Nos. 88-1198 and 88-1393

In the Supreme Court of the United States

OCTOBER TERM, 1989

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.,
CROSS-PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

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The only conduct challenged by the Commission in this case was a concerted refusal by competing private practice attorneys to provide their professional services to the District of Columbia "unless we are granted a substantial increase in our hourly rate" (Pet. App. 78a). As a result of this conduct, the District of Columbia was denied the services of nearly every attorney who had theretofore chosen to make a practice of accepting CJA assignments. Only when it increased the CJA rate was the District again able to retain the services of the boycotting lawyers.

In the court of appeals' words, "[t]his constriction of supply is the essence of 'price-fixing' " (Pet. App. 16a) and "could properly be condemned as a *per se* violation of Section 1 of the Sherman Act unless it also comes within the protection of the First Amendment" (*id.* at 32a). Respondents and their amici[1] have failed to identify any existing principle of Sherman Act construction or First Amendment law that would warrant either absolute immunity, or exemption from *per se* condemnation, for the price-fixing boycott in which they engaged.

1.a. The court of appeals (Pet. App. 45a), the Commission (*id.* at 123a), and the administrative law judge (*id.* at 216a), all recognized that to grant antitrust immunity to respondents' boycott would entail an extraordinary expansion of the *Noerr* doctrine. As our opening brief demonstrated, the *Noerr* doctrine does not protect "price-fixing agreements, boycotts, market-division agreements, and other similar arrangements" even if they are an integral part of a campaign to exert pressure on a legislature (*Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136-37 (1961)). *Noerr* assures only that the Sherman Act's prohibition against "conspirac[ies] * * * in restraint of trade" (15 U.S.C. 1) cannot be construed to prohibit agreements by businessmen "jointly to seek legislation or law enforcement" (365 U.S. at 136) through the same "otherwise lawful" (*id.* at 138) means of publicity and persuasion that all citizens have at their disposal.[2]

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[1] Respondent Superior Court Trial Lawyers Association (SCTLA) and the individual respondents (Ind.) have filed separate briefs. *Amicus* briefs supporting respondents have been filed by: the Washington Council of Lawyers et al. (WCL); the American Medical Association (AMA); the American Civil Liberties Union (ACLU); and the National Association of Criminal Defense Lawyers (NACDL).

[2] Amicus WCL ignores this point when it argues (Br. 8) that to deny the possibility of *Noerr* immunity for price-fixing and other classic trade restraints would deprive *Noerr* of content because *Noerr* comes into play only when conduct that would "otherwise violate the antitrust laws" is involved. In fact, traditional joint lobbying and publicity campaigns to achieve anticompetitive legislation could easily have been held to "violate the antitrust laws" but for *Noerr's* rejection of such an "expansive" construction of the Sherman Act (365 U.S. at 136).

Allied Tube & Conduit Corp. v. *Indian Head, Inc.*, 108 S.Ct. 1931 (1988), confirms that *Noerr* affords no immunity for naked horizontal restraints of trade such as price-fixing and output restrictions. In *Allied Tube,* the Court addressed and rejected an argument similar to one respondents make here: that *Noerr* immunizes "every concerted effort that is genuinely intended to influence government action" (108 S.Ct. at 1938).[3] The Court noted that this "absolutist position" (*ibid.*) would immunize, *e.g.*, "horizontal output restrictions on the ground that they are intended to dramatize the plight of [an] industry and spur legislative action" (*id.* at 1939). Instead, this Court held that the legality of genuine efforts to influence legislation must depend on the "context and nature of the activity" (*ibid.*). The Court's reference to "context and nature" was plainly not designed, as SCTLA and WCL contend (SCTLA Br. 24; WCL Br. 8-9), to raise the novel possibility that price-fixing and horizontal output restrictions designed to obtain a price increase could be deemed protected conduct under some circumstances. Rather, the Court was explaining that activities of this "nature" are not immune under *Noerr* even though they may be "genuinely" intended to "spur legislative action" (108 S. Ct. at 1939).[4]

In an effort to bring themselves within *Noerr*'s ambit, petitioners insist that a principal purpose of their concerted refusal to deal was to influence the legislature by eliciting publicity and public support for their position (*e.g.*, Ind. Br. 34-35; SCTLA Br. 25). This argument in unavailing because, as the Court in *Noerr* emphasized, the publicity campaign there involved no agreement by the participants to "jointly give up their trade freedom" (365 U.S. at 136). The only "contract, combination

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[3] Compare, *e.g.*: "genuine efforts to petition the legislature are not within the scope of the Sherman Act" (SCTLA Br. 23); "a legislative boycott aimed directly at petitioning the legislature is by that fact alone beyond the Sherman Act" (Ind. Br. 14).

