Nos. 88-1198, 88-1393

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FEDERAL TRADE COMMISSION,
Petitioner,
v.
SUPERIOR COURT TRIAL LAWYERS ASSOCIATION,
RALPH J. PERROTTA,
KAREN E. KOSKOFF,
REGINALD G. ADDISON,
JOANNE D. SLAIGHT

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

BRIEF FOR RESPONDENT/CROSS-PETITIONER SUPERIOR COURT TRIAL LAWYERS ASSOCIATION

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QUESTIONS PRESENTED

1. Whether a public boycott aimed at petitioning the legislature, and perceived as political expression by elected government officials, was intended to be reached by the antitrust laws.

2. Whether the antitrust laws should be construed to condemn a legislative petitioning boycott *per se*, without any inquiry into whether the boycott participants did or even could exercise economic coercion.

3. Whether application of a *per se* rule to a legislative petitioning boycott is so much more restrictive of political expression than necessary to advance the general governmental interest in competition as to be barred by the First Amendment.

4. Whether the reasons for barring application of the *per se* rule to a petitioning boycott can be satisfied by a "truncated" rule of reason analysis, which assumes—rather than requiring proof—that the challenged conduct had an anticompetitive effect.

PARTIES TO THE PROCEEDINGS

Petitioner/Cross-Respondent is the Federal Trade Commission. Respondents/Cross-Petitioners, all of whom were petitioners in the proceedings before the Court of Appeals and respondents in the proceedings before the Federal Trade Commission, are the Superior Court Trial Lawyers Association ("SCTLA") and Ralph J. Perrotta, Karen E. Koskoff, Reginald G. Addison, and Joanne D. Slaight (the "Individual Respondents"). None is incorporated.

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STATEMENT OF THE CASE

This case concerns the Federal Trade Commission's efforts to condemn as a *per se* violation of the antitrust laws the highly publicized "strike" staged by Respondents

and others in 1983.[1] Respondents struck to focus public attention on the need for legislation increasing the statutory maximum rate of compensation for representation of indigent criminal defendants under the District of Columbia Criminal Justice Act, D.C. Code § 11-2601 *et seq.* (1981) (the "D.C. CJA"). The strike was an integral part of a long-running dialogue among the bar and bench, civic leaders, study groups, and the legislative, executive, and judicial branches of the D.C. government. To understand the political context and nature of the strike, that dialogue must be briefly described.

1. Representation of Indigent Criminal Defendants Under the D.C. Criminal Justice Act

In the District of Columbia, the assistance of counsel guaranteed by the Sixth Amendment is provided to indigent defendants through a mixed system comprised principally of government attorneys employed by the

[1] Respondents' challenged conduct is referred to herein as a "strike" because that term was commonly used in the press and by the participants at the time. It was not a strike in the technical sense used in the context of labor disputes, however, and it did not involve a complete work stoppage, since the lawyers continued to handle cases to which they had already been appointed. (C.A. App. 187, 515b.) For simplicity, the term "Respondents" is used to refer to Respondents in No. 88-1198, Cross-Petitioners in No. 88-1393. The following citation forms are used in this brief: "C.A. App." refers to the Joint Appendix used in the Court of Appeals, ten copies of which were lodged with this Court in lieu of a printed Appendix pursuant to the parties' joint Motion to Dispense With Joint Appendix, which motion was granted by this Court on June 5, 1989. "Pet. App." refers to the Appendix filed with the FTC's Petition for Certiorari in No. 88-1198. "FTC Br." refers to the FTC's brief on the merits. Testimony at the hearing before the Administrative Law Judge not included in the Court of Appeals Appendix is cited as "Tr. —— (witness name)." "CX" "RX" and "JX" refer, respectively, to the admitted exhibits offered at the hearing by Complaint Counsel, by Respondents, and jointly. References to the transcript page at which exhibits were admitted are given parenthetically after the exhibit citation.

District's Public Defender Service ("PDS") and private attorneys ("CJA lawyers") compensated under the D.C. CJA.

The D.C. CJA, which was enacted in 1974, created a Joint Committee on Judicial Administration of the District of Columbia Courts ("Joint Committee") with authority to establish maximum rates of compensation not exceeding those established by the federal Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1982 & Supp. 1989) ("federal CJA"). *See* D.C. Code § 11-2604 (1981 & Supp. 1988). As amended in 1970, the federal CJA provided for reimbursement at the rate of $20 an hour for out-of-court time and $30 an hour for in-court time, with an overall compensation limit of $400 per misdemeanor and $1,000 per felony. Pub. L. No. 91-447, § 1, October 14, 1970, 84 Stat. 916. The per-case ceilings, but not the maximum rates, were waivable in certain circumstances. The Joint Committee adopted the federal rates and per-case limits for the D.C. CJA.

The rates thus established were maximum rates. Judges retained full discretion under D.C. Code § 11-2604(d) to award less than the amount requested by CJA lawyers, and frequently did so, generally without stating any reasons for the reduction. (C.A. App. 105-06, 151, 419-21, 448-49, 453-54, 626; *Thompson v. District of Columbia*, 407 A.2d 678 (D.C. 1979).) The maximum rates under the federal CJA and D.C. CJA were not increased from 1970 to the time of the strike in 1983.

2. Efforts of Judicial and Bar Groups to Raise the Maximum Rates of Compensation Under the Criminal Justice Act

Even as it established the federal CJA rates in 1970, Congress recognized that they were low. S. Rep. No. 91-790, 91st Cong., 2d Sess. 14-15 (1970). By 1972, Justice Powell had observed that compensation for rep-

resentation of indigent defendants was "generally inadequate," so that "the majority of persons willing to accept appointments are the young and inexperienced." *Argersinger v. Hamlin*, 407 U.S. 25, 57 n.21 (1972) (concurring opinion). By 1983, it had become obvious that these rates were "woefully inadequate" and "scandalously low." (Tr. 1082 (testimony of John H. Pickering); C.A. App. 324 (testimony of Geoffrey C. Hazard); *see also* Tr. 1451, 1418, 1434 (testimony of Norman Lefstein, an expert on the provision of criminal defense services).) Not only had the Consumer Price Index increased by 140% since 1970, but new bases for procedural and evidentiary motions had substantially increased the time required for investigation, research, motions practice, and trial preparation. As a result, lawyers doing CJA work faced "additional procedural obligations . . . at the very time when the courts (and bar associations) indicated a willingness to consider claims of malpractice" and other sanctions. (Pet. App. 174a-75a; Tr. 1138-42 (Hazard).)

The consensus of expert opinion, as found by the Administrative Law Judge, was that the inadequacy of the CJA rates adversely affected the quality of representation by compelling inordinately large caseloads, discouraging experienced attorneys from continuing to practice CJA work, and depriving CJA lawyers of even the rudimentary secretarial and other support needed to practice law. (Pet. App. 175a-77a.) CJA attorneys typically worked out of their homes or briefcases and did their own typing because they could not afford to do otherwise. (Pet. App. 177a; Tr. 1439-40 (Lefstein); Tr. 646-47 (Perrotta); Tr. 793 (Koskoff); Tr. 952 (Slaight); C.A. App. 263-64 (Slaight).) They could not afford to attend continuing legal education courses. (JX 8 at 82-83 (Tr. 66); JX 10 at 80-81, 100-02, 124-25 (Tr. 66).) These conditions eventually drove the more experienced and capable attorneys, even those initially motivated by a dedication to public service, into more lucrative fields.

