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RICO--The Rejection of an Economic Motive Requirement

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RICO—THE REJECTION OF AN ECONOMIC MOTIVE REQUIREMENT

NOW v. Scheidler, 114 S. Ct. 798 (1994)

I. INTRODUCTION

In *NOW v. Scheidler*,[1] the United States Supreme Court held that the Racketeer Influenced and Corrupt Organizations Act (RICO), which outlaws certain racketeering activity by or in relation to an enterprise, does not require that the enterprise or the racketeering activity be economically motivated.[2] The National Organization For Women (NOW) and two health clinics that perform abortions brought suit against anti-abortion activists and organizations under RICO for "conspir[ing] to shut down abortion clinics through a pattern of racketeering activity."[3] Based on statutory interpretation and legislative history, Chief Justice Rehnquist, writing for the majority, concluded that the unambiguous language of RICO did not require a defendant to have an economic motive, and therefore a RICO suit could be brought against abortion protesters who were morally and religiously motivated.[4]

This Note argues that the majority, although it arrived at the correct resolution, employed inadequate statutory analysis to arrive at its holding. The term "enterprise" as used in the statute is ambiguous; consequently, the Court should have looked for the ordinary meaning of the term "enterprise" to determine the plain meaning of the statute. The Court was correct, however, not to judicially impose restrictions onto the broad language of RICO based on the legislative history of the statute, because the legislative history does not show a strong Congressional intent to require an economic motive under RICO. In addition, this Note analyzes Justice Souter's treatment of the First Amendment implications of the majority's decision and suggests future applications of RICO.

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1 114 S. Ct. 798 (1994).

2 *Id.* at 806.

3 *Id.* at 801.

4 *Id.* at 806.

II. BACKGROUND

In 1970, Congress enacted the Organized Crime Control Act (OCCA).[5] Chapter 96 of the OCCA §§ 1961-68, entitled Racketeer Influenced and Corrupt Organizations (RICO), makes certain racketeering activities and conspiracy to commit these racketeering activities unlawful.[6] These racketeering activities are defined in detail in § 1961(1) of RICO,[7] and are often referred to as RICO predicate acts

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[5] OCCA, Pub. L. No. 91-452, 84 Stat. 922, codified at 18 U.S.C. §§ 1961-1968 (1970).

[6] Section 1962(a) reads in part:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962 (1988).

Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *Id.*

Section 1962(d) states "It Shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c)." *Id.*

Section 1961(1) of RICO defines certain offenses and acts considered racketeering activity; these offenses are referred to as RICO predicate acts. 18 U.S.C. § 1961 (1988).

[7] Section 1961(1) defines the following acts as "racketeering activity":

> (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, Unites States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relati[ng] to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity)[,] . . . section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code,

or predicate offenses. To successfully allege a RICO offense, it is also necessary to prove the existence of an enterprise as described in § 1961(4).[8]

Although Congress originally enacted OCCA, including RICO, to "seek the eradication of organized crime in the United States,"[9] the language of RICO is broad and not specifically limited to organized crime.[10] Over the years, courts have attempted to interpret the meaning of these general terms to determine the appropriate scope of RICO.

A. THE HISTORICALLY BROAD INTERPRETATION OF RICO

For years, the United States Supreme Court has given RICO a broad reading.[11] For example, the Court in *United States v. Turkette*[12] refused to limit the scope of RICO to legitimate enterprises, holding that the general language of § 1961(4)'s description of enterprise "include[s] both legitimate and illegitimate enterprises within its scope."[13] The defendant in this case was an alleged member of an illegitimate enterprise involved in drug trafficking, arson, insurance fraud, bribery, attempted bribery of police officers, and corruption of the judicial system.[14] The Court rejected the defendant's argument "that RICO was intended solely to protect legitimate business enterprises from infiltration by racketeers and that RICO does not make criminal the participation in an association which performs only illegal acts and which has not infiltrated or attempted to infiltrate a legitimate enterprise."[15]

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section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

Id. (footnotes omitted)

8 Section 1961(4) states that "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.*

9 OCCA, 84 Stat. at 923.

10 H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 248 (1989). "The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." *Id.*

11 *See, e.g.*, H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989); Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985); United States v. Turkette, 452 U.S. 576 (1981).

12 452 U.S. 576 (1981).

13 *Id.* at 580.

14 *Id.* at 579.

15 *Id.* at 579-80.

Instead, the Court interpreted the term "enterprise" broadly. The Court reasoned that, if Congress had intended enterprise to include only legitimate enterprises, it "could easily have . . . insert[ed] a single word, 'legitimate.'"[16] Although the Court in *Turkette* was not expressly addressing whether RICO requires that the enterprise have an economic motive, the Court defined enterprise as "an entity, . . . a group of persons associated together for a common purpose of engaging in a course of conduct,"[17] which does not require an economic motive. Thus, the Court established precedent for a liberal reading of RICO, and specifically the term "enterprise."

In a series of decisions following its broad interpretation of RICO in *Turkette*, the Supreme Court, as well as the Seventh Circuit, continued to refuse to judicially legislate restrictions into RICO. Both courts repeatedly held that RICO was an unambiguous Act and that Congress purposefully employed broad language, that courts should not construe narrowly.[18] First, in the 1984 case *Haroco, Inc. v. American National Bank and Trust Co. of Chicago*,[19] the United States Court of Appeals for the Seventh Circuit refused to limit the applications of RICO when it rejected special standing and injury requirements for civil RICO plaintiffs.[20] The defendants were a bank that made loans to the plaintiff corporations, the officer and director of the bank, and the parent company of the bank.[21] Plaintiffs alleged that defendants used "the mails in furtherance of the alleged scheme to defraud plaintiffs by overstating the prime interest rate."[22] Such a fact pattern is not typical of the organized crime that Congress sought to eradicate through RICO, and "it does not seem at all likely that Congress anticipated the application of civil RICO to improperly calculated interest charges by a commercial bank."[23] Yet, the court concluded that it would not exclude the defendants' conduct from the reach of RICO. The court found that since "Congress deliberately chose to employ broad terms which would defy judicial confinement . . . it does not seem fitting for [the court] to attempt to narrow the statute in ways which are nearly impossible to rationalize merely to exclude subjects

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16 *Id.* at 581.

17 Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1594 (1994) (book review) (quoting *Turkette*, 452 U.S. at 583).

18 *See, e.g.*, H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989); Sedima, S.P.R.L., v. Imrex Co., Inc., 473 U.S. 479 (1985); Haroco, Inc. v. American Nat'l Bank and Trust Co. of Chicago, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985).

19 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985).

20 *Id.* at 399.

21 *Id.* at 385.

22 *Id.*

23 *Id.* at 399.

of this kind."[24] The court further explained that, "the fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."[25]

Shortly after *Haroco,* the Supreme Court rejected a special standing requirement for civil RICO plaintiffs in *Sedima, S.P.R.L. v. Imrex Co., Inc.*[26] The fact pattern in *Sedima* also did not involve organized crime. The dispute arose when a joint international venture between the Belgian company, Sedima, and the New York company, Imrex, went awry.[27] Sedima alleged that Imrex committed "violations of § 1962(c), based on . . . mail and wire fraud"[28] when Imrex "present[ed] inflated bills, cheating Sedima out of a portion of its proceeds by collecting for nonexistent expenses."[29] The Court rejected the Second Circuit's amorphous "organized crime" standing requirement that demanded a RICO plaintiff to "allege a 'racketeering injury'—an injury 'different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter.'"[30] The Court concluded that courts should not narrow RICO in this way, but instead should construe it broadly for two reasons.[31] First, because Congress purposely left the language in RICO broad;[32] and second, because Congress expressly stated that RICO was to "be liberally construed."[33] In addition, the Court agreed with the Seventh Circuit that "the fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity[,] [but] demonstrates breadth."[34]

Finally, in *H.J. Inc. v. Northwestern Bell Telephone Co.,*[35] the Supreme Court made an express decision not to limit RICO strictly to organized crime.[36] In that case, customers of Northwestern Bell Telephone Company filed a class action against "some of the telephone

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24 *Id.* at 398-99.

25 *Id.* at 398.

26 473 U.S. 479 (1985).

27 *Id.* at 483-84.

28 *Id.* at 484.

29 *Id.*

30 *Id.* at 485-86, 500 (quoting Sedima, S.P.R.L. v. Imrex, Co., Inc., 741 F.2d 482, 496 (2d Cir. 1984)).

31 *Id.* at 497-98.

32 *Id.*

33 *Id.* at 498 (quoting OCCA, Pub. L. 91-452, § 904(a), 84 Stat. 947 (1970)). RICO contains a liberal construction provision. OCCA, § 904(a), 84 Stat. 947.

34 *Sedima, S.P.R.L.,* 473 U.S. at 499 (quoting Haroco, Inc. v. American Nat'l Bank and Trust Co. of Chicago, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd,* 473 U.S. 606 (1985)).

35 492 U.S. 229 (1989).

36 *Id.* at 249.

company's officers and employees, various members of the Minnesota Public Utilities Commission (MPUC), and other unnamed individuals and corporations."[37] The telephone customers alleged violations of RICO based on factual allegations that Northwestern Bell bribed and illegally influenced the MPUC to "approve rates for the company in excess of a fair and reasonable amount."[38] The Court rejected a narrow reading of the phrase "pattern of racketeering activity," holding that it does not require proof of "multiple illegal schemes"[39] or that the predicate acts be "indicative of an organized crime perpetrator."[40] Instead, the Court settled on a broad meaning for "pattern of racketeering" that requires a "plaintiff or prosecutor [merely to] prove [a] continuity of racketeering activity, or its threat, simpliciter."[41] The Court referred to the legislative history of OCCA in support of this broad interpretation.[42] The Court also considered the fact that, in other sections of OCCA and in other statutes, Congress "enact[ed] explicit limitations to organized crime"[43] and could have easily done

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37 *Id.* at 233.