[4] This is further apparent from the majority's criticism of the dissent (108 S. Ct. at 1941 n.10) for not offering an alternative to distinguish those "non-immune activities [output restrictions and others] from the activity at issue in this case."

* * * or conspiracy" in *Noerr* was the joint conduct of the parties in placing advertisements designed to influence public and legislative opinion in their favor. Here, by contrast, respondents collectively withheld their services from a buyer until it agreed to pay a higher price for them. This was an "agreement[] traditionally condemned by § 1 of the [Sherman] Act" (365 U.S. at 136).[5] Whether and to what extent this classic trade restraint was intended to, or actually did, elicit publicity or public support for respondents' cause is simply irrelevant.

It likewise makes no difference to the legality of respondents' boycott that, in their view, the boycott was "the only effective means" (Ind. Br. 33) or "require[d] * * * to mobilize the political support necessary for [] passage" of a fee increase (SCTLA Br. 24; see also AMA Br. 14; ACLU Br. 10). Nothing in *Noerr* suggests that the right to petition the government includes the right to use whatever techniques one feels necessary to petition successfully (Pet. App. 123a).[6] Surely no one would suggest that a political group or advocacy organization might, by leave of the First Amendment, block entry to the offices of D.C. councilmembers, spray-paint pleas for more money on

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[5] Although the trucker-plaintiffs in *Noerr* contended that the railroads' use of the so-called "third party technique" ("giving propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups" (365 U.S. at 140)) was unethical, the Court noted that "insofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity and * * * a publicity campaign to influence governmental action falls clearly into the category of political activity." The Court also emphasized the lower court's apparent rejection of the proposition "that the use of the third-party technique alone could constitute a violation of the Sherman Act." (365 U.S. at 140-141.)

[6] Respondents cannot claim that they had no significant means available to them other than a boycott by which to express their views. The record shows that prior to the boycott they collectively met with numerous City officials and influential members of the public, and secured introduction of legislation to effect the changes they desired (Pet. App. 6a-7a). Plainly, they enjoyed far greater access to the legislative process than many persons do. Respondents' complaint is simply that the lawful means of communication at their disposal had not resulted, as of September 1983, in passage of the legislation they desired.

the walls of the District Building, or violate traffic or park service regulations because they had grown dissatisfied with the results of lawful lobbying activities and sincerely believed they had "no other viable means available to get their message to the public" (Ind. Br. 34 n.31). Lawyers enjoy no greater right to employ price-fixing as a means of putting pressure on the legislature.

It would not affect the legality of the boycott under *Noerr* if, as SCTLA contends, "the perception of government officials" was "that they [we]re being lobbied rather than coerced" (SCTLA Br. 30).[7] Despite SCTLA's disavowals, this argument is but a restatement of the rejected view that the "knowing wink" of city officials (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226-227 (1940)), or a target's ultimate acquiescence in a boycott, makes the boycott legal. By this logic, any boycott, public employee strike, office blockade, graffiti campaign, or other statutorily prohibited act committed in a sincere effort to influence the legislature would become "legitimate political activity" and gain First Amendment protection so long as the target government chose to overlook the unlawfulness of the conduct and address the merits of the legislative demands at issue.

To soften the anarchic implications of their position, respondents insist that "boycotts promoting legislation" have

[7] The Commission, of course, rejected this conclusion. It noted that despite widespread support for increased CJA funding, the City Council, for budgetary reasons, declined to increase the rate until a boycott created the imminent prospect of a court crisis (Pet. App. 96a-97a). We also note that (1) Chief Judge Moultrie, in his own words, was "unalterably opposed to * * * an organized boycott" as a means of raising the CJA rate (Pet. App. 81a & n.47) and (2) neither Mayor Barry nor any member of the D.C. City Council is on record as supporting the SCTLA boycott specifically, or supplier boycotts (or public employee strikes) generally, as a way to prod timorous legislators to act in the public interest "without fear of losing public support" (Ind. Br. 32). Respondents' interpretation of remarks they attribute to the Mayor (SCTLA Br. 12-13, 29) is solely their own. The only public officials who *have* made an appearance in this proceeding have unequivocally opposed SCTLA's contention that joint supplier refusals to deal are a lawful means of persuading a legislature to increase prices. See Brief of 14 States as Amici Curiae in Support of Petitioner (June 22, 1989).