(Pet. App. 176a.) The loss of attorneys with two or three years experience was, according to Professor Hazard, "the most pernicious effect" of a low rate. (Pet. App. 176a.)

Concerned that the guarantees of the Sixth Amendment were at risk, judicial and bar groups initiated efforts to amend the 1970 rates as early as 1975. In that year, the "authoritative" report of a joint committee of the Judicial Conference of the D.C. Circuit and the District of Columbia Bar (Unified), commonly referred to as the Austern-Rezneck Report, concluded that the existing rates were not adequate. It found that the low rates of compensation resulted in "reduced services" to clients and noted that "a system which is heavily weighed against the indigent defendant in terms of the compensation that his attorney will receive raises serious questions of equal protection." (C.A. App. 770, 766 (Tr. 608).) The committee recommended that the CJA hourly rate be increased to $40 per hour for time both in and out of court. (C.A. App. 762 (Tr. 608).) The report declared:

> We are mindful that many lawyers practicing under the Act are willing to accept appointments at current rates, but believe that the proposed increase in compensation represents the absolute minimum necessary to attract and hold good criminal lawyers and assure their ability to render effective representation to their clients.

(C.A. App. 771 (Tr. 608).) Nonetheless, the D.C. Council did not act. (Pet. App. 174a.)

In 1982, the report of the D.C. Bar Court System Study Committee again recommended that the CJA hourly rates be increased promptly to at least the level proposed by the Austern-Rezneck committee, and the D.C. Bar adopted a resolution supporting legislation to increase the level of compensation. (C.A. App. 783-85 (Tr. 608).) About the same time, a bill was introduced in the

D.C. Council to increase the D.C. CJA hourly rate to $50. No hearings were held, however, and the bill died in committee. (Pet. App. 178a-79a.)

Contemporaneously, efforts were being made to increase the maximum rates under the federal CJA, which, if successful, would automatically have authorized an increase in the maximum D.C. rates as well. These efforts, spanning several years, were led by the Judicial Conference of the United States, the American Bar Association, and numerous other bar and judicial groups. (C.A. App. 652-732 (Tr. 591, 595, 604-06).) But like the efforts to amend the D.C. CJA, they were unsuccessful.[2]

3. Respondents' Pre-Strike Efforts to Secure Legislation Increasing Maximum CJA Compensation Levels

While these efforts were going on, the CJA lawyers themselves were also lobbying for legislation to increase the CJA maximum rates. Their initial efforts were no more successful. "The response from the Mayor and Council members before September, 1982, was almost unanimous support but no concrete results . . . ." (Pet. App. 179a n.127.) In late 1982, against this background of failed attempts to obtain legislation increasing CJA compensation, several lawyers relatively new to CJA practice, including the individual Respondents in this case, renewed their efforts to obtain such legislation. They did so in large part because they thought it was "the single most important thing" they could do to improve the quality of representation provided to indigent defendants. (C.A. App. 156-61 (Perrotta); *see also* C.A. App. 235-40 (Koskoff), 263-67, 474-77, 480-81 (Slaight), 450 (Stein), 497-98 (Perrotta), 504-05 (Addison).)

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[2] In October 1984, about a year after the successful conclusion of the D.C. CJA lawyers' strike, legislation was finally passed, increasing the federal CJA hourly rates to $60 for in-court time and $40 for out-of-court time. (Pet. App. 189a-90a n.161.)

These CJA lawyers began by requesting regular monthly meetings with Chief Judge Moultrie of the Superior Court and Larry Polansky, Executive Officer of the D.C. Courts, about a variety of subjects concerning the improvement of the system for representing criminal defendants. (C.A. App. 162, 528.) One of the subjects repeatedly discussed was how the lawyers could go about getting legislation to increase the rates, and whether the Chief Judge would support such an increase. (C.A. App. 163-65, 206-07.) Both Judge Moultrie and Mr. Polansky stated privately that they believed the CJA lawyers deserved an increase. (Pet. App. 179a.) However, the Chief Judge refused to do anything to support it on the ground that he might have to pass on the constitutionality of any legislation. He told the CJA lawyers that they themselves would have to "generate the political support for it," and indicated that they should contact the D.C. government because it was a city problem, not a court problem. (C.A. App. 164, 207.)

The lawyers then sought to meet with the Mayor, but were received only by his counsel, Herbert Reid. Mr. Reid expressed sympathy for their cause, but sent them back to the D.C. Council and/or the Chief Judge. Mr. Reid stated that the Council would have to act before the Mayor could do anything, and noted that it was politically unrealistic to expect the Mayor to support an increase when the Superior Court was not asking for it. (C.A. App. 166-67, 208-10, 217, 529). The Chief Judge continued to refuse to take a position, however, despite repeated requests for public support. (C.A. App. 167, 210-11, 528-29.)

In early 1983, the CJA lawyers began contacting members of the D.C. Council and their aides, starting with Councilmember Wilhelmina Rolark, who chaired the Council's Judiciary Committee, Council Chairman David Clarke, and Councilmember John Ray. (C.A. App. 211; Tr. 805, 808 (Koskoff).) In March of 1983, Council

Chairman Clarke introduced a new bill to increase the hourly rate, and Councilmember Rolark announced that hearings would be held the following June. When the CJA lawyers learned of this bill and the scheduled hearings, they contacted Councilmember Rolark and her counsel, as well as other council members' staffs, other government officials, bar groups, the PDS, and Judge Moultrie to seek support for the bill. (C.A. App. 211-13, 528-29; Tr. 803-08 (Koskoff); JX 13 at 51-52, 173 (Tr. 66) (Koskoff).) They also wrote to the Mayor seeking support. (RX 66 (Tr. 610); Tr. 694 (Perrotta).)

At the hearings, the CJA lawyers submitted written statements and testified orally. (C.A. App. 216, 565-67 (Tr. 310-11), 575-89 (Tr. 311), 826-39 (Tr. 614), 869-76 (Tr. 615).) Although Chief Judge Moultrie refused to testify (C.A. App. 528-29), the PDS and numerous representatives of bar groups testified or submitted statements. (C.A. App. 303 (Pickering), 381-82 (Isbell), 565-69 (Tr. 310-11), 615-21 (Tr. 242), 802-18 (Tr. 611-12), 840-41 (Tr. 614), 876-81 (Tr. 615).) The D.C. Bar, for example, which rarely takes a position on legislation because it is required to obtain a vote of its members to do so, supported the legislation because of "the importance to the Bar, as well as to the public, of the subject now before the Committee." (C.A. App. 802-03 (Tr. 611), 378-79 (Isbell), 880-81 (Tr. 615).) Bar President David Isbell testified that this was one of only two issues in the bar's history on which it had taken such a position. (C.A. App. 881 (Tr. 615).) Not a single witness or submission opposed the bill on its merits. (C.A. App. 174, 216, 381-82, 564-69 (Tr. 310-11), 575-89 (Tr. 401), 802-95 (Tr. 227-28, 611-15).)