38 *Id.* at 233-34.

39 *Id.* at 234-35 (quoting H.J., Inc. v. Northwestern Bell Tel. Co., 648 F. Supp. 419, 425 (Minn. 1986)).

40 *Id.* at 244.

41 *Id.* at 241.

42 *Id.* at 246-48. In response to complaints about the breadth of OCCA, "the statute's sponsors made evident that the omission of this limit was no accident, but a reflection of OCCA's intended breadth." *Id.* at 246. The Court looked specifically to the following words of Senator McClellan:

> The danger posed by organized crime-type offenses to our society has, of course, provided the occasion for our examination of the working of our system of criminal justice. But should it follow . . . that any proposals for action stemming from that examination be limited to organized crime?
>
> This line of analysis . . . is seriously defective in several regards. Initially, it confuses the occasion for reexamining an aspect of our system of criminal justice with the proper scope of any new principle or lesson derived from that reexamination.
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> * * *
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> In addition, the objection confuses the role of the Congress with the role of a court. Out of a proper sense of their limited lawmaking function, courts ought to confine their judgments to the facts of the cases before them. But the Congress in fulfilling its proper legislative role must examine not only individual instances, but whole problems. In that connection, it has a duty not to engage in piecemeal legislation. Whatever the limited occasion for the identification of a problem, the Congress has the duty of enacting a principled solution to the entire problem. Comprehensive solutions to identified problems must be translated into well integrated legislative programs.
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> The objection, moreover, has practical as well as theoretical defects. Even as to the titles of [the OCCA bill] needed primarily in organized crime cases, there are very real limits on the degree to which such provisions can be strictly confined to organized crime cases . . . . On the other hand, each title . . . which is justified primarily in organized crime prosecutions has been confined to such cases to the maximum degree possible, while preserving the ability to administer the act and its effectiveness as a law enforcement tool.

Id. at 246-47 (quoting 116 Cong. Rec. 18,913-14 (1970)).

43 *Id.* at 245. *See, e.g.*, Title VI which "permitted the deposition of a witness to preserve

the same in RICO, but chose not to do so.[44] Further, the Supreme Court stressed that it is not the job of the courts to judicially legislate restrictions into RICO.[45]

B. THE SPLIT AMONG THE CIRCUITS

Despite these decisions establishing a trend of liberal RICO interpretation, a split developed among the courts of appeals on the issue of whether RICO requires "the racketeering enterprise or the predicate acts of racketeering [to be] motivated by an economic purpose."[46] Both the Second Circuit and the Eighth Circuit maintained that an economic motive requirement exists in RICO. In contrast, the Third Circuit held that RICO does not require an economic motive.

1. Second Circuit

The Second Circuit first established the economic motive requirement in *United States v. Ivic*.[47] The defendants in *Ivic* were Croatian terrorists convicted of "conspir[ing] to kill or otherwise injure" the Secretary General of the Croatian National Congress,[48] attempting to bomb several locations, and "conspir[ing] to transport and utilize explosives."[49] These acts provided possible predicate offenses for the RICO count of the indictment.[50] The indictment described the alleged RICO enterprise as a "criminal enterprise" whose "primary object . . . [was] that the defendants would and did use terror, assassination, bombings, and violence in order to foster and promote their beliefs and in order to eradicate and injure persons who they perceived as in opposition to their beliefs."[51] The court held that RICO did not apply to these defendants because neither the enterprise nor

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testimony for a legal proceeding, upon motion by the Attorney General certifying that 'the legal proceeding is against a person who is believed to have participated in an organized criminal activity.'" *Id.* (quoting 18 U.S.C. § 3503(a)). *See also* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 601(b), 82 Stat. 209, which defines "organized crime" as "the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to gambling, prostitution, loan sharking, narcotics, labor racketeering, and other unlawful activities of members of such organizations." *H.J. Inc.*, 492 U.S. at 245 (quoting § 601(b), 82 Stat. 209).

44 *H.J. Inc.*, 492 U.S. at 244-45.

45 *Id.* at 249.

46 NOW v. Scheidler, 114 S. Ct. 798, 801 (1994). No express requirement exists in the language of RICO, but the courts argued over whether a putative economic motive requirement exists.

47 700 F.2d 51 (2d Cir. 1983).

48 *Id.* at 53-54.

49 *Id.* at 54-56.

50 *Id.* at 54-55.

51 *Id.* at 58.

the predicate acts were economically motivated, but instead were politically motivated.[52]

The court provided four reasons for requiring an economic motive.[53] First, the court decided that, because the term "enterprise" as used in subsections 1962(a) and (b) clearly refers to an "organized profit-seeking venture," it must assume that the term has the same economic meaning in subsection 1962(c).[54] Second, the court concluded that the ordinary meaning of the words "corrupt" and "racketeer influenced" in the title of the statute mandates an economic motive requirement.[55] Third, the court found that Congress did not intend RICO to cover non-economic activity because the statement of findings prefacing OCCA does not cover non-economic activity.[56] Thus, the court held it was beyond the purpose of RICO "to prevent[ ] and revers[e] the infiltration of legitimate businesses by organ-

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[52] *Id.* at 65.

[53] *Id.* at 60-65.

[54] *Id.* at 60-61. The court based this conclusion on the view that "[w]hen the same word is used in the same section of an act more than once, and the meaning is clear in one place, it will be assumed to have the same meaning in other places." *Id.* at 60. The court cited United States v. Nunez, 573 F.2d 769, 771 (2d Cir.), *cert. denied*, 436 U.S. 930 (1978), as support for this rule of construction.

[55] *Ivic*, 700 F.2d at 61. The court found that the words "have a familiar connotation to ordinary people as describing money-making activities." *Id.*

[56] *Id.* at 61-62.

The statement of findings reads:

> The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.
>
> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

OCCA, 84 Stat. 922.

Further, the court stated that "Senator McClellan, the principal sponsor of the Organized Crime Control Act of 1970, made clear on several occasions that the purpose of Title IX is 'economic' and that the only crimes included in § 1961(1) are those adapted to 'commercial exploitation'." *Ivic*, 700 F.2d at 63.

ized crime elements."[57] Finally, the court found persuasive the 1981 Justice Department's RICO Guidelines that require an enterprise to have an economic goal.[58]

In *United States v. Bagaric*,[59] the Second Circuit next addressed the issue of a RICO economic motive requirement. In *Bagaric*, the court clarified its holding in *Ivic*, specifying that the economic motive requirement is sufficiently satisfied if the purpose for committing the RICO predicate act is economically motivated and not the enterprise itself.[60] The defendants in *Bagaric*, like those in *Ivic*, were Croatian terrorists. However, in addition to their politically-motivated bombings and murders, the defendants committed murders in an attempt to extort money "'to further [their] activities.'"[61] Thus, the court distinguished the defendants in *Bagaric* on the grounds that they were "'motivated' by political *as well as* economic goals,"[62] whereas the defendants in *Ivic* were motivated solely by political goals. The court in *Bagaric* declined to require the government to prove that the ultimate purpose of the enterprise is economic,[63] noting that "the *Ivic* court nowhere stated . . . that economic gain must be the sole motive of every RICO enterprise."[64]

To support its version of the economic motive requirement, the court in *Bagaric* used two of the same arguments the court in *Ivic* used—the meaning of the words in the title Racketeer Influence and Corrupt Organizations, and RICO's purpose as expressed by Congress in the statement of findings prefacing RICO.[65] First, the court in *Bagaric* found that since the defendants used the very tactics that the dictionary uses to define "corrupt" and "racketeer,"[66] the ordinary

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57 *Id.*

58 *Id.* at 64. "The Preface to these Guidelines states that RICO is 'most directly addressed' to the 'infiltration of organized crime into the nation's economy'." *Id.* (quoting U.S. DEPT. OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL (1981). "Guideline VI directs that '[n]o RICO count of an indictment shall charge the enterprise as a group associated in fact, unless the association in fact has an ascertainable structure which exists for the purpose of maintaining operations directed toward an *economic* goal . . . .'" *Id.* (quoting U.S. DEPT. OF JUSTICE, *supra*). However, in 1984, after the Second Circuit decided *Ivic*, Congress amended the RICO Guidelines to "provide that an association-in-fact enterprise must be 'directed toward an economic *or other identifiable goal*.'" NOW v. Scheidler, 114 S. Ct. 798, 805 (1994) (quoting U.S. DEPT. OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-110.360 (Mar. 9, 1984) (emphasis added)).

59 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983).

60 *Id.* at 53-54.

61 *Id.* at 53.

62 *Id.* (emphasis added).

63 *Id.* at 53-54.

64 *Id.* at 53.

65 *Id.* at 57 n.13.