"been a part of the legitimate political heritage of our nation since its foundation" (Ind. Br. 23; see also WCL Br. 9) and are thus either constitutionally protected, or were never meant to be covered by the Sherman Act at all (Ind. Br. 20-24). But the "boycott" in this case, unlike the various consumer boycotts and tax protests cited by Individual Respondents (Br. 20-24) was "the essence of price-fixing": an agreement by economic competitors to withhold supply in order "to profit financially from a lessening of competition in the boycotted market" (*Allied Tube*, 108 S. Ct. at 1941). Respondents offer no evidence that this kind of conduct enjoys an honored place in the history of political protest. To the contrary, "the Congress that enacted the Sherman Act intended to make naked price-fixing agreements illegal per se" (R. Bork, *The Antitrust Paradox* 66 (1978)), and as the court of appeals demonstrated (Pet. App. 16a-32a), the conduct in this case is a "classic" example of the conduct covered by the language of the Sherman Act.[8]

It may well be true, as respondents maintain, that the years before passage of the Sherman Act in 1890 saw few if any instances of public price-fixing boycotts directed at legislatures

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[8] As noted in our opening brief (FTC Br. 10 n.11), the price-fixing here took the form of a "boycott" only because, in the market for indigent legal services, like many others, the buyer (rather than the seller) posts a price, sellers decide whether to supply at that price, and the buyer adjusts the price if the free play of competition (or, as here, a seller's cartel) does not yield an adequate supply (see also Pet. App. 86a).

SCTLA's suggestion that "caution in applying the antitrust laws" is warranted because the boycott was "open and notorious" (SCTLA Br. 28) is plainly wrong. Price-fixing often occurs in the open because the participants are insensitive to the legal significance of their conduct. See, *e.g.*, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 783 (1974) (published bar association fee schedule is "a classic illustration of price-fixing"); *San Juan Racing Ass'n* v. *Associacion de Jinetes*, 590 F.2d 31, 32 (1st Cir. 1979) ("openness does not immunize agreement"); Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 Cornell L. Rev. 405, 417 (1978) (civil, rather than criminal suit may be warranted because "[o]ccasionally defendants engage in per se price-fixing, but their conduct clearly indicates that they had no idea they were violating the antitrust laws. There may, for instance, have been open and widely advertised public meetings among a group of naive businessmen without an antitrust counsel").

(Ind. Br. 21 & n.16). But that sheds no light upon the intended reach of the Sherman Act. Governments in the 19th century did not spend millions of dollars to purchase the services of private-practice lawyers, doctors, and other businesspersons. Today, by contrast, government purchases account for more than a fifth of the gross national product—over $900 billion (United States Bureau of the Census, *Statistical Abstract of the United States: 1989*, at 421 (109th ed. 1988)). "Congress intended to strike as broadly as it could in § 1 of the Sherman Act" (*Goldfarb* v. *Virginia State Bar*, 421 U.S. at 787). The Act's reach cannot be limited even if, in the "modern world" (*id.* at 788), the targets and perpetrators of price-fixing are not always the same as they were before 1890.

Similarly unavailing is the contention that the SCTLA boycott deserves *Noerr* immunity because the legislature can always "legislate to * * * defeat coercion" (Ind. Br. 28) and thus "do[es] not need protection against economic pressures" (ACLU Br. 6; see also SCTLA Br. 28). Congress has already legislated—in the Sherman Act—to protect all buyers, including legislatures, from collusive refusals to deal by those who supply needed goods and services.[9] If the Constitution forbids application of the Sherman Act to public price-fixing boycotts against the legislature on grounds that such economic behavior is protected political communication, the First Amendment would presumably invalidate whatever other statute a legislature might fashion to protect itself from such conduct.