Following the hearing, the CJA lawyers spoke with Councilmember Polly Shackleton and with Council Chairman Clarke. (C.A. App. 216.) They also spoke with Timothy Leeth, a member of the staff of the Subcommittee on the District of Columbia of the U.S. Senate Committee

on Appropriations, to discuss the possibility of federal funding to increase the level of CJA compensation. Mr. Leeth informed them, however, that Congress was sensitive to the District's Home Rule status and would not support an increase until the District itself had acted, through either a request from the Chief Judge of the Superior Court or a bill enacted by the D.C. Council. (Pet. App. 183a.)

It soon became apparent that the hearings on the Council bill to increase the CJA rates were little more than an empty gesture (C.A. App. 173-75, 203, 249-50, 500-01, 512), and that there was no "political steam" behind the bill. (C.A. App. 394 (Isbell).) An aide to Councilmember Rolark told Respondent Koskoff that passage was extremely unlikely because there was no source of funding. (Tr. 809 (Koskoff).) Under the legislative system in the District of Columbia, the prospects for legislation on matters affecting appropriations are heavily dependent on the Mayor's office because the Council is unable to project anticipated revenues and, consequently, cannot independently assess the impact of legislation on the balanced budget required by the act granting Home Rule. (Tr. 1241, 1244, 1247-48 (testimony of former D.C. Council Chairman Sterling Tucker).) Reflecting the Mayor's influence over such legislation, an aide to Councilmember John Ray told Respondents that (in the words of Respondent Addison) "if the Mayor wants you to have it, he can get it." (C.A. App. 252.) But, as noted above, the Mayor's counsel had told the CJA lawyers that the Council would have to act first. (C.A. App. 208-09.)

4. The Strike

Earlier in the year, the CJA lawyers had received some advice from Wiley Branton, then Dean of Howard Law School, that now seemed particularly appropriate. (C.A. App. 171-72, 213-15, 402-05 (Branton).) Dean Branton was knowledgeable about the local political process, had

served on a task force advising the Mayor on the administration of justice and other matters, was chairman of the D.C. Judicial Nomination Commission, and knew the Mayor and every member of the D.C. Council personally. (Tr. 1376-79 (Branton); C.A. App. 213.) He told the CJA lawyers that the chances for an increase in rates were "very dim," and that they needed to generate political support. (C.A. App. 171-72, 213-15, 404-05.) He explained that the problem was not just a lack of funding, and remarked that "if a billion dollars fell on the District of Columbia tomorrow," the lawyers would still not get their increase. (C.A. App. 511.) He explained that there was no organized constituency to lobby for the increase, and that the criminal defense bar was not held in high enough regard by the government or the public at large to generate support as long as the cases were being handled and the system was running smoothly. (C.A. App. 171-72, 214-15, 409, 495.) As Dean Branton later testified:

> In a nutshell I told them . . . that they were going to have to do something dramatic to attract attention in order to get any relief.
>
> And I probably used an expression, you will have to raise hell about this to attract somebody's attention.

(C.A. App. 410.)

In the course of the meeting with Dean Branton, it was mentioned that some CJA lawyers were thinking of a strike to draw public attention to the problem, and Dean Branton indicated that "it may well have to come to that." (C.A. App. 411.) No serious consideration was given by the CJA lawyers to a strike at that time, however, because the lawyers were still hopeful that legislation might be passed by the D.C. Council. (C.A. App. 215.)

After the Judiciary Committee hearings had come and gone with neither substantive opposition nor apparent

progress, however, a number of the CJA lawyers finally concluded that dramatic action was needed to attract public and legislative support. On August 11, 1983, they decided on what they called a "strike"—*i.e.*, they would cease calling in to the CJA offices to volunteer for new appointments.[3] Unlike a classic strike, however, their refusal to volunteer for new appointments did not involve a complete work stoppage. The lawyers continued to handle cases to which they had already been appointed, believing that they "had an absolute duty" and "a moral and a legal obligation and an ethical one to continue representing the people that [they] already represented." (C.A. App. 187, 515b; Tr. 884-85 (Addison), Tr. 962 (Slaight), Tr. 643 (Perrotta).) Moreover, although most of the lawyers stopped calling in to volunteer for new matters, "[n]o one ever refused an appointment." (C.A. App. 515b (Tr. 66).) Respondent Koskoff, for example, accepted a new case for an existing client at the request of a judge, though she declined appointment under the Criminal Justice Act and represented the client *pro bono* instead. (C.A. App. 229-30.)

As with their lobbying efforts generally, a major motive of the strike was to improve the quality of CJA representation. (Pet. App. 226a-27a.) Although most of the lawyers also stood to gain economically from a rate increase, this was not universally true. Respondent Slaight had at the time already formed an intention to

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[3] C.A. App. 515b-16 (Tr. 66). The message of the strike, according to one of the Respondents, was:

> [T]he system had sold our clients out—indeed had sold us out—by saying . . . all we want is to meet the constitutional requirement that you have a lawyer, and that we don't really care what kind of job you do.
>
> So what we said essentially is, we will no longer be a party to the system's desire to only have a warm body beside you. And that, in fact, we cannot in good conscience continue to take cases under the present circumstances.

(C.A. App. 504 (Addison) (Tr. 66).)

leave CJA practice and had stopped taking new appointments. She participated as a leader of the "strike" because she believed "it was the right thing to do" and "felt [she] was doing more for [her] clients by supporting the increase in legislation than [she] had done for the last two and a half years [representing clients under the CJA]."[4] Other CJA lawyers felt that higher rates would be economically detrimental to them because so many new lawyers would be drawn to taking CJA cases that it would make it difficult for lawyers that wished to make a living at CJA work to get enough cases to do so. (C.A. App. 498.)

The strike was scheduled to commence on September 6, several weeks after it was announced. The early announcement, coupled with the fact that many CJA lawyers increased their caseloads in advance of the strike, allowed PDS to reduce its caseload and take other actions in preparation for the strike. (*See* C.A. App. 107-08, Tr. 92, 96-97, 110-12 (Carter); C.A. App. 141-42 (Robinson).)

On August 29, between the announcement and commencement of the strike, several of the lawyers met with the Mayor. The Mayor stated that he supported the legislation, that an increase was long overdue, and that CJA lawyers did useful work at extraordinarily low rates. (C.A. App. 176.) He discussed in general terms how the bill might be funded and explained the District's emergency legislative authority, saying that "if an emergency arises I will have to deal with it." (C.A. App. 176-77, 222-23, 495-96, 507-08.) Respondent Koskoff had never heard of emergency legislation until the Mayor brought

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[4] C.A. App. 265-67. She subsequently returned to CJA practice after a stint at a public interest organization in New York. Two of the other three individual Cross-Petitioners, Ms. Koskoff and Mr. Perrotta, left CJA practice shortly after the events in question, reflecting the often rapid turnover among those regularly taking CJA cases (particularly among tbe younger lawyers).

it up. (C.A. App. 223.) The overall impression conveyed at the meeting, according to Respondent Perrotta, was:

> If I don't have an emergency I can't respond in any kind of emergency way.
>
> . . . [I]t is almost like theater. He has to be able to come in as the rescuer, the man on the white horse and say, well, I am going to solve this huge crisis in the court system . . . .