66 *Id.*

meanings of "Corrupt" and "Racketeer" encompass "terrorist groups [like the one in *Bagaric,*] which finance their violent activities through extortionate means."[67] Second, the court in *Bagaric* concluded that "apart from the reference to 'organized crime,'"[68] the purpose of RICO as expressed in the statement of findings—to stop activities which "drain[ ] billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption"[69]—"clearly covers the conduct of" the terrorists in the *Bagaric* case who committed extortion to gain money to support their cause.[70]

The Court of Appeals for the Second Circuit reaffirmed its decision in *Bagaric* in *United States v. Ferguson.*[71] In *Ferguson,* the court reiterated that RICO "merely [requires] 'some financial purpose' either to the criminal enterprise or the acts of racketeering."[72] Defendants were members of "The Family,"[73] and "self-professed revolutionaries"[74] who helped a Black Liberation Army leader escape from jail.[75] The defendants committed armed robberies "to support enterprise members and to maintain safe houses."[76] Thus, similar to the defendants in *Bagaric,* the ultimate purpose of the defendants in *Ferguson* was non-economic, but the crimes they committed were "economic crimes."[77]

2. *Eighth Circuit*

The Eighth Circuit, like the Second Circuit, interpreted RICO as requiring an economic motive. The Eighth Circuit first mentioned an economic motive requirement in *United States v. Anderson.*[78] The defendants in *Anderson* were county administrators alleged to have accepted bribes and kickbacks in a scheme to defraud the citizens of two counties.[79] The court held that the facts of the case did not fall within

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67 *Id.* The court relied on WEBSTER'S NEW COLLEGIATE DICTIONARY (5th ed. 1977), which defined "corrupt" as "characterized by bribery, the selling of political favors, or other improper conduct," and which defined "racketeer" as "one who extorts money or advantages by threats of violence, by blackmail, or by unlawful interference with business or employment." *Bagaric,* 706 F.2d at 57 n.13 (quoting WEBSTER'S NEW COLLEGIATE DICTIONARY (5th ed. 1977)).

68 *Bagaric,* 706 F.2d at 57 n.13.

69 OCCA, 84 Stat. 922.

70 *Bagaric,* 706 F.2d at 57 n.13.

71 758 F.2d 843 (2d Cir.), *cert. denied,* 474 U.S. 841 (1985).

72 *Id.* at 853 (quoting *Bagaric,* 706 F.2d at 55).

73 *Ferguson,* 758 F.2d at 847.

74 *Id.* at 853.

75 *Id.* at 846.

76 *Id.* at 853.

77 *Id.*

78 626 F.2d 1358 (8th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981).

79 *Id.* at 1361-62.

the meaning of the term "enterprise" as described in § 1961(4) of RICO because the enterprise was not an "association that is substantially different from the acts which form the 'pattern of racketeering activity.'"[80] The court interpreted the term "enterprise" "to encompass only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the 'pattern of racketeering activity.'"[81] Thus, the Eighth Circuit created the *Anderson* definition of "enterprise;" however, the court "provide[d] very little explanation for the 'economic goal' part of [the] definition,"[82] merely referring to the fact that the purpose of RICO is economic.[83] Moreover, the economic goal portion of the *Anderson* definition was "entirely dicta,"[84] since the defendants in the case unquestionably had an economic motive for their actions[85] and the court only "set forth th[e] economic goal requirement as part of its discussion of a distinct enterprise requirement."[86] Regardless of these limitations on precedential value, the Seventh Circuit in *United States v. Neapolitan*,[87] adopted the *Anderson* definition of "enterprises," which also laid the foundation for the subsequent Eighth Circuit decision in *United States v. Flynn*.[88]

In *Flynn*, the defendant was charged under RICO for "participat[ing] in an organization which engaged in a series of violent crimes in an attempt to obtain and maintain control of various labor

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80 *Id.* at 1365, 1369.

81 *Id.* at 1372.

82 Cunningham, *supra* note 17, at 1592 (citation omitted).

83 *Id.* n.146. "The Anderson court . . . quote[d] a law review article by Senator McClellan, a cosponsor of the Act, and a law review note to the effect that 'the purpose' of RICO is 'economic.'" *Id.* (citing *Anderson*, 626 F.2d at 1368 as quoting John L. McClellan, *Organized Crime Control Act (S. 30) or Its Critics: Which Threaten Civil Liberties?*, 46 NOTRE DAME L. REV. 55, 161-62 (1970), and Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. PA. L. REV. 192, 222 (1975)).

84 *See* Cunningham, *supra* note 17, at 1592.

85 NOW v. Scheidler, 968 F.2d 612, 627 (7th Cir. 1992).

86 NOW v. Scheidler, 765 F. Supp. 937, 942 (N.D. Ill. 1991).

87 791 F.2d 489 (7th Cir.), *cert. denied*, 479 U.S. 939 (1986). The Seventh Circuit holding in *Neapolitan*, like the Eighth Circuit's decision in *Anderson*, "distinguished between the racketeering acts and the enterprise." *NOW*, 968 F.2d at 627 (citing *Neapolitan*, 791 F.2d at 500). The case involved "police officers [who] took bribes from car thieves, and were charged with conducting the sheriff's office (the enterprise) through a pattern of racketeering activity," and also the "car thieves themselves [who] operated a large scale 'chop shop,' which was allegedly the RICO enterprise." *Id.* Whether the defendants were motivated by financial gain was not an issue in the case because it was obvious that they were. *Id.* However, in concluding that the racketeering acts must be separate from the enterprise, the *Neapolitan* court specifically adopted the *Anderson* definition of "enterprise" containing the "economic motive" language. *Neapolitan*, 791 F.2d at 500.

88 852 F.2d 1045 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988).

unions and to retaliate against leaders of rival groups, organizations and families for acts committed against the enterprise."[89] The defendant "argue[d] that the evidence failed to show that his activities promoted his economic interests in the enterprise."[90] Based on the *Anderson* definition of "enterprise," the court specifically held that RICO requires that "an enterprise . . . be directed toward an economic goal."[91] The enterprise at issue satisfied this requirement because its activities were directed towards controlling labor unions.[92] Thus, the court sustained the RICO convictions.[93]

3. Third Circuit

In contrast to the Second and Eighth Circuits, the Third Circuit determined that RICO does not require an economic motive. The Third Circuit in *Northeast Women's Center, Inc. v. McMonagle*[94] held that where economic motive is not necessary to commit the predicate offense, there is no separate economic requirement under RICO.[95] In this case, a women's health center brought a RICO action "against a group of anti-abortion activists."[96] As the RICO predicate offense, the clinic alleged acts of extortion in violation of the Hobbs Act, 18 U.S.C. § 1951,[97] which is an offense that does not require an economic motive. The court concluded that, if the elements of the RICO predicate offense have been satisfied, RICO requires no additional proof of an economic motive.[98] Specifically, the court found the defendants' actions for which the jury convicted them were the very acts the statutes proscribed and that the defendants were not immunized from punish-

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89 *Id.* at 1046.

90 *Id.* at 1052.

91 *Id.*

92 *Id.*

93 *Id.*

94 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989).

95 *Id.*

96 *Id.* at 1345.

97 *Id.* at 1348. Section 1961(1)(B) defines racketeering activity as "any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1951 . . . ." 18 U.S.C. § 1961.

18 U.S.C. § 1951(a) reads:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951 (1988).

Section 1951(b)(2) defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Id.*

98 *Northeast Women's Ctr., Inc.*, 868 F.2d at 1348.

ment because they were motivated by their political beliefs.[99]

The United States Supreme Court finally resolved this conflict among the federal courts of appeals in *NOW v. Scheidler*.[100]

III. Facts and Procedural History

Pro-Life Action Network (PLAN) is a nationwide coalition of anti-abortion activists and organizations[101] pursuing a goal to "shut down [abortion] clinics and persuade women not to have abortions."[102] To further this purpose, these anti-abortion activists and organizations committed the following unlawful acts: organized "blitzes" on clinics, in which protesters blockaded the clinics, disabled the locks to the clinics with glue, and locked themselves to the clinic doors; led an invasion of a Florida clinic in which protesters injured the clinic administrator and another woman and destroyed clinic property; threatened those who conduct business with the clinics; and maintained connections with arsonists who have fire-bombed clinics.[103] Further, several of the protesters allegedly stole fetal remains from a medical testing laboratory named Vital-Med Laboratories, which reportedly was a participant in this scheme.[104]

In response to these and similar acts by PLAN and its members, the National Organization for Women (NOW) and two health care centers, Delaware Women's Health Organization, Inc. (DWHO) and Summit Women's Health Organization, Inc. (SWHO),[105] filed a suit in the United States District Court for the Northern District of Illinois against the named members of PLAN[106] (hereinafter "protesters") and Vital-Med Laboratories.[107] The suit alleged that the protesters,

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99 *Id.*

100 NOW v. Scheidler, 114 S. Ct. 798, 802 (1994).

101 Joseph Scheidler, John Patrick Ryan, Randall Terry, Andrew Scholberg, Conrad Wojnar, Timothy Murphy, Monica Migliorino, Pro-Life Action League, Inc., Pro-life Direct Action League, Inc., Project Life, and Operation Rescue are all members of PLAN. United States Supreme Court Brief for Petitioner at 4-5, NOW v. Scheidler, 114 S. Ct. 798 (1994) (No. 92-780).

102 *NOW*, 114 S. Ct. at 801.

103 NOW v. Scheidler, 968 F.2d 612, 615-16 (7th Cir. 1992).

104 *Id.* The protesters clearly committed the acts; the only issues before the court were whether the acts constituted stealing as alleged by NOW, Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc. and whether the lab was part of the scheme.

105 Plaintiffs intended the suit to be a class action on behalf of NOW and its women members, other women who use or may use the services of the targeted health centers, and Delaware Women's Health Organization, Inc., Summit Women's Health Organization, Inc., and similarly targeted clinics. However, the district court dismissed the class certification motion upon granting defendant's motion to dismiss the suit. *Id.* at 615 n.3.

106 *See supra* note 101.

107 *NOW*, 968 F.2d at 615.

through their actions, "restrained trade in violation of section one of the Sherman [Antitrust] Act."[108] In addition, DWHO and SWHO[109] alleged that the protesters "were members of a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity"[110] in violation of §§ 1962(a),[111] 1962(c),[112] and 1962(d)[113] of RICO.