Respondents also appear to mean by their "protect itself" defense that the D.C. City Council might have taken steps to reduce its demand for the CJA lawyers' services, *e.g.*, by proposing "a large increase in the PDS appropriations" (SCTLA Br. 28-29 n.16) or legislating a new "community service program" involving compulsory representation of indigents by

[9] The *Noerr* doctrine, of course, is not limited to efforts to petition the legislature. See *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). Likewise, respondents' "protect itself" argument would apply to any publicly conducted price-fixing against an executive branch agency, since presumably the legislature could "protect" the executive in the same ways that respondents suggest it should be able to protect itself.

selected members of the bar (Ind. Br. 28). Respondents' argument is akin to contending that a bakers' boycott is legal because the populace could survive or even defeat the boycott by eating rice or baking their own bread. The alternatives available to the City to break the SCTLA boycott carried with them high costs and significant drawbacks (Pet. App. 158a-161a, 205a-206a). The City chose to pay the $4-5 million annual cost of a CJA rate increase rather than the cost in dollars of enlarging the Public Defender Service or the cost in civic turmoil of a massive lawyers' draft.[10] This hardly demonstrates that the City was not entitled, like any buyer, to antitrust protection from the boycott in the first place, or that the boycott was immune under *Noerr*.

b. Respondents fare no better in their effort to bring themselves within the scope of *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982). Although a higher CJA rate was the explicit object of their boycott, the individual respondents attempt to demonstrate that, at least for some of them, earning more money was of secondary concern to their desire to improve the quality of CJA representation. But nothing in respondents' briefs provides reason to doubt the conclusion, reached by both the Commission and court of appeals after

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[10] SCTLA claims that the 1974 draft (imposed during a lapse in CJA appropriations) proves that a draft would have succeeded in 1983 (*e.g.*, Br. 48-49 n.36). But Chief Judge Moultrie drew a different conclusion. Because of "strenuous" resistance to the 1974 draft ("[o]nly 43% of the attorneys summoned actually reported" (Pet. App. 159a) and the D.C. Bar filed a court challenge (Tr. 1078)), Judge Moultrie, long before the 1983 boycott "had indicated an unwillingness to impose similar drafts" (Pet. App. 160a; see also Pet. App. 52a). Moreover, even a "successful" draft, in which several hundred "uptown" lawyers each handled a few cases, would not have provided the same level of representation as the CJA program. SCTLA's own witness acknowledged that a lawyer "cannot maintain awareness and proficiency in regard to such matters [criminal defense work] unless you are continuously involved in them" (Tr. 1143-1144 (Hazard); see also Tr. 244-245, 272-273 (Carter)).

careful consideration, that "the boycott was motivated primarily by economic self-interest" (Pet. App. 43a).[11]

Although the CJA lawyers' manifest economic interest in their boycott makes this case an easy one, subjective motivation should not ever be the test. It is "well settled that good motives will not validate an otherwise anticompetitive practice" (*NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 n.23 (1984) (citing cases)). When competing suppliers "jointly give up their trade freedom" by collectively withholding their services from a buyer—whether it be the legislature or any other—they engage in economic behavior. Society may regulate or prohibit such economic behavior, even if it is used in an effort to communicate or to influence the political process, and regardless of the ratio of avarice to idealism that motivates it. See *International Longshoremen's Assoc.* v. *Allied International, Inc.*, 456 U.S. 212, 225-226 (1982) (politically motivated secondary boycotters with *no* economic interest denied First Amendment protection).[12]

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[11] Respondents' selective and in some cases misleading recasting of the evidence provides no basis on which this Court could reverse this finding, even were it to accept respondents' request to review it *de novo* (Ind. Br. 19 n.12). To cite but one example, respondents claim "many" of them "did not expect to * * * earn more as a result of the hourly fee increase" because the boycott did not demand an increase in the yearly maximum cap on CJA earnings (Ind. Br. 38). Respondents fail to disclose that the pre-strike cap on CJA earnings was well above the pre-boycott earnings of most CJA lawyers. Thus, only the hourly CJA rate (the sole focus of the boycott) determined how much most CJA lawyers earned; the yearly cap was not a constraint. Moreover, the yearly cap was set administratively, not by legislation. Shortly after the City Council raised the hourly CJA rate, the yearly cap was also increased (to $50,000). (See Pet. App. 170a.)