(C.A. App. 495-96.) The meeting ended with the Mayor smiling directly at Respondent Koskoff and saying, "[Y]ou do what you got to do and I will do what I got to do." (C.A. App. 223-24.) After the meeting, the Mayor and the lawyers held a press conference, which resulted in publication of an article on CJA funding in the *Washington Post*. (C.A. App. 224, 899 (Tr. 616).) The Mayor described himself as "sympathetic" and said that he would discuss with Council members the possibility of providing funds for a raise. But he declared, "My action has nothing to do with what they may or may not do in September." (C.A. App. 899 (Tr. 616).)

The CJA lawyers actively sought media coverage of the strike to create public awareness and support. (C.A. App. 225-29, 253-54, 260-62, 267-69, 461-62, 466-67, 506, 523-27.) A public relations coordinator was designated, two press information kits were prepared, and SCTLA leaders were encouraged to seek out journalists. (Pet. App. 194a; C.A. App. 225-29, 253-54, 260-62, 267-69, 461-62, 466-67, 506, 523-27; Tr. 919-25 (Kline); CX 6-C-J, 13 (Tr. 310-11); RX 97 (Tr. 923); RX 106-A-C (Tr. 618).) The strike was covered widely, not just on Washington television and in local papers, but on national network news, in the *New York Times*, *USA Today*, and *The Economist*. (*See* C.A. App. 900 (Tr. 626), 921-22, 930, 954 (Tr. 619).) The strike generated favorable editorials, including one by the *Washington Post* (C.A. App. 934 (Tr. 619)) and an op-ed article by Harold H. Greene,

former Chief Judge of the Superior Court, who urged: "These lawyers should receive the modest increase they have requested." (C.A. App. 946 (Tr. 619).) The strike also led Chief Judge Moultrie for the first time to state *publicly* that he supported an increase in rates. (C.A. App. 396-97, 948 (Tr. 619), 955 (Tr. 621).)

The strike by CJA lawyers commenced on September 6, 1983, as CJA lawyers had earlier announced it would, and it ended on September 20, two weeks later. (Pet. App. 193a, 204a-05a.) During the strike, newly arrested indigent criminal defendants were represented by PDS attorneys, a dozen CJA regulars, volunteers from the private bar, and law students. (Tr. 96-98, 101-02, 190-97, 222-23 (Carter); Tr. 338-39 (Robinson).) According to petitioner's own witness, proceedings in the Superior Court were conducted at their normal pace (Tr. 561 (O'Neill)), apart from presentments and arraignments, which required an extra hour or so each day to process. (Tr. 568-69, 573-74 (O'Neill).) Although one or two "citation" cases were briefly continued,[5] not a single indigent accused was denied legal representation during the strike. (*See* Tr. 103, 223-25 (Carter).)

5. Passage of Bill No. 5-128

On September 15, in the strike's second week, Frank Carter, Director of PDS, wrote letters to the Mayor, Chief Judge Moultrie, and D.C. Council Judiciary Committee Chairwoman Rolark stating that by the next week, difficulties in providing counsel would "reach a crisis point." (CX 31-A, 32-A, 33-A (Tr. 106).) The letter

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[5] "Citation" cases involve misdemeanor offenses such as petty theft and traffic violations. In such cases, trustworthy defendants are released on their own recognizance directly from the precinct after a telephone interview and approval by the pretrial services agency. At the time of release, they are assigned a date to appear in court two or three weeks after their arrest dates. (Tr. 103, 223-25 (Carter).)

also noted the widespread support for the pending bill to increase D.C. CJA rates by PDS and others, and urged the Mayor, Chief Judge Moultrie, and Councilmember Rolark to declare their unified support for the bill. (CX 31-B-C, 32-B-C, 33-B-C (Tr. 106).)

Mr. Carter testified that a principal purpose in writing the letters was to prompt all three branches of government to take immediate action to secure passage of Bill No. 5-128, pending before the Council. (C.A. App. 119-20.) Mr. Carter wrote the "crisis" letters in the context of the "status quo" (C.A. App. 119)—that is, they were predicated on the assumption that nothing further would be done by PDS or the court to get additional volunteers or to compel non-volunteers to take appointments. (C.A. App. 119-24.) At the time, PDS had contacted only a fraction of the law firms and lawyers who might have provided assistance,[6] and a number of lawyers who had handled cases during an earlier 1974 strike testified that attorneys in their firms would have volun-

[6] Prior to the strike, PDS contacted only about 15 of the 40 firms on the D.C. Bar's *pro bono* list in seeking volunteer assistance. (C.A. App. 110-11 (Carter).) In addition, PDS contacted several former U.S. attorneys and former PDS attorneys and approximately 25 to 30 attorneys who accepted appointments during prior emergencies. (C.A. App. 111 (Carter); Tr. 335 (Robinson).) PDS did not seek volunteer assistance from the remaining 25 firms on the bar's *pro bono* list until two days before PDS reached a decision to write the "crisis" letters, with the result that the "crisis" letters were written before PDS knew the extent of additional volunteer assistance that would be available. (C.A. App. 117-19 (Carter).) PDS also did not solicit assistance from firms not on the list, many of which had extensive litigation practices and had provided attorneys in prior emergencies. (C.A. App. 122-23 (Carter).) Nor did PDS request the D.C. Bar to help mobilize volunteer assistance, although Mr. Carter of PDS appeared at a Board of Governors meeting of the bar on September 13. (C.A. App. 118, 123-24, 311-12.) PDS was aware that there were substantial additional sources of volunteer assistance which could have been utilized to avert a "crisis" if the strike persisted. (*See* C.A. App. 120-24 (Carter).)

teered for cases if asked to do so by PDS. (C.A. App. 332-33 (testimony of James F. Rill), 340-42 (testimony of Edward J. Lopata), 371-73 (testimony of James R. Loftis).) Similarly, the court had not exercised its power to order members of the bar (including striking CJA lawyers) to accept appointments.[7] Indeed, some of the CJA lawyers had expressed the view beforehand that if the court chose to exercise this power, it could break the strike. (C.A. App. 451-52.)