The district court dismissed the suit pursuant to Federal Rule of Civil Procedure 12(b)(6) "for failure to state a claim upon which relief may be granted."[114] The district court granted dismissal for four reasons: First, in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*,[115] the United States Supreme Court held that the Sherman Act does not apply to political activity aimed at petitioning the government.[116] Thus, the district court concluded that because the protesters' alleged activities "involve[d] political opponents, not commercial competitors, and political objectives, not marketplace goals,"[117] the Sherman Act was inapplicable to the present matter. Second, the court dismissed the § 1962(a) RICO claim because PLAN's alleged income came from voluntary donations that "in no way were derived from the pattern of racketeering alleged" by the clinics and required by § 1962(a).[118] The court found that "[w]hile supporters may have

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108 NOW v. Scheidler, 765 F. Supp. 937, 939 (N.D. Ill. 1991). Section 1 of the Sherman Antitrust Act states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1988).

109 Only DWHO and SWHO sued under RICO. NOW v. Scheidler, 114 S. Ct. 798, 802 (1994).

110 *Id.* at 801. The activities allegedly included extortion in violation of the Hobbs Act, 18 U.S.C. § 1951. *Id.*; *see supra* note 97. In support of this allegation, DWHO and SWHO claimed that the protesters "conspired to use threatened or actual force, violence or fear to induce clinic employees, doctors, and patients to give up their jobs, give up their economic right to practice medicine, and give up their right to obtain medical services at the clinics." *NOW*, 114 S. Ct. at 801-02. Further, the conspiracy allegedly resulted in injury to the plaintiffs' "business and/or property interests." *Id.* at 802.

111 *See supra* note 6.

112 *See supra* note 6. PLAN "constitute[d] the alleged racketeering 'enterprise' for purposes of § 1962(c)." *NOW*, 114 S. Ct. at 802.

113 *See supra* note 6.

114 NOW v. Scheidler, 765 F. Supp. 937, 939 (N.D. Ill. 1991).

115 365 U.S. 127 (1961).

116 *Id.*

117 NOW v. Scheidler, 114 S. Ct. 798, 802 (1994) (quoting *NOW*, 765 F. Supp. at 941).

118 *Id.* (quoting *NOW*, 765 F. Supp. at 941).

contributed in order to promote the extortionate activities of defendants,"[119] the "supporters of defendant organizations were not extorted, either directly or indirectly, into contributing to the organizations."[120] Third, the district court held that § 1962(c) of RICO requires an economic motive "to the extent that some profit-generating purpose must be alleged in order to state a RICO claim."[121] The court found that the protesters' acts were not motivated by economics, but by moral and political goals. Thus, the court dismissed the § 1962(c) claim.[122] Finally, the court dismissed the § 1962(d) conspiracy claim because it was dependent on whether the plaintiffs prevailed in the other two RICO claims.[123] And once the court dismissed all of the federal claims, the pendent state claims lacked jurisdiction.[124]

The United States Court of Appeals for the Seventh Circuit affirmed the district court's decision,[125] "despite the reprehensible nature of the defendants' activities."[126] The court of appeals rejected the district court's use of *Noerr Motor Freight, Inc.* in dismissing the antitrust claims.[127] Instead, the court of appeals found that the legislative and economic history of the Sherman Act showed that "the Sherman Act . . . was intended to prevent business competitors from making restraining arrangements for their own economic advantage."[128] Thus, the court held that, because the "[d]efendants [were] not involved in business, and [had] no ability to concentrate economic power," the Sherman Act did not apply to and did not prohibit the activities alleged by NOW, DWHO, and SWHO.[129]

The court of appeals agreed with the district court's second rationale for dismissing the case, finding that § 1962(c) of RICO contains an economic motive. The court of appeals began its analysis by noting that in *United States v. Neapolitan*[130] it had adopted the *Anderson* definition of enterprise that requires an economic motive.[131] How-

119 *NOW*, 765 F. Supp. at 941.

120 *Id.*

121 *Id.* at 943.

122 *Id.* at 944.

123 NOW v. Scheidler, 114 S. Ct. 798, 802 (1994). Section 1962(d) makes it "unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c)," of § 1962. 18 U.S.C. § 1962 (footnote omitted).

124 *NOW*, 765 F. Supp. at 944-45.

125 NOW v. Scheidler, 968 F.2d 612 (7th Cir. 1992).

126 *Id.*

127 *Id.* at 621.

128 *Id.*

129 *Id.*

130 791 F.2d 489 (7th Cir.), *cert. denied*, 479 U.S. 939 (1986).

131 *NOW*, 968 F.2d at 626; *see supra* text accompanying note 81.

ever, because "economic motive was not an issue in either *Neapolitan* or *Anderson*,"[132] the court of appeals went on to examine the reasoning behind the Second Circuit's holdings in *Ivic*, *Bagaric*, and *Ferguson*.[133] The court concluded that the economic motive requirement established in this line of cases was warranted,[134] despite the Seventh Circuit's traditionally broad interpretation of RICO,[135] and despite the fact that "'the breadth of the statute . . . was the result of deliberate policy choices on the part of Congress.'"[136]

The court of appeals provided several reasons justifying its decision that an economic motive requirement was warranted. First, following the analysis of the Second Circuit in *Ivic*,[137] the court of appeals argued that the "use of the term enterprise in §§ 1962(a) and (b) conveys a restriction to economic entities."[138] The court bolstered the analysis in *Ivic* by quoting the Supreme Court's comment in *Sedima* that "'[the Court] should not lightly infer that Congress intended the term ["violation" in RICO] to have wholly different meanings in neighboring subsections.'"[139] Second, the court stated that requiring an economic motive should not be troubling because the requirement is not "vague" and "amorphous."[140] In addition, the court of appeals argued that by requiring an economic motive it is not "adding elements to the [RICO] offense, but merely fleshing out the definitions of those elements."[141] Furthermore, the court of appeals believed that the Supreme Court's consistent referral to "businesses" in its discussions of RICO[142] "bolster[ed] [the court of appeals'] con-

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132 *Now*, 968 F.2d at 627; *see supra* note 87.

133 *Now*, 968 F.2d at 627-29.

134 *Id.* at 629.

135 *Id.*; *see, e.g.*, Morgan v. Bank of Waukegan, 804 F.2d 970, 975-76 (7th Cir. 1986); Schacht v. Brown, 711 F.2d 1343 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983).

136 *NOW*, 968 F.2d at 629 (quoting Haroco, Inc. v. American Nat'l Bank and Trust Co. of Chicago, 747 F.2d 384, 398-99 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985)).

137 *See supra* note 54 and accompanying text.

138 *NOW*, 968 F.2d at 629.

139 *Id.* at 627 (quoting Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 489 (1985)).

140 *Id.* The court noted that in Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985), the Supreme Court was troubled by the vagueness of a racketeering injury requirement, *NOW*, 968 F.2d at 629 (citing *Sedima*, 473 U.S. at 494-95), which the Second Circuit had read into RICO and which the Supreme Court ultimately rejected. *See supra* text accompanying note 30.

141 *NOW*, 968 F.2d at 629. The court of appeals made this argument in response to the holding in *Sedima* that the "courts should not graft on additional elements" to RICO. *Id.* (citing *Sedima*, 473 U.S. at 497).

142 The court of appeals provided the following quote for support:

> Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises. Legitimate businesses enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences; and, as a result, § 1964(c)'s use against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued.

clusion that non-economic crimes committed in furtherance of non-economic motives are not within the ambit of RICO."[143] Finally, the court felt the economic motive requirement had support in the decisions in *Anderson*, *Neapolitan*, and *Flynn*.[144] Based on the above considerations, the court of appeals held that RICO does not apply to situations where neither the enterprise nor the predicate acts are economically motivated.[145]

After finding that RICO requires an economic motive, the court of appeals rejected petitioners' arguments that the increased costs to the clinics as a result of the protesters' actions satisfied the economic requirement.[146] The court "refuse[d] to equate [economic] effect with the economic motive required."[147] The court also found that the contributions PLAN received incidentally from its actions did not show that PLAN had an economic motive.[148] Moreover, the court of appeals concurred with the district court's disposition of the §§ 1962(a) and (d) RICO claims.[149] NOW, DWHO, and SWHO, appealed.

Recognizing a developing conflict among the courts of appeals, the United States Supreme Court granted certiorari[150] to "determine whether RICO requires proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose."[151]

IV. SUMMARY OF OPINIONS

A. MAJORITY OPINION

Writing for a unanimous Court, Chief Justice Rehnquist concluded that RICO does not require proof that "the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose."[152] The majority found that neither the language

Id. (quoting H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249 (1989)).

143 *Id.*

144 *Id.*

145 *Id.* at 629-30.

146 *Id.* at 630.

147 *Id.*

148 *Id.*

149 NOW v. Scheidler, 114 S. Ct. 798, 802 (1994).

150 NOW v. Scheidler, 113 S. Ct. 2958 (1993).

151 *NOW*, 114 S. Ct. at 801.