[12] Respondents observe that the First Circuit's decision in the *Longshoremen*'s case dismissed an antitrust count (Ind. Br. 23-24 n. 21; SCTLA Br. 40 n.30). That does not aid respondents because the court's holding rested on its finding that the longshoremen's boycott was "ill-designed as a means of gaining a competitive or commercial advantage for the union or its members" (*Allied International, Inc.* v. *International Longshoremen's Ass'n*, 640 F.2d 1368, 1380 (1st Cir. 1981)). Moreover, the holding was "fortified" by the fact that the boycott violated provisions of the Labor Management Relations Act that were " 'enacted as an alternative to subjecting unions

2. Just as respondents have shown no basis for absolute antitrust immunity for their conduct, so, too, have they failed to show any reason why their conduct should escape the summary condemnation (without regard to market power) that the Sherman Act prescribes for naked horizontal restraints on price and output.

Respondents do not question seriously the court of appeals' conclusion that theirs was a "naked" horizontal restraint. As the court found, "petitioners have advanced no claim that their boycott was ancillary and necessary to some larger, cooperative venture that permitted them to operate more efficiently" (Pet. App. 21a-22a). As the court of appeals further noted after reviewing this Court's decisions, the economic wisdom of the *per se* prohibition of horizontal restraints on price or output has been reexamined only "in the context of horizontal restraints that were 'ancillary' to 'an integration of the economic activities of the parties and appear[ed] capable of enhancing the group's efficiency' " (Pet. App. 21a, quoting *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986)).[13]

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to antitrust liability for secondary activities' " (*id.* at 1381). Given the common purpose of anti-trust and anti-strike laws, there is no logical reason whatsoever why the First Amendment should be applied differently to them.

[13] In some cases in which this Court has examined proffered procompetitive justifications for naked horizontal restraints, it has described its analysis as involving the "rule of reason." But the "rule of reason" analysis performed in these cases considers only the alleged justifications; if they are found meritless, condemnation of the practice follows without proof of market power. See, *e.g.*, *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978); *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. at 110. The AMA tries to exploit this variance in terminology by arguing that in *Michigan State Medical Society*, 101 F.T.C. 191 (1983), "the Commission saw fit to apply the rule of reason" (AMA Br. 24). This statement is true, but misleading in the present context. *Michigan State* involved a threatened Medicaid boycott. The Commission's "rule of reason" analysis entailed examination of "asserted pro-competitive justifications" for the threatened boycott (101 F.T.C. at 291). Upon rejecting these, the Commission held the conduct unlawful without any market power inquiry (*id.* at 289-296).

Respondents suggest that their boycott was pro-competitive because the higher price they achieved resulted in "an entirely different and higher level of CJA services" and "a much larger pool of qualified attorneys providing higher quality legal service" (Ind. Br. 38). It would not be surprising if a 75% increase in the price of a service attracted new providers and increased quality.[14] But this Court has rejected such a "justification" for price-fixing as a "frontal assault on the basic policy of the Sherman Act" (*National Society of Professional Engineers* v. *United States*, 435 U.S. at 695).[15]

The contention of respondents and the court of appeals that application of the *per se* rule to this case is impermissible under *United States* v. *O'Brien*, 391 U.S. 367 (1968), has been undermined further, rather than assisted as SCTLA maintains (Br. 45), by this Court's recent First Amendment decisions. As this Court has made clear, the *O'Brien* test for evaluating regulation of allegedly expressive conduct is a "relatively lenient" one (*Texas* v. *Johnson*, 109 S.Ct. 2533, 2540 (1989)). It requires not that a regulation be the "least restrictive" or "least intrusive" means of accomplishing an end, but only that it reflect "narrow tailoring" to achieve the government's purpose (*Ward* v. *Rock Against Racism*, 109 S.Ct. 2746, 2757-2758 (1989)). And the "requirement of narrow tailoring is satisfied 'so long as the * * * regulation promotes a substantial government interest that would be achieved less effectively absent the regulation' " (109 S.Ct. at 2758, quoting *United States* v. *Albertini*, 472 U.S. 677, 689 (1985); see also *Board of Trustees, State Univ. of N.Y.* v. *Fox*, 109 S.Ct. 3028, 3033-3034 (1989).

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[14] For a more balanced assessment of the actual impact of the increased CJA fee than respondents provide, however, see Pet. App. 207a-208a ("a dramatic transformation in the quality of indigency practice is unlikely").

[15] Equally misplaced is the AMA's suggestion that price-fixing boycotts against the government may be pro-competitive because they alert the government that it is spending too little on the good or service subject to the boycott (AMA Br. 18-19). The AMA has it backwards. Our economic system relies on the results of competition, not collusion, to let buyers know whether they are offering enough for a particular good or service (*e.g.*, *NCAA* v. *Board of Regents of the Univ. of Okla.*, 468 U.S. at 104 n.27).