The PDS letter provided a basis for the D.C. government to act and to invoke its emergency legislative powers. On September 15, the Mayor called Respondent Kos-

[7] There is no dispute that the court had the power to order the 14,000 members of the bar in private practice in the D.C. area to take appointments. (C.A. App. 127-30.) During an earlier strike in 1974, the court exercised this power to provide counsel for over two months, a far longer period than the two weeks involved in this case. (C.A. App. 125-27 (Carter), 422-28 (Lefstein).) If ordered to appear, large numbers of private attorneys, pursuant to their obligations as officers of the court, would have done so, as they had in the past. (C.A. App. 310 (Pickering), 315-18 (Colbert), 330, 332-33 (Rill), 342 (Lopata), 373 (Loftis).) While the ALJ found that a mandatory *pro bono* program relying on involuntary court appointments would not have been a satisfactory permanent replacement for reliance on voluntary CJA practioners (Pet. App. 158a-60a), uncontradicted expert testimony indicated that a system of court-ordered appointments could have kept the system operating for several months to a year. (C.A. App. 428-29 (Lefstein).) Such a system of appointments resulted in a high quality of representation during the 1974 strike. (RX 55-Z4 (Tr. 608).) The record is also clear that while a substantial percentage of the attorneys sent appointment orders in 1974 did not appear on the date of their notice, very few simply ignored the orders. Rather, because they were given very short notice, a large number notified PDS that they were willing to accept cases but needed their appearance dates continued because of scheduling conflicts. (C.A. App. 422-25 (Lefstein).) The "overwhelming majority" either appeared or were willing to appear. (C.A. App. 434.) Despite these scheduling conflicts, the 1974 "draft" produced enough attorneys to operate the criminal justice system for an extended period until new CJA funds were obtained. (*Id.*)

koff and requested a meeting that evening with her and Respondents Perrotta and Addison. (C.A. App. 231.) "The meeting was friendly. The Mayor shook hands all around and congratulated the SCTLA leadership on the success of the boycott." (Pet. App. 200a; *see* C.A. App. 189-90, 232, 487.) The Mayor explained that since an emergency now existed, the bill could be passed as emergency legislation. (C.A. App. 232-34.) He explained the legislative schedule and stated that he would sign the bill promptly. (C.A. App. 192-93, 232-34, 487-89.) The CJA lawyers asked him when they should return to work, and he responded that "as an old organizer," he would advise them to do so only after the first reading of the bill. (C.A. App. 193, 234, 487-89, 521-22.)

The Mayor wrote to Councilmember Rolark the next day, September 16, stressing "the importance of quality representation for indigent defendants," expressing his support for the pending legislation, and stating that he would "ensure that the courts have adequate resources to cover the increased costs." (Pet. App. 201a-02a.)[8] On

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[8] The letter reads in part as follows:

> [B]ecause I believe in the importance of quality representation for indigent defendants and appreciate the significance of the Criminal Justice Act program to the administration of justice in the District, I will, if this legislation is approved by the Council, initiate reprogramming or supplemental actions during FY 1984 sufficient to ensure that the courts have adequate resources to cover the increased costs.
>
> As you know, my position has modified somewhat in the past months. This has been due in large part to your diligence in pursuing the bill, your hard work over the issue of indigent defense, and your support of my efforts to ensure that the Council make a commitment to necessary revenue measures when actions with fiscal impact are taken, [which] has persuaded me that the bill should not be opposed simply because of the financial consequences. I appreciate your and Chairman Clarke's efforts on behalf of this bill, and I look forward to our continued cooperation on matters involving public safety and the administration of justice in Washington, D.C.

(Pet. App. 201a-02a.)

the same day, the Mayor arranged for some of the Respondents to meet with Council Chairman Clarke and Councilmember Rolark. Chairman Clarke conditioned action by the Council upon a vote by the CJA lawyers to end the strike. (Pet. App. 204a.) A favorable vote was taken by the lawyers on September 19; the Council approved the bill unanimously the next day. (Pet. App. 204a.) The Mayor signed the bill, stating in a press release that he did so because "I believe in the importance of quality representation for indigent defendants and believe that this will contribute to the administration of justice in the District." (C.A. App. 961 (Tr. 623).) Three of the Respondents were invited to attend the signing and the cocktail reception that followed. (C.A. App. 193-94, 240, 961 (Tr. 623).)

6. Effects of the Legislation

The increase in the maximum rates under the D.C. CJA resulted in a dramatic increase—approximately a doubling—in the number of attorneys seeking CJA appointments each day as compared with the period before the strike. (C.A. App. 140, 143, 161, 201-02.) Approximately 75 new attorneys not registered with the CJA Office before the strike registered to take appointments between the passage of the bill and the time of hearing. (Tr. 255-56 (Carter); RX 168 (Tr. 1230).) Other attorneys who had previously registered to take CJA cases, but who had reduced the number they were taking or had dropped out of the program entirely before the strike, returned to become active CJA practitioners. (Tr. 858 (Koskoff).) Experts and participants in the system testified without contradiction that the increased rates would improve the quality of legal services provided to indigent criminal defendants. (C.A. App. 160-61, 254-56, 497-98; Tr. 1539-40 (Lefstein); Tr. 1153-54 (Hazard); Tr. 726, 728-29 (Perrotta).)

7. The Political Functions of the Strike

At the hearing before the Administrative Law Judge, there was extensive testimony concerning the political functions of the strike. Then-Bar President David Isbell described the strike as "an effort directed toward bringing effective public attention to the problem of inadequate compensation," and Dean Branton described it as "a form of lobbying" to which the lawyers were "driven . . . because of the economic plight they found themselves in." (C.A. App. 385, 416.) John H. Pickering, who was immediate past president of the D.C. Bar at the time of one of the major study group reports, similarly described the strike as a form of lobbying, noting that its success "simply indicates that eventually everybody understood that there was a legitimate grievance here that impacted severely on the administration of justice and it was time to do something about it." (C.A. App. 293, 309-10.)

There was also uncontroverted testimony at the hearing linking the strike, media coverage, and petitioning efforts. For example, Professor Robert H. Salisbury, a professor of political science at Washington University in St. Louis and an expert on interest group politics (Tr. 979-81), explained that "media coverage is absolutely vital" for those who lack the resources necessary to influence legislation directly and must mobilize public attention. (C.A. App. 285.) Sterling Tucker, former chairman of the D.C. Council, testified that D.C. government officials and Council members regarded the media "as very important in establishing public opinion, building public support, influencing the outcome of decisions, [and] affecting the decision making process generally in and out of government." (C.A. App. 356; *see also* C.A. App. 353-55.) There was also expert testimony that "direct action" is often the only way of attracting media attention for groups lacking status and prestige, and that boycott-like actions are often far better ways of obtaining continuing attention than other actions such as demonstrations. (C.A. App. 285-88 (Salisbury).)

Mr. Tucker also explained why both legislators and strikers would be particularly likely to view the strike as political in the District of Columbia. Noting that most members of the D.C. Council itself had personal experience with "direct action" in the period before Home Rule (C.A. App. 344-50), he stated:

> We have been a part of the civil rights movement. We have been a part of the movement to achieve justice and to acquire [services] in this community. . . . And it is one of the strategies to produce change and we regarded it or I regarded it as such and I am sure that my colleagues did. As a matter of fact, there was never any discussion about it particularly because we just accepted it. That was practically true of all members of the council, including the current Mayor. And I think that probably people in Washington feel and felt freer to use tactics of various kinds and strategies which to some might appear extreme because . . . they know that we understood both the philosophy of such strategies as well as the actions of such strategies. And so they knew that we wouldn't be intimidated by it. I wouldn't regard it as particularly unusual.

