition of
20 racketeering activity, which included any crime dangerous
21 to life, limb, or property -- dangerous to life, limb, or
22 property, which clearly would have fit this facts, and
23 they moved it down to specific crimes. And the specific
24 crimes that they adopted was extortion, not coercion. In
25 1961 this country had promulgated in the criminal law

1 community the model penal code.

2 Anyone familiar with the vocabulary of the model
3 penal code -- and McLellan, Hruska, and Paff, the
4 principal architects of this statute were familiar with
5 the model penal code; they served on the Brown
6 Commission -- knew the difference between extortion and
7 coercion. When they put in extortion and leave out
8 coercion --

9 QUESTION: Yes, but --

10 QUESTION: But that, it seems to me, contradicts
11 your argument in which you pin your entire argument on the
12 word "affairs."

13 MR. BLAKEY: Your Honor, this is holistically.
14 You have to look at every word in context. I am --

15 QUESTION: Well, and I've been meaning to add as
16 a footnote that murder is included. That's not
17 necessarily an economic crime. It usually isn't, in fact.

18 MR. BLAKEY: If -- when you read the legislative
19 history closely, you see that the addition of some
20 offenses -- murder would be one, obstruction of justice
21 would be another -- was added for the instrumental role --
22 not the direct role, but the instrumental role -- role
23 they play in economic affairs, not independent.

24 QUESTION: Why isn't it -- why isn't it still
25 the case that your -- the point of your argument is that

1 extortion should be construed narrowly so that it does not
2 include coercion, but that is irrelevant to the question
3 of what enterprise means.

4 MR. BLAKEY: Your Honor, absolutely. But what
5 I'm suggesting to you is you cannot do this word by word.
6 You've got to do it line by line, text by text.

7 QUESTION: No, but Congress -- by the same
8 token, Congress doesn't have to do the same thing three
9 different ways. And if, in fact, it was addressing the
10 concerns that the ACLU raised by its definition of
11 predicate offense, that is not a premise for saying that
12 it therefore also intended enterprise to be narrowed in
13 the way -- with the limitation that you want to place on
14 it.

15 MR. BLAKEY: Your Honor, I think the -- the
16 limitation comes from the word "affairs" in section (c).
17 It comes from "interest or control" in (b). It comes from
18 "income" in (a).

19 QUESTION: Well, I would certainly feel betrayed
20 if I were one of the Senators who favored a broader
21 statute and the ACLU came in with objections and I
22 conceded well, okay, to meet your objections what we'll do
23 is we'll narrow the crime; we'll just have certain types
24 of crimes instead of other crimes. And I thought that was
25 the deal, and the ACLU says, yeah, that's good enough,

1 okay, and then we all go home, and then it turns out that
2 by narrowing the crimes I've also changed the meaning of
3 the word "affairs."

4 MR. BLAKEY: Your Honor.

5 QUESTION: Or I've changed the meaning of the
6 word "enterprise."

7 MR. BLAKEY: Your Honor, this statute was --

8 QUESTION: It seems to me a deal is a deal. If
9 that's what -- if that's how they meant to narrow the
10 statute, that ought to be narrow enough. And the argument
11 you must rely on, then, is that this is not extortion.

12 MR. BLAKEY: Your Honor, I want to rely on all
13 the arguments --

14 QUESTION: I know you do.

15 MR. BLAKEY: And let me -- let me turn to
16 another one.

17 QUESTION: Before you leave this argument,
18 though, you suggest that in response to the concern about
19 the Vietnam protestors they drew up -- drafted a rather
20 narrow definition of racketeering activity.

21 MR. BLAKEY: That's correct.

22 QUESTION: The narrowed definition includes over
23 2 pages and lists lots of crimes, some of which do not
24 have an economic motive such as some of the obscenity
25 crimes. So I don't know how that helps here.

1 MR. BLAKEY: Obscenity was not in it, Your
2 Honor, in 1970.

3 QUESTION: Well, it's in it now.

4 MR. BLAKEY: It's in it now, and maybe Congress
5 was unwise in doing that.

6 (Laughter.)

7 MR. BLAKEY: Let me turn to -- but we're not
8 here to argue that, fortunately.

9 QUESTION: No, but I think it's inconsistent
10 with the notion that they limit it in a way which
11 definitely excluded everything except economic gain.