As we observed in our opening brief, the Sherman Act, as construed by this Court in *Noerr* and *Claiborne Hardware*, has already been tailored to accommodate the speech rights of competitors with the antitrust rights of the public (FTC Br. 26).[16] The further "tailoring" demanded by respondents can only be achieved at a very great cost to statutory clarity and effective law enforcement.

Respondents suggest essentially three reasons why the *per se* rule is unconstitutionally overbroad. First, in their view, "legislative petitioning boycotts" as a class are unlikely to present the same threat to competition as other price-fixing boycotts do. This is so, respondents claim, because, "the predominant effects upon consumers flow from governmental action and are likely to be quite different from those usually associated with a cartel" (SCTLA Br. 33; see also Ind. Br. 39), and because "petitioning boycotts" must depend for their success on "persuasion" rather than "coercion," so that presumptions about the exercise of market power that underlie the *per se* rule do not apply (*e.g.*, SCTLA Br. 35). This logic is flawed.

The "predominant effects" of a "petitioning" price-fixing boycott, like the effects of any other price-fixing boycott, flow from collusive *private* action: a purchaser is denied the freedom to obtain goods or services in a competitive market unless it pays more for them.[17] Whether (and to what unquantifiable degree) such concerted disruptions of supply "coerce" or "per-

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[16] WCL's observation that "*Claiborne Hardware* is the application in one particular context of the general rule set forth in *O'Brien*" (WCL Br. 23) makes our point precisely. As we showed in our opening brief (at 17-24), this Court has repeatedly made clear that the "political boycott" doctrine announced in *Claiborne Hardware* does not apply to price-related competitor boycotts. In announcing that *O'Brien* does apply to this case, the court of appeals disregarded the manner in which this Court has already applied *O'Brien* to the antitrust laws.

[17] The purchaser (and victim) need not be a legislature. Respondents' definition of a "petitioning boycott" includes any concerted refusal to deal designed to influence legislative action, whether the purchaser is the government, as here, or individual consumers, as in a concerted gasoline station shutdown undertaken to induce relaxation of legislative price controls.

suade" the legislature to act, there is no reason to assume that, as a class, they pose a lesser economic threat than any others.[18]

Respondents' second contention is simply that as applied to *this case*, the *per se* rule is overbroad because the conduct here is not harmful. This begs the question (and is also incorrect as we discuss elsewhere). The point of *United States* v. *Albertini, supra, Clark* v. *Community for Creative Non-Violence,* 468 U.S. 288 (1984), and *O'Brien* itself, is that content-neutral prohibitions of generally harmful conduct can be upheld against the "limitless variety" (391 U.S. at 376) of potential "expressive conduct" claims, without demonstration in each particular case that the proscribed conduct causes the underlying harm that the legislature sought to prevent.[19]

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[18] Respondents' contention that the legislature can "protect itself" provides no basis for distinction in this context. As we noted earlier (pp. 7-8, *supra*) legislatures must ordinarily pay a price—in money or civic turmoil—if they seek to break a boycott. State and local governments are thus no less presumptively immune to the exercise of market power than resourceful private parties. Respondents also suggest that expressive price-fixing is less worrisome than other price-fixing because it is "a traditional tool of the disenfranchised" (SCTLA Br. 44) and "picturesque 'little people' in the Jeffersonian tradition" (*id.* at 41). In the Commission's experience, however, such boycotts are more often engineered by some of society's most privileged members—lawyers, doctors, and other professional elites. *E.g., Michigan State Medical Society, supra*; FTC Br. 33 n. 28. Although SCTLA disputes our belief that price-fixing boycotts against the government are infrequent because most people consider them unlawful (Br. 41), amicus AMA confirms our view. The AMA cautions its members (presumably reflecting its understanding of what the law requires) "to avoid activities that could be characterized as a collective refusal to deal with governmental or private payors" (AMA Br. 24 n.17).

[19] *Clark* illustrates the point notwithstanding WCL's claim (Br. 27-28) that it involved some "proven danger" not present here. In *Clark*, the Park Service had permitted homeless persons to conduct a 24-hour vigil in Lafayette Park. The protestors argued it would do no incremental harm to the Park were they to violate a regulation against "overnight sleeping" during the permitted vigil. Without refuting that plausible premise, this Court held that "the validity of this regulation need not be judged solely by reference to the demonstration at hand" (468 U.S. at 296-297).