152 *Id.* The court also addressed the threshold question of whether DWHO and SWHO had standing to bring their RICO claims and concluded that they did. *Id.* The court held that, because the district court had dismissed the petitioners' claim at the pleading stage, petitioners would have standing and their complaint would be sustained "if relief could be granted 'under any set of facts that could be proved consistent with the allegations.'" *Id.* at 803 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). The court found that

of RICO nor its legislative history requires an economic motive.[153] Therefore, the Court concluded that DWHO and SWHO may maintain their RICO claims if the protesters "conducted the enterprise through a pattern of racketeering activity."[154]

Examining the language of RICO, Chief Justice Rehnquist found that neither § 1962(c) nor § 1961, which define the terms used in RICO, indicate that RICO requires an economic motive.[155] The Chief Justice paid special attention to the § 1962(c) phrase, "any enterprise engaged in, or the activities of which *affect*, interstate or foreign commerce," because that language "comes the closest of any language in subsection (c) to suggesting a need for an economic motive."[156] Based on Webster's Third New International Dictionary's definition of the word "affect"—"to have a detrimental influence on"[157]—Chief Justice Rehnquist argued that a RICO enterprise does not have to have "its own profit-seeking motives" to satisfy § 1962(c).[158] Surely, an enterprise could "have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives."[159]

Consistent with the definitional analysis, Chief Justice Rehnquist rejected the court of appeals' view that the economic use of the word "enterprise" in subsections 1962(a) and (b) implies an economic motive requirement for the enterprise in subsection (c).[160] According to Chief Justice Rehnquist, the rule the court of appeals relied upon—that "'[a court] should not lightly infer that Congress intended' terms 'to have wholly different meanings in neighboring subsections'"[161]—does not apply to the term "enterprise" in subsections 1962 (a), (b), and (c).[162] The Chief Justice found this to be the case because "the term 'enterprise' in subsections (a) and (b) plays a different role in

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the following allegations incorporated into the petitioners' § 1962(c) claim satisfy this standard: "respondents conspired to use force to induce clinic staff and patients to stop working and obtain medical services elsewhere," *Id.*; the "conspiracy 'has injured the business and/or property interests of the' petitioners," *Id.* (quoting App. 66, Second Amended Complaint at 72, ¶ 104); and "respondent Scheidler threatened DWHO's clinic administrator with reprisals if she refused to quit her job at the clinic." *Id.* (quoting 66 App. Second Amended Complaint at 68, ¶ 98(g)).

153 *Id.* at 804, 806.

154 *Id.* at 806.

155 *Id.* at 804.

156 *Id.* (emphasis added).

157 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 35 (1969).

158 *NOW*, 114 S. Ct. at 804.

159 *Id.*

160 *Id.*

161 NOW v. Scheidler, 968 F.2d 612, 627 (1992) (quoting Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 489 (1985)).

162 *NOW*, 114 S. Ct. at 804.

the structure of those subsections than it does in subsection (c)."[163] In subsections (a) and (b), the enterprise is "something acquired through the use of illegal activities or by money obtained from illegal activities,"[164] and thus is the "victim of unlawful activity."[165] Such an enterprise "may very well be a 'profit-seeking' entity."[166] In contrast, in subsection (c) the term "enterprise" refers to "the vehicle through which the unlawful pattern of racketeering activity is committed."[167] Thus, Chief Justice Rehnquist concluded that, because the enterprise in subsection (c) is not being acquired, the enterprise "need not have a property interest that can be acquired nor an economic motive for engaging in illegal activity" as is likely required with an enterprise in subsections (a) and (b).[168]

The majority also examined the significance of language absent from RICO in determining that the language of the statute does not imply an economic motive requirement.[169] Chief Justice Rehnquist referred to *United States v. Turkette*[170] for the rationale that, where "Congress could easily have narrowed the sweep of the term 'enterprise' by inserting a single word," but did not, the limitation most likely does not exist and courts should not infer it.[171] Applying this rationale to the case at bar, the majority found as persuasive evidence against requiring an economic motive[172] the fact that "Congress has not, either in the definitional section or in the operative language, required that an 'enterprise' in § 1962(c) have an economic motive."[173]

Moreover, the majority examined the legislative history of RICO relied upon by the defendants, and concluded that the legislative history does not indicate Congress intended to proscribe an economic motive requirement.[174] Defendants Scheidler, Scholberg, and Pro-Life Action League, Inc. based one legislative history argument on "the principle of selection by which RICO's sponsors included and excluded the federal and state predicate offenses in RICO."[175] These

163 *Id.*
164 *Id.*
165 *Id.*
166 *Id.* However, all that these subsections mandate is that the enterprise "be an entity that was acquired through illegal activity or by money generated from illegal activity." *Id.*
167 *Id.*
168 *Id.*
169 *Id.* at 805.
170 452 U.S. 576 (1981). *See supra* text accompanying note 16.
171 *NOW*, 114 S. Ct. at 805.
172 *Id.*
173 *Id.*
174 *Id.* at 805-06.
175 Brief for Respondent at 23, NOW v. Scheidler, 114 S. Ct. 798 (1994) (No. 92-780).

defendants argued that RICO does not cover their activities because the legislative history shows that Congress intentionally based the selection of predicate offenses on the principal of "commercial exploitation" to "preclude . . . application [of RICO] to political and social protest."[176] Defendants Terry, Project Life, and Operation Rescue further argued that the purpose of RICO as shown by the legislative history, and acknowledged by the Court in previous cases, "was to strike at the 'source of economic power' of organized crime,"[177] and thus RICO does not apply to the defendants' protest activities.[178] Despite these arguments, the Court found that "the parties' submissions respecting legislative history" did not clearly express an intent on the part of Congress to require an economic motive. Thus, Chief Justice Rehnquist held that a construction other than the one dictated by the unambiguous language of the statute was unwarranted.[179]

Along these same lines, the majority held that the rule of lenity in criminal cases should not control the result of the case because "the rule of lenity only applies when an ambiguity is present [in the statute]."[180] According to the rule of lenity, when an ambiguity exists in the language of a criminal statute, the court should interpret the language narrowly,[181] to protect due process concerns by "giv[ing] potential criminal defendants fair warning that their conduct may be punished."[182] Although intended for criminal cases, the rule could potentially apply in a civil RICO suit to ambiguous language in § 1962(c), since criminal RICO penalties, as well as civil penalties, stem from the offenses contained in § 1962.[183] The majority, however, found that there was not sufficient ambiguity in the language of RICO "to invoke the rule of lenity"[184] since "'the fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'"[185]

In reaching its decision, the majority attacked the Second Cir-

176 *Id.* at 23, 31-35.

177 Respondent's Brief at 18, *NOW* (No. 92-780) (quoting Russello v. United States, 464 U.S. 16, 27 (1983) (internal quotation marks and citation omitted)).

178 Respondent's Brief at 18-19, *NOW* (No. 92-780).

179 NOW v. Scheidler, 114 S. Ct. 798, 806 (1994).

180 *Id.*

181 Matthew C. Blickensderfer, Note, *Unleashing RICO*, 17 HARV. J.L. & PUB. POL'Y 867, 877 (1994).

182 *Id.*; *see also* Bryan T. Camp, *Dual Construction of RICO: The Road Not Taken In Reves*, 51 WASH. & LEE L. REV. 61, 90 (1994).

183 Blickensderfer, *supra* note 181, at 877-78.

184 *NOW*, 114 S. Ct. at 806.

185 *Id.* (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) and Haroco, Inc. v. American Nat'l. Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985)).

cuit's reasoning in *United States v. Bagaric*,[186] which the court of appeals relied upon for its determination that RICO contains an economic motive requirement.[187] Chief Justice Rehnquist disagreed with the Second Circuit's conclusion in *Bagaric* that the words in the statement of congressional findings prefacing RICO, "refer[ing] to the activities of groups that 'drain[ ] billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption,'"[188] condemn only economically motivated activities.[189] The Chief Justice found that these words also condemn activities that "may not benefit the protesters financially but still may drain money from the economy by harming businesses."[190] Moreover, Chief Justice Rehnquist found that reliance on the congressional statement was particularly weak support for an economic motive requirement considering that, as the Court stated in *H.J. Inc. v. Northwestern Bell Telephone Co.*,[191] Congress purposely chose to enact a general statute even though combating organized crime was its main purpose.[192]

The majority also attacked the court of appeals' reliance on the Department of Justice's 1981 guidelines for RICO prosecutions, which the Second Circuit also found persuasive in *Ivic*.[193] To charge an association as an enterprise in a RICO indictment, the 1981 Guidelines required that "the association exist[ ] 'for the purpose of maintaining operations directed toward an economic goal . . . .'"[194] In 1984, however, the Department of Justice amended the guidelines, now requiring that an "association-in-fact enterprise" as described in § 1961(4)[195] be "directed toward an economic *or* other identifiable goal."[196] Thus, Chief Justice Rehnquist dismissed the argument that the Guidelines require an economic motive.

Finally, Chief Justice Rehnquist "decline[d] to address the First Amendment question argued by [the protesters] and the amici,"[197]

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186 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983); *see supra* text accompanying note 65.

187 *See supra* note 133 and accompanying text.

188 *NOW*, 114 S. Ct. at 805 (quoting *Bagaric*, 706 F.2d at 57 n.13 as quoting OCCA, 84 Stat. 922).

189 *Id.* at 805.

190 *Id.*

191 492 U.S. 229 (1989).

192 *NOW*, 114 S. Ct. at 805 (quoting *H.J. Inc.*, 492 U.S. at 248).

193 *Id.* at 805.

194 *Id.*

195 Section 1961(4) describes "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals *associated in fact* although not a legal entity." 18 U.S.C. § 1961 (emphasis added).

196 *NOW*, 114 S. Ct. at 805 (quoting U.S. DEPT. OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-110.360 (Mar. 9, 1984) (emphasis added)).