12 MR. BLAKEY: Well, Your Honor, I think whatever
13 "affairs" meant in 1970, it remains that no matter what
14 they do when they introduce obscenity.

15 Let me turn -- in other words, if obscenity
16 comes in it doesn't change the meaning of the word
17 "affairs." Affairs means commercial or professional
18 business, and it's the word of limitation in this context.

19 Let me turn, if I might, to the statutes in pari
20 materia with this statute. This statute was modeled on
21 the antitrust statutes. The antitrust statutes have as
22 their purpose securing freedom in the marketplace. RICO
23 has as its purpose securing integrity in the marketplace.

24 When Congress adopted RICO in 1970, it had
25 before it the subtle jurisprudence of this Court under the

1 antitrust laws, and that subtle jurisprudence excludes
2 political activity, it excludes labor activity, it -- and
3 we've learned since, in Claiborne Hardware, that it
4 excludes protest activity.

5 If, in fact, Carrie Nation and the Anti-Saloon
6 League wielding an ax in a saloon is not in restraint of
7 trade, if William Letter heading up the American
8 Association -- American Federation of Hosiery Workers in a
9 violent sitdown strike is not restraint of trade, if
10 Medgar Evers and the NAACP in a sometimes violent civil
11 rights boycott is not in restraint of trade, then I
12 suggest to you Joe Scheidler and PLAN is not conducting
13 the affairs in the sense of business or commercial.

14 QUESTION: Mr. Blakey, I've been thinking about
15 affairs, and it -- if Congress wanted to convey the
16 meaning you suggested, wouldn't it have said business?
17 Because affairs come in all sizes and shapes. There are
18 private affairs, there are family affairs.

19 MR. BLAKEY: That's why, Your Honor --

20 QUESTION: But wouldn't business fit much better
21 if that's what Congress was trying to portray?

22 MR. BLAKEY: Your Honor, let me trace the
23 legislative history at this point. An earlier statute
24 indeed used the word "business" and the reason the word
25 "business" was dropped is because two statutes were

1 merged.

2 Senator McLellan's original Syndicate bill,
3 which was aimed at the underworld generally, Senator
4 Hruska's Infiltration bills were aimed at the upper world.
5 Senator Hruska's bill said "business enterprise." When
6 those two bills were merged, had the statutory draftsman
7 left the word "business" in there, you would have had the
8 very real ambiguity this Court had to deal with in
9 Turkette as to whether this meant legitimate business
10 only. The word "business" was dropped not to make it
11 beyond business --

12 QUESTION: And you don't think you can have
13 legitimate and illegitimate affairs?

14 MR. BLAKEY: Your Honor --

15 (Laughter.)

16 MR. BLAKEY: You certainly do. The question is
17 whether you have them in this statute in this context.
18 And the answer to that question is holistic and cannot be
19 done by the abstract analysis of the word "affairs." Look
20 at it in context.

21 QUESTION: Thank you -- thank you, Mr. Blakey.

22 Ms. Clayton, you have 5 minutes remaining.

23 REBUTTAL ARGUMENT OF FAY CLAYTON

24 ON BEHALF OF PETITIONERS

25 MS. CLAYTON: Thank you, Mr. Chief Justice, may

1 it please the Court:

2 If I heard Mr. Blakey right, his argument began
3 with the principle that the concept of illicit gain sums
4 up the RICO statute. I think in -- Justice Ginsburg's
5 question just a moment ago pointed out how inaccurate that
6 statement really is.

7 But I would also like to remind the Court and
8 Mr. Blakey that in his 1980 article which is relied upon
9 by Mr. Scheidler in his brief, he said -- and more
10 important, this Court has said on many occasion that
11 Congress knew how to put a limitation in RICO when it
12 wanted to. And if Congress wanted to limit RICO to crimes
13 done for illicit gain, two words would have solved the
14 problem and we wouldn't see the quagmire of issues like
15 Mr. Blakey has been forced to address this morning.

16 The question -- the argument that he makes
17 raises so many questions that no one can answer. Even the
18 lower courts couldn't say -- with all the various
19 definitions they've come up with in Ivic, in Bagaric,
20 which took away motive and gave dimension, it still
21 doesn't answer the question of where we're supposed to
22 look for this economic motive or dimension or gain. Is it
23 supposed to be in the crimes, in the enterprise, in the
24 criminals themselves?