Respondents and amici inaptly seek refuge from *Clark* and *Albertini* in this Court's observation that "[a] complete ban can be narrowly tailored * * * only

Finally, respondents suggest that the *per se* rule should be deemed unconstitutional as applied to the present boycott by approximately 100 CJA lawyers (comprising nearly all those who made a practice of CJA cases at the time) because otherwise the law would prohibit totally inconsequential boycotts by only "two" (SCTLA Br. 38) or "five" (WCL Br. 14) lawyers out of 100, and "no matter how brief in duration their boycott is" (SCTLA Br. 46).[20] But many laws have *de minimis* applications that do not make such laws unconstitutional. If two federal employees went on strike for one day to express their view on an issue of public importance, they would be violating the *per se* federal employee anti-strike law (see 5 U.S.C. 7311). That hypothetical possibility surely does not call into question application of the law to indefinite strikes by 100 or 1000 or 10,000 employees.[21]

Of course, the *de minimis per se* price-fixing boycotts imagined by respondents, like *de minimis* strikes, seldom if ever occur, because two or five lawyers acting alone in a market served by 100 lawyers would have no reason to believe that a concerted

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if each activity within the proscription's scope is an appropriately targeted evil" (*Frisby* v. *Schultz*, 108 S.Ct. 2495, 2502-2503 (1988); see, *e.g.*, SCTLA Br. 45). The Court has construed this statement to mean only that "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals" (*Ward* v. *Rock Against Racism*, 109 S.Ct. at 2758). The *per se* rule against price-fixing, like *per se* laws against strikes, speeding, and sleeping overnight in the parks, satisfies that standard even though not every single instance of the conduct prohibited by such laws necessarily causes the substantive harm at which the categorical prohibitions are directed.

[20] In fact, respondents' boycott was neither "limited in duration" (SCTLA Br. 41) nor a "temporary strike" (Ind. Br. 37). The boycott was designed to last, and did last, for as long as it took the target to agree to increase its price. No price-fixing boycott ever lasts any longer than this.

[21] SCTLA suggests, with no support, that "prosecutorial discretion" is not an adequate answer to *de minimis* applications of the antitrust laws (as it is for all other laws), because the antitrust laws are privately enforced (SCTLA Br. 38 n.27). But an alleged Sherman Act violation may be privately challenged only by a person who is "injured" (15 U.S.C. 15) or can show "threatened loss or damage" (15 U.S.C. 26). Private enforcement in *de minimis* cases is therefore not a concern.

refusal to deal could have any effect. By contrast, the administrative law judge found that "[t]he expectation of the CJA lawyers was that their boycott would have a severe impact on the District's criminal justice system. This expectation was fully realized * * *" (Pet. App. 195a).[22]

The Commission certainly does not maintain that *Albertini* and related cases eliminate any need for the government to distinguish the harmful from the harmless unless it can do so "at no cost whatsoever" (SCTLA Br. 43). Our point is that sacrificing the protections of the *per se* rule in the case of public price-fixing boycotts against the government (or even just the legislature[23]) would impose substantial and potentially debilitating costs upon antitrust enforcement—as well as create substantial uncertainty for those who must obey the law. As this Court has recognized (*Northern Pacific R.R.* v. *United States*, 356 U.S. 1, 5 (1958)), *per se* rules spare courts and litigants

> the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

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[22] To overcome this and related findings of the Commission (see FTC Br. 41), respondents now assert that their boycott did not result in a 'real' crisis", but only "a politically convenient 'emergency' " (Ind Br. 35; see also *id.* at 28-29). They buttress this assertion with the claim that no indigent defendant was denied counsel during the boycott (*id.* at 12; see also SCTLA Br. 14). This last statement, unlike the first, may be true. Denying counsel to an indigent would have required dismissal of the charges against him. When the point came during the boycott at which the Chairman and Director of the PDS represented to the Mayor and City Council that this intolerable result was imminent, owing to the exhaustion of the resources of PDS attorneys and those few CJA regulars who did not join the boycott (see Pet. App. 197a-200a), the City agreed to increase the CJA rate.