197 *Id.* at 806 n.6. The protesters and amici were concerned that the "application of

because the constitutional argument was "directed almost entirely to the nature of [the protesters'] activities, rather than to the construction of RICO."[198] In addition, none of the parties made a constitutional argument as to the proper construction of RICO in the court of appeals, and the Supreme Court did not grant certiorari regarding that issue.[199]

In sum, the majority disagreed with the court of appeals' interpretation of the language of RICO. Instead, the majority believed that the unambiguous language of RICO warranted a finding that RICO does not contain an economic motive requirement. Accordingly, Chief Justice Rehnquist rejected all legislative history and other Congressional intent arguments that the court of appeals and the protesters made in support of an economic motive requirement.

B. JUSTICE SOUTER'S CONCURRENCE

Justice Souter agreed with the majority that RICO does not contain an economic motive requirement.[200] However, Justice Souter felt it necessary to address two additional points regarding the First Amendment issues raised by the protesters and amici. First, he concluded that the First Amendment does not mandate an economic motive requirement.[201] Second, he explained why the majority decision "does not bar First Amendment challenges to RICO's application in particular cases."[202]

Justice Souter rejected the protesters and amici's arguments that courts should construe RICO as requiring an economic motive to avoid "First Amendment issues that could arise from allowing RICO to be applied to protest organizations."[203] Justice Souter stated that such a statutory construction "applies only when the meaning of a statute is in doubt," and did not apply in the instant case because the language of RICO is unambiguous.[204] Justice Souter also concluded that an economic motive requirement would result in both overprotection and underprotection of First Amendment concerns and would not ad-

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RICO to antiabortion protesters could chill legitimate expression protected by the First Amendment." *Id.*

198 *Id.*

199 *Id.*

200 *Id.* at 806 (Souter, J., concurring). Justice Kennedy joined Justice Souter's opinion.

201 *Id.* (Souter, J., concurring).

202 *Id.* (Souter, J., concurring).

203 *Id.* (Souter, J., concurring).

204 *Id.* at 806-07 (Souter, J., concurring). In prior cases, the Court has "interpreted . . . generally applicable statutes so as to avoid First Amendment problems." *Id.* at 806 (Souter, J., concurring). *See, e.g.*, Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961); Lucas v. Alexander, 279 U.S. 573, 579 (1929).

equately protect First Amendment interests.[205]

Furthermore, Justice Souter stated that an "economic-motive requirement is . . . unnecessary" because "free-speech claims may be raised and addressed in individual RICO cases as they arise."[206] As Justice Souter suggested, RICO defendants might raise the First Amendment as grounds for dismissal and as a defense.[207] Furthermore, if a RICO defendant is "otherwise engag[ed] in protected expression," the First Amendment may limit the amount of relief awarded to the plaintiff, even if a RICO violation is validly established.[208] Thus, Justice Souter found that First Amendment challenges are not barred.

In conclusion, Justice Souter recognized the need to take "notice that RICO actions could deter protected advocacy" and "caution[ed] courts applying RICO to bear in mind the First Amendment interests that could be at stake."[209]

V. ANALYSIS

This Note argues that although the majority's holding that RICO applies to non-economically motivated enterprises was correct, the Court based its conclusion on inadequate considerations. The majority failed to notice the ambiguity in the term "enterprise" and should have looked to the ordinary meaning of "enterprise" to arrive at a plain meaning for the term as used in the statute. In addition, this Note concludes that the majority correctly found that Congress had no clear intent contrary to the plain meaning of the language of the statute. Finally, this Note argues that Justice Souter accurately addressed the First Amendment issues raised by the respondents and amici.

A. THE MEANING OF THE TERM "ENTERPRISE"

In concluding that the statutory language of RICO requires no economic motive for the enterprise, the majority did not fully inquire into the meaning of the term "enterprise." Instead, Chief Justice

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205 *NOW*, 114 S. Ct. at 807 (Souter, J., concurring). According to Justice Souter, overprotection of First Amendment interests would result since an economic motive requirement "would keep RICO from reaching ideological entities whose members commit acts of violence we need not fear chilling," and underprotection would result because "entities engaging in vigorous but fully protected expression might fail the proposed economic-motive test (for even protest movements need money) and so be left exposed to harassing RICO suits." *Id.*

206 *Id.* (Souter, J., concurring).

207 *Id.* (Souter, J., concurring).

208 *Id.* (Souter, J., concurring).

209 *Id.* (Souter, J., concurring).

Rehnquist focused on the conduct of the enterprise described in § 1962(c).[210] Finding that a non-economically motivated entity's activities could "affect[ ] interstate or foreign commerce,"[211] the Court concluded that § 1962(c) provided no indication of an economic motive requirement.[212] On this basis, the Court found that the language of RICO is unambiguous and, in the absence of a clear Congressional intent to the contrary, judged the inquiry into an economic motive complete.[213]

The Court's analysis, however, was incomplete. Although a non-economically motivated entity may engage in activities affecting interstate or foreign commerce, it does not follow that the term "enterprise" includes non-economically motivated entities. The Court did not explore the possibility that an economic motive requirement could exist within the meaning of the term "enterprise" itself.[214] Further, in contrast to the view of the Court that the language of the statute is unambiguous, the split among the circuits between those who accept the *Anderson* definition[215] of "enterprise" and those who accept the *Turkette* definition,[216] shows the exact meaning of "enterprise" is in fact ambiguous.[217] To accurately resolve this conflict about the plain meaning of the statute, the Court first should have looked to the ordinary meaning of the term "enterprise."[218] Then, if an analysis

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210 The Court looked to the language of subsection (c) which states that an enterprise can be something "the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(c). The Court then found that an enterprise does not have to have an economic motive to affect interstate commerce. *NOW*, 114 S. Ct. at 804. Thus, the Court concluded that "nowhere in either § 1962(c), or in the RICO definitions in § 1961, is there any indication that an economic motive is required." *Id.*

211 18 U.S.C. § 1962(c).

212 *NOW*, 114 S. Ct. at 804-05.

213 *Id.* at 806.

214 At least one definition of enterprise found in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE—UNABRIDGED 757 (Merriam Webster Inc. 1986) defines enterprise as "a unit of economic organization or activity (as a factory, a farm, a mine); esp: a business organization: FIRM, COMPANY." *See* Cunningham et al., *supra* note 17, at 1590-91.

215 The court in *Anderson* defined enterprise as "an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the 'pattern of racketeering activity.'" United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

216 The court in *Turkette* defined enterprise as "an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct." United States v. Turkette, 452 U.S. 576, 583 (1981).

217 If the definition was clear, the Supreme Court would not have to grant certiorari to determine the plain meaning of the language of the statute. Cunningham et al., *supra* note 17, at 1564.

218 *Id.* at 1564-65 (quoting Chisom v. Roemer, 111 S. Ct. 2354, 2369 (1991) (Scalia, J., dissenting)); *see also* Smith v. United States, 113 S. Ct. 2050, 2054 (1993); Russello v. United

of the legislative history showed no "clear indication that some permissible meaning other than the ordinary one applie[d]," the Court should have held the inquiry complete and adopted the ordinary meaning.[219]

The Court began to do this by looking at § 1961(4) "Definitions" to see if Congress provided a clear meaning of enterprise.[220] The Court concluded that the § 1961(4) definition of enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity,"[221] does not indicate an economic motive.[222] A more thorough examination of the language of § 1961(4), however, reveals that § 1961(4) does not define the term enterprise[223]—"it does not state necessary and sufficient conditions for something to be an enterprise"[224]—but merely instructs the reader not to exclude certain categories from the reader's existing understanding of the term enterprise.[225] Since, § 1961(4) does not provide a definition of what

States, 464 U.S. 16, 21 (1983).

219 Cunningham et al., *supra* note 17, at 1564-65 (quoting Chisom v. Roemer, 111 S. Ct. 2354, 2369 (1991) (Scalia, J., dissenting)). As Justice Scalia wrote in his dissent in *Chisom*,

> I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.

Chisom, 111 S. Ct. at 2369 (Scalia, J., dissenting).

Although Justice Scalia made this statement in a dissenting opinion, it has persuasive value for Chief Justice Rehnquist's majority opinion in NOW v. Scheidler, because the Chief Justice himself, as well as Justice Kennedy, joined in Justice Scalia's dissenting opinion in *Chisom*.

220 Now v. Scheidler, 114 S. Ct. 798, 803-04 (1994).

221 18 U.S.C. § 1961.

222 *NOW*, 114 S. Ct. at 804.

223 Section 1961(4) "describes 'enterprise' not as *meaning* certain enumerated items, but rather as *including* them. To *include* something is not to *mean* it. Indeed, to describe the term as *including* other things is not an attempt to define the term at all; rather, it is an attempt to provide examples." Blickensderfer, *supra* note 181, at 873-74.

224 Cunningham et al., *supra* note 17, at 1590.

225 *Id.* at 1590. Section 1961(4) uses the verb "includes" in describing the term "enterprise" and not "means" as is used in describing other terms in § 1961, such as "State" and "racketeering investigation."

> If Congress intended for includes to be interpreted as means, then anything that fits within one of the categories listed after includes would count as an enterprise. . . . [However,] § 1961 does define other terms using 'means.' . . . [Thus,] [i]nasmuch as § 1961 does use different verbs in defining other words, it is reasonable to assume that includes has a different import than means in that section, just as it does in ordinary language.