(C.A. App. 349-50.)

8. The Proceedings Below

Following a three-week hearing, the Administrative Law Judge filed an initial decision recommending dismissal of the complaint. (Pet. App. 229a.) The FTC, with two members not participating,[9] reversed, holding that the strike was a *per se* antitrust violation under the standards of Section 1 of the Sherman Act, and, in the alternative, an unreasonable restraint of trade if judged under a truncated rule of reason. (Pet. App. 86a-98a.) The Court of Appeals, in turn, reversed and re-

[9] Pet. App. 68a. The FTC's brief is thus quite correct in twice referring to the decision as "unanimous" (FTC Br. 6, 14), since three votes are required for the Commission to issue a final order.

manded for a determination of whether the striking CJA lawyers possessed market power. While rejecting Respondents' contention that the strike was not within the scope of the antitrust laws under the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), (Pet. App. 32a-45a), the court held that where the "special concern of the First Amendment with efforts to petition the government for redress of one's grievances" was at stake, a presumption of anticompetitive effect without proof of market power was more restrictive than essential to furtherance of the government's interest and thus ran afoul of the test set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). (Pet. App. 47a-51a.)[10]

The FTC's petition for reconsideration and suggestion for rehearing *en banc* was denied on October 25, 1988. On January 23, 1989, the FTC petitioned this Court for certiorari and on February 22, 1989, Respondents cross-petitioned for certiorari. This Court granted certiorari on both petitions on April 17, 1989.

SUMMARY OF ARGUMENT

The record in this case establishes beyond question that the CJA lawyers' strike constituted petitioning of a legislature and served the traditional functions of such petitioning. As such, it implicates important First Amendment values which, under standard principles of statutory construction, should not be invaded unless the clear intent of Congress permits no other course. Through the *Noerr* doctrine, this Court has already construed the

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[10] In view of this disposition, the Court of Appeals did not rule on the CJA lawyers' contention that, even if a violation could be found, the FTC's order is overly broad and not reasonably related to the remedial purpose of the FTC Act. Should this Court reverse the Court of Appeals on the basis asserted by the FTC, remand to the Court of Appeals for a determination on this issue will be required.

Sherman Act not to reach conduct whose context and nature establish that it is political rather than commercial. That doctrine is fully applicable here: the strike was open and, indeed, highly publicized; it was directly aimed at generating media attention and creating the political climate necessary for the legislature to act; the government officials that were the ostensible targets of the strike made no attempt to discourage the strikers, but instead made clear that action of that kind was necessary to enable them to pass the legislation without incurring undue political risk; and the government retained at all times the power to end the strike, as the strikers were fully aware. In these circumstances, the court below should have required dismissal of the complaint, and insofar as it failed to do so, its decision should be reversed.

Because dismissal should be required without regard to market power, it is not necessary for this Court to reach the questions presented in the FTC's petition in No. 88-1198. If those questions are reached, however, the Court should affirm the Court of Appeals' holding that the CJA lawyers' strike could not be condemned without a showing of market power. That holding may be affirmed on statutory grounds, for a legislative petitioning boycott is not the kind of conduct that almost inevitably has a pernicious effect on competition and lacks any redeeming virtue. The conditions for applying the *per se* rule are therefore not present. Moreover, because a legislative petitioning boycott by parties without market power cannot be economically coercive, such a boycott falls squarely within the policy of *Noerr*.

Alternatively, the decision of the court below may be affirmed on the First Amendment grounds on which it rested. Application of a *per se* rule to the CJA lawyers' strike would restrict political petitioning and expression far more broadly than reasonably necessary to further the governmental interest in protecting competition, and thus must be struck down under the standards announced in

cases such as *Ward v. Rock Against Racism*, 57 U.S.L.W. 4879 (U.S. June 22, 1989) and *Board of Trustees v. Fox*, 57 U.S.L.W. 5015, 5018 (U.S. June 29, 1989).

The FTC also argues that, even assuming market power must be shown, it may satisfy that burden by a "truncated" rule of reason that relies on the mere fact that the lawyers succeeded in getting the legislature to increase the price for the services they provided. Applying a "truncated" analysis to these facts, however, would ignore the very reason for using a rule of reason in the first place. The FTC's question-begging analysis cannot be accepted.

ARGUMENT

I. THE CJA LAWYERS' STRIKE IS BEYOND THE SCOPE OF THE SHERMAN ACT

A. The Strike Constituted Petitioning and Served the Traditional Functions of Petitioning

It is axiomatic that a statute should be interpreted to avoid potential constitutional problems unless such an interpretation is contrary to the plain intent of Congress.[11] In keeping with this principle, this Court held in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), that genuine efforts to petition the legislature are not within the scope of the Sherman Act,[12] even if the techniques used are indirect and even if they result in incidental direct anticompetitive effects in the marketplace. In so holding, the Court observed that the "right of petition is one of the freedoms pro-

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[11] *Gomez v. United States*, 57 U.S.L.W. 4643, 4644 (U.S. June 12, 1989); *Crowell v. Benson*, 285 U.S. 22, 46 (1932).

[12] The FTC concedes that Section 1 of the Sherman Act, 15 U.S.C. 1, controls its decision. (FTC Br. 5-6 n.7). Accordingly, the relevant antitrust statute in this case is the Sherman Act of 1890, not the Federal Trade Commission Act of 1914. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454-55 (1986).

tected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138.

The reach of the *Noerr* doctrine depends, of course, on "the source, context, and nature of the anticompetitive restraint at issue." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931, 1936 (1988). The FTC contends that the nature of Respondents' conduct is such that it implicates no First Amendment values whatsoever. In the opinion accompanying its order, the FTC declared that the strike constituted "disruption of the normal channels of government decision-making . . . wholly unlike lobbying, and the policy reasons for protecting lobbying do not apply to it." (Pet. App. 122a.) Similarly, the FTC maintains here that the strike is not speech at all, let alone political speech, and thus does not warrant even the limited protection accorded by *United States v. O'Brien*, 391 U.S. 367 (1968). (FTC Br. 25-26.) Legislation has been likened to a dance,[18] but the FTC evidently sees no element of choreography here; it finds incomprehensible, and therefore declares nonexistent, a process in which the executive and virtually all of the legislators can agree on the need for a particular measure, yet require an elaborate direct-action campaign, complete with striking lawyers, picket lines, press releases, and television crews, to mobilize the political support necessary for its passage.

Contrary to the FTC's position, however, the record in this case leaves no doubt that the strike constituted legislative petitioning and served the traditional functions of such petitioning. Witness after witness testified about the petitioning functions of the strike (*e.g.*, C.A. App. 270-92 (Salisbury), 308-10 (Pickering), 343-51, 353-62 (Tucker), 384-85, 398-99 (Isbell), 414-16 (Branton); *see also* C.A. App. 182-88 (Perrotta), 227-29 (Koskoff),

[18] *See generally* E. Redman, *The Dance of Legislation* (1973).