25 Congress knew how to put limits in RICO, and as

1 this Court said in Russello, the short answer is that
2 Congress did not write the statute that way. It could
3 have -- certainly it could have limited enterprises to
4 business enterprises. It could have limited predicate
5 acts to ones done for gain: murder for profit, arson for
6 profit. It didn't do that. Affairs certainly doesn't
7 imply the exclusion of illegitimate affairs any more -- or
8 noneconomic affairs any more than the arguments that this
9 Court heard in Turkette made any sense. It just doesn't
10 wash.

11 Mr. Blakey's reliance on the antitrust laws is
12 mystifying to me, because the antitrust laws for more than
13 three-quarters of a century have taught that good motives
14 do not save illegal acts. And all the authorities, his
15 reference to antitrust cases, are entirely apart from this
16 case, because each and every one of them involved either
17 petitioning or protected lawful speech.

18 Even the Seventh Circuit, which threw out --
19 which upheld throwing out our complaint, recognized --

20 QUESTION: Well, that may be, but I think the
21 point he's using them for -- and this statute is modeled
22 after the treble damage actions in the antitrust laws.
23 What he's using them for is to show that in another area
24 we have imported an extratextual limitation upon the
25 statute. Now for whatever reasons, First Amendment

1 reasons, whatever reasons, the point is it is an
2 extratextual limitation.

3 MS. CLAYTON: But, Your Honor, it was based on
4 the text, the phrase "restraint of trade." Restraint of
5 trade was not a defined term in the antitrust --

6 QUESTION: It restrains trade to have a grape
7 boycott. That certainly restrains trade.

8 MS. CLAYTON: Your Honor, going back almost a
9 century, we know that when the antitrust laws were
10 enacted, the word "restraint of trade" was a highly
11 technical, highly legalistic term, and the Court had to
12 infer what it meant.

13 QUESTION: In any case, it was a limitation on
14 what, by analogy, we would call the predicate acts, wasn't
15 it?

16 MS. CLAYTON: I'm sorry, Justice Souter, I
17 didn't hear your question.

18 QUESTION: The limitations that Mr. Blakey was
19 referring to are those which, by analogy, we would refer
20 to as limitations on the predicate acts which would
21 suffice?

22 MS. CLAYTON: It would -- it would seem like
23 that would be the limitation, but he --

24 QUESTION: It certainly would not support the
25 argument that -- that enterprise -- in this case, that

1 enterprise has to be so limited.

2 MS. CLAYTON: Well, Your Honor, the antitrust
3 laws don't exclude nonprofit enterprises. I mean -- or
4 nonprofit businesses. We have the -- all the
5 professional, the lawyers that we had, the medical
6 association, the people who were the association saying
7 plastic tube was dangerous, all these nonprofit
8 associations, they were not --

9 QUESTION: But they're acting for commercial
10 motives,

11 MS. CLAYTON: Not always, Your Honor. In many
12 cases the -- in fact, there's never been a case, Your
13 Honor, where the antitrust law has been limited -- except
14 this case, where the lower court -- we had wished you had
15 taken our antitrust issue too. But the lower court was
16 the first one in the country to ever say motives count.

17 The Eighth Circuit decision in Council of
18 Defense had said exactly the opposite. A purely political
19 boycott there, and a peaceable one so we didn't invoke the
20 First Amendment problems -- that the Eighth Circuit said
21 in 1920 and that had been good law ever since, that the
22 fact that they did it purely for politics, they didn't
23 like Mr. Hearst's pro-German sympathy and so they called
24 for a major commercial boycott, not a consumer boycott, of
25 his paper, that wasn't protected.

1 This is the first case that's ever --

2 QUESTION: Do you agree with that decision?

3 MS. CLAYTON: Absolutely, Your Honor. I think
4 it's right and I think to impose a requirement on the
5 antitrust laws that if -- that if they're done for another
6 motive, it flies in the face of all of the antitrust case
7 law which shows that purpose and effect on commerce is
8 what counts.

9 Thank you very much, Your Honors.

10 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
11 Clayton.

12 The case is submitted.

13 (Whereupon, at 11:01 a.m., the case in the
14 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

NATIONAL ORGANIZATION FOR WOMEN, INC. V. JOSEPH SCHEIDLER, ET AL.

CASE 92-780

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

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