The use of the verb "includes"

> seems to assume that the reader already has an understanding of what an enterprise is, and to instruct the reader that nothing should preclude considering the listed types of entities as possible enterprises pursuant to that understanding. In particular,

that understanding of the term "enterprise" is, the Court must look elsewhere for the ordinary meaning of "enterprise."[226]

One possible source the Court could have looked to is the dictionary definition.[227] The definition of enterprise, however, varies from dictionary to dictionary.[228] In addition, dictionaries do not necessarily represent the ordinary usage of the word.[229] Because of the weaknesses in relying on the dictionary as a source of ordinary meaning, a better source for the Court would have been a study done by a group of linguists to determine the ordinary meaning of enterprise as it is relevant in *NOW v. Scheidler*.[230] Specifically, the linguists tested whether the *Anderson* definition of "enterprise" that requires an economic motive reflected ordinary usage of the word "enterprise."[231] The linguists' study concluded that the primary criterion the majority of people look at to determine if an entity is an enterprise is whether the entity has a clear goal, which can be economic or not.[232] For a smaller group of the speech community, the primary criterion for an enterprise is whether the entity resembles a profit-seeking business, or in other words, whether it has an economic motive.[233] Thus, the majority of people subscribe to a "goal-oriented" definition of enterprise, while the minority of people believe in a "profit-seeking" definition of enterprise.[234] Consequently, both the *Anderson* definition and *Turkette* definition[235] appear to reflect ordinary usage.[236]

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§ 1961(4) seems intended as a corrective against the possibility that the reader's preexisting understanding of enterprise might cause her to limit the word to legally constituted entities like corporations and partnerships.

Id. (citations omitted).

226 Cunningham et al., *supra* note 17, at 1590.

227 *Id.* at 1590-91. Chief Justice Rehnquist did this in the majority opinion when he used the definition of "affect" from WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 35 (1969). NOW v. Scheidler, 114 S. Ct. 798, 804 (1994).

228 *See, e.g.*, Cunningham et al., *supra* note 17, at 1618-19 (Appendix A provides various definitions of enterprise).

229 *Id.* at 1591, 1614-15.

230 *Id.* at 1595. The study was conducted after the Supreme Court granted certiorari to hear *NOW v. Scheidler*, in an effort to show that linguists can assist judges in determining the ordinary meaning of a statutory term. *See id.* at 1612-13. The study included collecting examples from NEXIS of the use of the term enterprise in spoken and written natural language. *Id.* at 1595. The study also included giving questionnaires to students and judges that asked the subjects to decide whether they consider certain groups to be enterprises. *Id.* at 1595.

231 *Id.* at 1595.

232 *Id.* at 1610-11. These people would consider PLAN an enterprise. *Id.* at 1611.

233 *Id.* at 1611. This group would probably *not* consider PLAN an enterprise. *Id.* at 1611.

234 *Id.* at 1608-10. For both groups, a business is a stereotypical enterprise, but it is only a subgroup of enterprise and is not synonymous with enterprise. *Id.* at 1595, 1611.

235 The *Turkette* Court defined enterprise as "an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct."

Faced with two ordinary meanings of the term "enterprise," the Court would have encountered a dilemma. However, there are four persuasive reasons why Chief Justice Rehnquist should have expressly adopted the "goal-oriented" definition of enterprise as the plain meaning of the term "enterprise" used in RICO.

First, adoption of the "goal-oriented" definition satisfies the Supreme Court's "same meaning" rule in *Sedima* that "[a court] should not lightly infer that Congress intended [a] term to have wholly different meanings in neighboring subsections."[237] Recognizing Chief Justice Rehnquist's decision that the enterprise in subsection (a) and (b) "is likely" to need an economic motive, while the enterprise in subsection (c) "need not have . . . an economic motive,"[238] the "goal-oriented" meaning of enterprise corresponds with the use of the term "enterprise" in §§ 1962(a), (b), and (c). The "goal-oriented" meaning encompasses both the profit-seeking use of the term "enterprise" in subsections (a) and (b), as well as the broader, non economically motivated use of the term in subsection (c).[239] The "profit-seeking" definition, however, excludes the broader meaning of enterprise in subsection (c); it does not encompass non-economically motivated enterprises.[240] Thus, the "profit-seeking" definition does not apply across all three subsections in accordance with the "same meaning" rule; for the definition to apply universally to subsection (a), (b), and (c), the enterprise discussed in subsection (c)[241] must be judicially restricted to economically motivated entities[242] contrary to the established policy of the Court to interpret RICO broadly.[243] On the other hand, it is possible to apply the goal-ori-

Id. at 1594 (quoting United States v. Turkette, 452 U.S. 576, 583 (1981)).

236 *Id.* at 1612. The *Anderson* definition reflects the "profit-seeking" meaning of enterprise, and the *Turkette* definition reflects the "having a goal" meaning of enterprise. *Id.* at 1611.

237 Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 489 (1985). Instead of using this rule as support for the "goal-oriented" definition of enterprise, however, the majority held that the "same meaning" rule did not apply to the situation at all since the term enterprise clearly has different functions in each subsection. NOW v. Scheidler, 114 S. Ct. 798, 804-05; *see supra* text accompanying notes 160 to 168. This was unnecessary.

238 *NOW*, 114 S. Ct. at 804; *see supra* text accompanying note 168.

239 Cunningham et al., *supra* note 17, at 1610-12.

240 *Id.* at 1611-12.

241 Section 1962(c) discusses an "enterprise engaged in, or the activities of which affect, interstate or foreign commerce. . . ." 18 U.S.C. § 1962.

242 This is the case because the Court determined that the language of § 1962(c) does not limit itself to economically motivated entities; the Court held that non-economically motivated entities' activities may affect interstate or foreign commerce. *NOW*, 114 S. Ct. at 804.

243 *See, e.g.*, H.J. Inc. V. Northwestern Bell Tel. Co., 492 U.S. 229 (1989); Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985); United States v. Turkette, 452 U.S. 576 (1981).

ented meaning to all three subsections satisfying the "same meaning" rule while permitting the Court to act in congruence with its historically liberal interpretation of RICO.

Second, the Court should have adopted the "goal-oriented" definition as the ordinary meaning of enterprise because Congress used the verb "includes" in § 1961(4), which indicates Congress' intention "to expand the meaning of enterprise in RICO beyond businesses."[244] Third, the description of enterprise in § 1961(4) includes labor unions, a group that the linguists' study concluded that people do not include in the "profit-seeking" meaning of enterprise.[245] Finally, as the study indicated, the "goal-oriented" definition of enterprise is the meaning that the majority of the speech community gave the term.[246]

Consequently, while the Chief Justice arrived at the right conclusion, that the plain meaning of RICO does not require an economic motive for the enterprise or the predicate acts, he drew this conclusion by mislabeling the statute as unambiguous and employing too sparse of a rationale. The majority opinion would have had more strength had Chief Justice Rehnquist explored the ordinary meanings of "enterprise" and specifically adopted the "goal-oriented" definition as the plain meaning of RICO.[247]

B. LEGISLATIVE HISTORY AND CONGRESSIONAL INTENT

After concluding that the language of RICO did not require an economic motive, the Court examined the legislative history of RICO for an express contrary intent on the part of Congress.[248] The Court accurately concluded that the legislative history reveals no clearly expressed Congressional intent to require an economic motive for the predicate acts or the enterprise.[249] Absent such a showing, the Court rightfully considered only the plain meaning of the statute.[250]

There are four reasons why the legislative history is definitely void of any congressional intent to require an economic motive. First, as

244 Cunningham et al., *supra* note 17, at 1612. "In particular, § 1961(4) seems intended as a corrective against the possibility that the reader's preexisting understanding of enterprise might cause her to limit the word to legally constituted entities like corporations and partnerships." *Id.* at 1590 (citations omitted).

245 NOW v. Scheidler, 114 S. Ct. 798, 804 (1994).

246 Cunningham et al., *supra* note 17, at 1611.

247 "To the extent that a court's opinion explicitly selected one of these two criteria [the "goal-oriented" or the "profit-seeking" criterion], subsequent applications of that opinion to new cases might be more coherent and predictable because the actual rationale would be seen clearly." Cunningham et al., *supra* note 17, at 1613.

248 *NOW*, 114 S. Ct. at 805-06.

249 *Id.*

250 *See supra* note 219.

the majority noted, if Congress had desired an economic motive restriction on the term "enterprise," it could easily have included one.[251] Instead, it appears that Congress specifically chose not to limit enterprise in such a way. The final version of the statute uses the term "enterprise." In the Senate proceedings prior to the enactment of RICO, however, the Senators used the term "business enterprise,"[252] or simply "business."[253] Nowhere in the final text is there any use of the term "business."[254]

Second, Congress' purpose for enacting RICO—to eradicate organized crime[255]—does not exclude application of RICO to non-mafioso type enterprises like PLAN. The legislative history shows that Congress intentionally used broad language in RICO, choosing not to limit the language to organized crime.[256] As Chief Justice Rehnquist noted, "[t]he occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime."[257] One reason Congress chose to adopt broad language was to avoid "perceived constitutional problems of making 'status' a crime and of defining just what constituted an 'organized criminal syndicate.'"[258] The drafters recognized that this broad definition went beyond "Congressional intent or mafioso,"[259] but chose to adopt it

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251 *NOW*, 114 S. Ct. at 805.

252 *See, e.g.*, 116 CONG. REC. 36,416 (1970). RICO would "prohibit any person from acquiring or maintaining any interest or control of a *business enterprise* by racketeering activity, and prohibit any person employed by or associated with a *business enterprise* from conducting its affairs by racketeering methods." *Id.* (emphasis added).

253 *See, e.g.*, 116 CONG. REC. 36,294 (1970). RICO "makes it unlawful to use income obtained from certain designated racketeering enterprises to acquire an interest in a *business* engaged in interstate commerce, to use racketeering activities as a means of acquiring such a *business*, or to operate such a *business* by racketeering methods." *Id.* (emphasis added).