[23] Although respondents note that many government purchases are made by executive agencies acting pursuant to nonspecific appropriations (Ind. Br. 26-27), all such appropriations ultimately derive from legislatures. Many overt or covert boycotts now aimed at influencing executive bodies could easily be restructured to assume the form of a demand for legislation if that were made a basis for relaxed antitrust treatment. See also note 17, *supra*.

The magnitude of the costs and uncertainty imposed on antitrust enforcement by the market power requirement respondents advocate is best illustrated by the dizzying array of facts that they themselves apparently consider relevant to determining whether an alleged "petitioning boycott" would be lawful under the Sherman Act (*e.g.*, SCTLA Br. 1-20; Ind. Br. 2-12). The record of this case shows an agreement by competing private practice attorneys to withhold their services from the government unless it increased its price for their services (Pet. App. 8a-9a). The attorneys comprised nearly 100% of those who made a practice of providing the vital service in question (*ibid.*). The attorneys "expected" that their boycott would seriously affect the City (by depriving the court of an adequate supply of attorneys) (*id.* at 195a), and within two weeks of the boycott's commencement precisely that effect had occurred: the head of the Public Defender Service announced that a "crisis" (*i.e.*, an insufficient supply of lawyers to satisfy the constitutional requirement) was imminent (*id.* at 9a-10a). Only when the price for their services was increased did the lawyers' boycott end (*id.* at 11a).

Ordinarily the facts above would more than suffice to demonstrate both a *per se* violation of the antitrust laws and adverse effects necessary to obviate any showing of market power under a full rule of reason analysis. See, *e.g.*, *FTC* v. *Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986). In respondents' view, however, the tribunal must further decide (1) whether the concerted refusal to deal is a "legislative petitioning boycott" and (2) if so, do the boycotters have "market power?" To describe these inquiries as a "sea of doubt" understates their complexity.[24]

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[24] In respondents' view, to determine whether the price-fixing boycott in question was a "petitioning boycott," the tribunal must scrutinize the motives and attitudes of both the boycotters and officials of the target government. Did the boycotters seek to "communicate" or to "coerce" when they withheld their services? And did officials of the targeted government feel "coerced" or "persuaded" by the boycott? If one rejects the pragmatic, objectively based analysis of these questions performed by the Commission and ALJ (see FTC

The argument for increasing CJA rates in 1983 no doubt had much to commend it. But every dollar that the City was required to pay to end a lawyers' boycott left it with that much less money to spend to feed the hungry, shelter the homeless, fight drugs, disease, and crime, or accomplish any number of other perennially underfunded public missions that compete with indigent legal care for limited public funds. The antitrust laws exist to ensure that, in allocating scarce resources, governments and all other purchasers enjoy the benefits of competition among suppliers. As this Court has observed, the Sherman Act

> rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

NCAA v. *Board of Regents of the Univ. of Okla.*, 468 U.S. at 104 n. 27, quoting *Northern Pacific R.R.* v. *United States*, 356 U.S. at 4-5.

The assurance of the lawyers and doctors appearing before this Court that their causes are unique and their claims on the public purse are uniquely compelling cannot justify the unprecedented antitrust treatment they demand. The "economic liberty" that the Sherman Act guarantees all buyers (*NCAA*, 468 U.S. at 104 n.27) need not be subordinated to the novel right to engage in

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Br. 41-42), as respondents do, the result is an inquiry of inordinate complexity, that reduces the tribunal to measuring the sincerity and authenticity of "smil[es]" (SCTLA Br. 13), "hand[shakes]" (*id.* at 17), and "cocktail reception[s]" (*id.* at 18), to arrive at the appropriate mode of antitrust analysis.

If the conduct is determined to be a "petitioning boycott," the tribunal must then assess market power. SCLTA apparently maintains that the fact that a D.C. bar member did not compete for CJA assignments prior to the boycott would not warrant exclusion from the market (Br. 48 n.35). While rejecting this usual test of market participation, however, SCTLA does not explain how else one decides which of 14,000 D.C. Bar members were market participants and which were not.

"expressive price-fixing" demanded by the respondents in this case.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed insofar as it vacates the decision of the Commission.[25]

Respectfully submitted.

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[25] We agree with respondents (SCTLA Br. 21 n.10; Ind. Br. 13 n.6) that in such event the case should be remanded to the court of appeals to consider respondents' unaddressed objections to the scope of the order to cease and desist against them.

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