253-54, 509-10 (Addison), 451-52 (Hirsch), 461-62 (Pickens)), and not a single witness contradicted them. As Respondent Perrotta observed, the strike was "an opportunity for the community at large beyond the handful of leaders whom we had seen, to respond to our request and to react to it." (C.A. App. 184.) Not only did it give columnists and writers of letters to the editor an opportunity to express their opinions, but

> [t]here was an opportunity for Harold Greene, former Chief Judge of the Superior Court to express himself and there was an opportunity finally even for Judge Moultrie who was so sensitive about potential conflict that he faced [to express an opinion].
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> * * * *
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> Judge Moultrie [had] never asked for the money. Finally Judge Moultrie asked for the money in a sense and I think the Mayor is in a position at that point to say, well, now I know that the community is really behind this, everybody is behind it. No one came out against it.

(C.A. App. 185-86.)

The strike also permitted the Mayor and Council members to test the public reaction without unnecessarily risking political capital:

> [F]or all that the Mayor knew in advance, the reaction might well have been, we have serious budget problems, why are you giving money to a bunch of lawyers who are already making $20 an hour? That is twice as much as anyone else makes, of working people in the city.
>
> The reaction might have been the crime rate is already so enormous . . . .
>
> There might have been all kinds of reactions. And it was clear with the focal point of the strike that that was not going to be the reaction and, consequently, [it was] like political theatre in a sense.

(C.A. App. 186-87 (Perrotta).)[14]

Indeed, although the ALJ felt bound by prior FTC precedent to reject Respondents' *Noerr* defense, he could only conclude after surveying this record:

> city officials (and practically everyone else concerned with the criminal justice system) were convinced in 1983 that (a) the optimal economic price was inadequate to satisfy the "political" (i.e., constitutional) requirement of effective representation, and (b) the CJA lawyers were unlikely to achieve higher fees if they continued to rely on communicative political petitioning alone. The perceptions of these local officials (whose judgment is not easily susceptible to second-guessing since they not only must provide for equal justice under law, but also must pay for it) would seem to argue strongly against pressing for an unnecessary and possibly uncertain confrontation be-

[14] The "testing the waters" function of the strike demonstrates the irrelevance of the ALJ's finding that "there is no credible evidence that the District's eventual capitulation to the demands of the CJA lawyers was made in response to public pressure, or, for that matter, that this publicity campaign actually engendered any significant measure of public pressure." (Pet. App. 194a.) It is unclear what the ALJ meant by "public pressure," since he found, at the same time, that the strike "did attract media attention and editorial support." (*Id.*) Such support was of major political significance, whether or not it constituted "pressure."

It was thus unnecessary, although clearly correct, for the court below explicitly to decline to credit the ALJ's finding concerning public pressure on the ground that it was not specifically adopted, and was therefore rejected, by the Commission. (Pet. App. 54a.) It is also unnecessary to invoke the principle that a reviewing court must examine the evidence critically where there is otherwise a risk that liability will be imposed for constitutionally protected conduct, *see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 & n.50 (1982), although that principle would clearly be applicable if the ALJ were taken to mean that there was not a significant outpouring of media support. That finding, which the ALJ did *not* make, would have been contrary to the uncontroverted evidence. (C.A. App. 182-88, 285-88, 353-56, 509-10, 921-54 (Tr. 619).)

> tween the Commission's antitrust perspective . . . and broader constitutional principles . . . .

(Pet. App. 227a.)

It is thus clear on the record that the CJA lawyers' strike served the traditional functions of petitioning, and was so perceived by those whose judgments ought to matter most—those being petitioned.[15]

B. The Political, Legislative, and Petitioning Context and Nature of Respondents' Conduct Demonstrate that the Strike Falls Within the Scope of the *Noerr* Doctrine

The court below avoided the FTC's error of assuming that the strike implicated no First Amendment value at all. It acknowledged that "[u]nlike *Allied Tube*, the relevant conduct here did take place in a political context —the legislative arena . . . ." (Pet. App. 37a.) Because the activity in question constituted a "concerted refusal to deal by competitors," however, the court believed that the "nature" of the activity foreclosed *Noerr* treatment. *Id.*

Such use of labels ignores the careful, context-specific approach taken by this Court in *Allied Tube*. That case involved the packing of a meeting of a private standard-setting organization with new members "whose only func-

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[15] The petitioning functions of a boycott have previously been recognized by this Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914-15 (1982). This Court there observed that a boycott staged to influence governmental action implicates speech, assembly, association, and petitioning protected by the First Amendment. 458 U.S. at 911. The Court recognized a broad "right of the States to regulate economic activity," but held that it "could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." *Id.* at 914. The complete prohibition against politically motivated boycotting which the FTC seeks in this case would trench upon First Amendment values no less.

tion would be to vote against" a competitor's proposal. 108 S. Ct. at 1935. The conduct "did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but within the confines of a private standard-setting process." *Id.* at 1940. Although the code established by that organization did have an indirect legislative impact in that many state and local governments routinely adopted the code into law with little or no change, it also had direct competitive effects in that the code directly influenced the commercial practices of private certification laboratories, underwriters, electrical inspectors, contractors, and distributors. *Id.* at 1934. In these circumstances, this Court characterized the conduct as "commercial activity with a political impact," and therefore outside of *Noerr*. *Id.* at 1941. Noting, however, that it is

> difficult to draw the precise lines separating anticompetitive political activity that is immunized despite its commercial impact from anticompetitive commercial activity that is unprotected despite its political impact,

id. at 1941 n.10, the Court cautioned that "our decision today depends on the context and nature of the activity." *Id.* And even the packing of a private standard-setting meeting was found to be "close to the line." *Id.*

Unlike *Allied Tube*, the conduct here was open and notorious, and, indeed, publicity was a central motive and feature of the strike. That alone should counsel caution in applying the antitrust laws. If actions are taken openly, legislatures have ample means at their disposal to control conduct that they believe harmful to the proper functioning of the political process [16] without resorting to

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[16] Congress has done so, for example, in the federal election laws. *See Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (upholding in part and striking in part provisions of the Federal Election Campaign Act). In the instant case, the D.C. Council could have used the long period between the strike announcement and its implementa-

a statute tailored, not to that end, but to protecting the functioning of commercial markets.[17] The legislative process is, by nature, rough-and-tumble; as this Court observed in *Noerr*, "no-holds-barred fight[s] . . . are commonplace in the halls of legislative bodies . . . ." 365 U.S. at 144; *see also California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (contrasting the scope of acceptable conduct in the legislative and adjudicatory arenas).

Moreover, the special circumstances of this case make clear that the CJA lawyers' strike, unlike the meeting-packing scheme in *Allied Tube*, is far from "close to the line," but instead was very clearly political in nature. The strikers were given the unmistakable political message that they would have to "do something dramatic" to develop support for the legislation. When they announced their strike, the Mayor did not discourage them, but instead told them "you do what you have to do," and explained how the emergency legislative process worked. (Pet. App. 187a.) The lawyers were subject to the full power of the Superior Court, which could have ordered them to take cases. (*See supra* p. 16 n.7.) Indeed, Respondent Koskoff took a case *pro bono* at a judge's request. (C.A. App. 229-30.) Instead of exercising com-

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tion to put substantial pressure on the CJA lawyers. A proposal for a large increase in the PDS appropriations, for example, could have raised the spectre of a major, long-term reduction in the need for CJA services, thus threatening the livelihoods of many of the CJA lawyers. A similar effect might have been achieved had either the Council or the Superior Court instituted a "draft" of lawyers—or even if PDS had undertaken more vigorous efforts to obtain volunteers—thus showing the lawyers that the battle would be a protracted one.