254 *See* 18 U.S.C. §§ 1961 and 1962.

255 OCCA, 84 Stat. 922 states:

> It is the purpose of . . . [RICO] to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

OCCA, 84 Stat. 922.

256 Camp, *supra* note 182, at 65.

257 NOW v. Scheidler, 114 S. Ct. 798, 805 (1994) (quoting H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989)).

258 Camp, *supra* note 182, at 65.

259 *Id.* at 65. "It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well." *Id.* (quoting 116 CONG. REC. 18,940 (1970) (remarks of Sen. McClellan)).

anyway.[260]

Third, the statement of findings prefacing RICO does not mandate an economic motive requirement.[261] Non-economically motivated entities could also cause the negative effects Congress attributes to organized crime[262] and which Congress intended to remedy. For example, as the majority pointed out, "predicate acts, such as the alleged extortion, may not benefit the protesters financially but still may drain money from the economy by harming businesses such as the clinics which are petitioners in this case."[263] In the same respect, non-economically motivated entities, such as those motivated by political or religious beliefs, may "infiltrate and corrupt legitimate business and labor unions and . . . subvert and corrupt our democratic processes."[264] Furthermore, entities motivated by religious and political beliefs may "weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens."[265] The majority was correct that the "statement of congressional findings is a rather thin reed upon which to base a requirement of economic motive neither expressed nor, we think, fairly implied in the operative sections of the Act."[266]

Finally, requiring an economic motive would not bring RICO in line with the intent of Congress to eradicate organized crime.[267] Since organized crime enterprises are not the only enterprises with economic motives, an economic motive requirement would not exclude RICO from non-mafioso type businesses. Consequently, an economic motive requirement does not accurately implement or clearly represent the goal of RICO.

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260 *Id.* at 65.

261 *See supra* note 56.

262 In the statement of findings, Congress first complains that organized crime "annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption." OCCA, 84 Stat. 922. Second, Congress complains that organized crime "infiltrate[s] and corrupt[s] legitimate business and labor unions and . . . subvert[s] and corrupt[s] our democratic processes." *Id.* Finally, Congress complains that organized crime activities "weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens." *Id.*

263 NOW v. Scheidler, 114 S. Ct. 798, 805 (1994).

264 OCCA, 84 Stat. 922.

265 *Id.*

266 *NOW*, 114 S. Ct. at 805.

267 The argument has been made that "[l]imiting the application of RICO to those who act with financial or commercial motives corresponds precisely to the intent of Congress." Blickensderfer, *supra* note 181, at 883.

For these reasons, the legislative history fails to show that Congress clearly intended to require plaintiffs to allege an economic motive in asserting a RICO claim. Under these circumstances, it was correct for the majority to rely solely on the plain meaning of the statute and conclude that RICO does not require an economic motive. It is a long stated policy of the Court that "in determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'"[268]

C. THE FIRST AMENDMENT

Procedurally, the majority was correct not to consider the protester's and amici's First Amendment arguments that "application of RICO to antiabortion protesters could chill legitimate expression protected by the First Amendment."[269] The First Amendment, however, is peripherally implicated by the majority's decision; RICO may reach enterprises that typically engage in activities protected by the First Amendment, but whose conduct has crossed the line into unprotected activities prohibited under RICO. In addressing this First Amendment issue in his concurring opinion, Justice Souter correctly concluded that reading an economic motive requirement into RICO is unnecessary because First Amendment concerns can be "raised and addressed in individual RICO cases as they arise."[270] Yet, Justice Souter's warning that it is still "prudent to notice that RICO actions could deter protected advocacy"[271] should not go unheeded.

Justice Souter's conclusion that courts may address First Amendment concerns on a case by case basis is sound.[272] As Justice Souter persuasively argues, to require an economic motive instead would be

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268 Reves v. Ernst & Young, 113 S. Ct. 1163, 1169 (1993) (citing United States v. Turkette, 452 U.S. 576, 580 (1981) as quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

269 *NOW*, 114 S. Ct. at 806 n.6. The arguments went to the merits of the alleged predicate acts, not the interpretation of the statute, and thus are matters left to the district court on remand. *Id.* Respondents argued that the alleged acts are protected First Amendment speech and do not amount to predicate offenses as petitioners claimed. *See, e.g.*, Respondent's Brief at 18, *NOW* (No. 92-780). Respondent Murphy argued that because RICO suits brought against non-economic enterprises will involve protected and possible unprotected acts, a heightened specificity in pleading is required to determine which, if any of the acts, meet the definition of a RICO predicate act and are thus not protected by the First Amendment. *Id.*

270 *NOW*, 114 S. Ct. at 807 (Souter, J., concurring).

271 *Id.* (Souter, J., concurring).

272 *Id.* at 806-07 (Souter, J., concurring).

overprotective of First Amendment interests.[273] An enterprise that does not have an economic motive may still engage in acts that amount to violent RICO predicate offenses, which the First Amendment does not protect. There is a potential problem, however, with deciding First Amendment matters individually. Specifically, courts will have to distinguish protected activities from unprotected activities when applying RICO to politically and religiously motivated enterprises like PLAN.[274]

Along these lines, one commentator complains that the majority decision will chill legitimate protected First Amendment activity because "[i]deological protesters, left uncertain as to the boundary between protected and unprotected conduct, will refrain from engaging in protected expression in order to avoid the uncertain line of demarcation."[275] A simple way to clarify the "line of demarcation" is for courts to consider an activity unprotected if it amounts to racketeering activity under RICO. Section 1961(1) defines precisely what conduct constitutes racketeering activity.[276] This standard would not chill protected speech, and it would help control ideological groups that have crossed the line to violence, murder, and terrorism. Unfortunately, it is unlikely that the Court will establish this standard. As Justice Souter pointed out, "conduct alleged to amount to Hobbs Act extortion, . . . or one of the other, more elastic RICO predicate acts may turn out to be fully protected First Amendment activity."[277] If this is the case, then plaintiffs and defendants will have to rely on precedent to determine where courts draw the line between protected and unprotected activity. Until the courts establish what is protected activity and what is not, there will be some uncertainty for ideological protesters; however, there is uncertainty whenever the courts are in the process of interpreting the Constitution.

A better method of establishing what is protected activity and what is not would be for Congress to expressly and clearly make the determination. This would provide defendants with the notice necessary to organize their actions to avoid RICO suits or prosecutions.

D. FUTURE APPLICATIONS

Without an economic motive restriction, RICO will cover enter-

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273 *Id.* (Souter, J., concurring).

274 "While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 918 (1982).

275 Blickensderfer, *supra* note 181, at 889.

276 *See supra* note 7.

277 NOW v. Scheidler, 114 S. Ct. 798, 807 (1994) (Souter, J., concurring).

prises that commit RICO predicate offenses that go beyond First Amendment protected acts and reach the level of organized violence. Possibly, RICO may affect the organization of skinheads, the White Aryan Resistance (WAR), whose gatherings have resulted in racially-motivated beatings and murders.[278] Seemingly less violent groups, such as environmental activist organizations like Greenpeace, Sea Shepherd Conservation Society, and Earth First!, may also fall within the ambit of RICO;[279] these groups have been known to engage in violent acts termed ecoterrorism or ecotage.[280]

Once the courts or Congress establish a clear demarcation between protected and unprotected activity, then the broad application of RICO will benefit society. It will help control and hopefully alienate organizations of moral protesters that terrorize innocent people, while protecting those who peacefully protest within the ambit of the First Amendment. The Court's decision not to place an economic restriction on the RICO enterprise is in line with the purpose of RICO "to seek the eradication of organized crime in the United States."[281] A liberal interpretation of enterprise allows RICO to apply to new forms of organized crime, such as organized violence by ideological and moral activists—organized crime of a type the drafters of RICO probably had not envisioned, but which are covered by the broad language Congress decided to adopt.

VI. CONCLUSION

Based on the plain meaning of RICO, the Court in *NOW* held that RICO does not require the enterprise or the racketeering activity to be economically motivated.[282] The Court found that legislative history and other sources of Congressional intent failed to show Congress had a strong desire to the contrary.[283]

This Note argued that while the Court arrived at the correct interpretation of RICO, the Court should have looked for the ordinary meaning of the term "enterprise" to determine the plain meaning of the statute. Then, presented with two ordinary meanings, the Court should have adopted the "goal-oriented" definition that does not re-

278 *See* Donna E. Correll, Note, *No Peace for the Greens: The Criminal Prosecution of Environmental Activists and the Threat of Organizational Liability*, 24 RUTGERS L. J. 773, 800-01 (1993).

279 *Id.* at 804.

280 *See, e.g., id.* at 773-90. For example, Sea Shepherd has regularly blown up illegal whaling ships in international waters. *Id.* at 781-84. "In November 1986, the Sea Shepherd Society . . . caused serious international anxiety by destroying a government-sanctioned whaling facility and sinking two whaling ships in Iceland." *Id.* at 783.

281 OCCA, 84 Stat. 922.

282 NOW v. Scheidler, 114 S. Ct. 798, 806 (1994).

283 *Id.* at 805-06.

quire an economic motive. In addition, this Note argued that the Court was correct in finding that the legislative history shows no clear Congressional intent to require an economic motive. Thus, the Court's rejection of an economic motive requirement was the appropriate result; if the Court had held otherwise, it would have violated the separation of powers doctrine by judicially legislating restrictions into the broad language of RICO. Finally, this Note asserted that the majority's decision to allow non-economically motivated predicate acts and enterprises within the ambit of RICO does not infringe upon the First Amendment.

JENNIFER G. RANDOLPH