The fact that such tools are available to a legislature demonstrates the speciousness of any suggestion that application of the *Noerr* doctrine to public, petitioning boycotts directed at a legislature would lead to dire consequences. *See infra* pp. 40-42.

[17] *See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 491-97 (1940).

pulsion, "several judges went out of their way to volunteer . . . how pleased they were at [the lawyers'] success." (C.A. App. 187 (Perrotta).) The PDS announced an imminent "crisis" at a time when it had contacted only a fraction of the law firms that might have offered help, and the director of PDS admitted on the stand that one of the principal purposes of doing this was to prompt all three branches of government to take immediate action to pass the legislation in question. (C.A. App. 119-20 (Carter); *see supra* p. 15 & n.6.)

The ALJ described this case as one in which the strikers had the D.C. government's "knowing wink." (Pet. App. 226a.) Though this is an accurate description of the record, it may have been an unfortunate phrase, one which may have led astray both the FTC and the court below. The FTC, for example, cites *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226-27 (1940), for the proposition that a "knowing 'wink' . . . of government employees or other boycott targets" [18] does not bear on a boycott's legality. (FTC Br. 44 n.40.) That argument misses the point. While a government official may not grant an exemption from the antitrust laws that Congress has not authorized, the perception of government officials—especially elected officials—that they are being lobbied rather than coerced certainly casts light on whether the conduct is "political" within the meaning of *Allied Tube*. Just as "a good intention will [not] save an otherwise objectionable [restraint]," yet is relevant where it "help[s] the court to interpret facts and to predict consequences," [19] so too the fact that D.C. officials recognized

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[18] Of course, *Socony* had nothing to do with boycott targets, governmental or otherwise; the Court was simply denying government officials the ability to grant unauthorized exemptions from the antitrust laws with respect to ordinary conspiracies to restrain competition in commercial markets. *See* 310 U.S. at 226-27.

[19] *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

and encouraged the political uses of the strike is surely germane to the political "context and nature" *Allied Tube* makes dispositive.

Allied Tube counsels us to consider the *entire* context and nature of the challenged activity. *See* 108 S. Ct. 1939-42 & nn.10, 11. Through this lens, the CJA lawyers' conduct was clearly a "publicity campaign directed at the general public, seeking legislation." *Allied Tube*, 108 S. Ct. at 1936, citing *Noerr*, 365 U.S. at 140-41. As such, it is not reached by the Sherman Act.

II. EVEN IF THE SHERMAN ACT WERE TO REACH RESPONDENTS' STRIKE, SUCH A STRIKE COULD NOT BE CONDEMNED WITHOUT A SHOWING OF MARKET POWER

A. The Antitrust Laws Do Not Reach Petitioning Conduct By Persons Without Market Power

Although the Court of Appeals concluded that the antitrust laws encompass economic coercion of governmental action, and therefore could in principle reach a petitioning boycott, it held that condemnation of the CJA lawyers' strike under the *per se* rule was a broader restriction of First Amendment activity than necessary to further the government's interest in preserving competition, and therefore was forbidden by the First Amendment. (Pet. App. 45a-51a.) In this latter holding, the court was correct, as we explain *infra* at pages 42-46. However, in keeping with the principle that the Court should not reach the constitutional issue if a reasonable construction of the statute will avoid it, we first explain why the *per se* rule should not be applied in this context as a matter of statutory construction.

1. *Conduct Designed Only to Secure Legislation Cannot Be Presumed to Have a Pernicious Effect on Competition and to Lack Any Redeeming Virtue*

This Court has repeatedly emphasized that the *per se* rule should be reserved for those restraints that "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable . . . without elaborate inquiry . . . ." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).[20] A presumption of this kind is reasonable "when surrounding circumstances make the likelihood of anticompetitive [effect] so great as to render unjustified further examination of the challenged conduct." *NCAA v. Board of Regents*, 468 U.S. 85, 103-04 (1984).[21] As the court below observed, such *a priori* judgments "may occasionally be overinclusive, condemning the ineffectual with the harmful"; but this overbreadth is tolerated because the types of arrangements so condemned "rarely, if ever, have redeeming virtues." (Pet. App. 49a.)

The basic reason for outlawing cartels and similar "naked" restraints on price or output is that "[i]n the absence of legal impediments, competitors will often join together in the hope of restricting output and achieving higher prices," much as a monopolist would. P. Areeda, *Antitrust Analysis* 322 (3d ed. 1981). The high price, in other words, is a result of the restricted output, and it can be formally demonstrated that the result is a loss to overall consumer welfare. *See id.* at 13-17.

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[20] *Accord Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 8 (1979); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

[21] *Accord Business Elecs. Corp. v. Sharp Elecs. Corp.*, 108 S. Ct. 1515, 1519 (1988); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15-16 n.25 (1984).

The presumption of such a loss cannot be justified, however, in the case of conduct intended to generate public support for legislation. In such a case, the predominant effects upon consumers flow from governmental action, and are likely to be quite different from those usually associated with a cartel. In this case, for example, there is no "demand" for CJA lawyers' services apart from the constitutional command of the Sixth Amendment and the decisions of legislatures, executive branch officials, and courts implementing that command.[22] "Demand" is therefore in large part a function of *political* choices and of the political processes by which those choices are made. If the strike succeeded by triggering public discussion and creating the political climate necessary for the bill's passage, then it had its effect by a politically-driven increase in *demand* for improved quality rather than by a restriction in *supply* by a cartel. To apply a *per se* rule would be to deny that possibility and to insist that, in every case, the effect must be presumed to flow from a cartel-like restriction. Nothing

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[22] The FTC persistently ignores the role of the legislative and executive branches in fulfilling the Sixth Amendment guarantee, arguing that the record fails to show that the pre-boycott rates resulted in significant Sixth Amendment violations. (*See* FTC Br. 22-24.) The issue here, however, is not whether Respondents have proved, at a hearing before an Administrative Law Judge of the FTC, that there have been widespread violations of Sixth Amendment rights, but whether the judicially-created *per se* rule should be used to foreclose a form of communication seeking to vindicate such rights legislatively. The strikers—and "every expert who had studied the problem" (Pet. App. 225a, 227a; *see also* Pet. App. 170a-78a)—*believed* that Sixth Amendment rights were at stake. This Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), imposed no requirement that systematic violations of the constitutional rights of blacks in Claiborne County, Mississippi be proved in court as a prerequisite to political action. The FTC seems to envision a vastly diminished role for the legislature in protecting constitutional rights—a world in which constitutional rights could be vindicated *only* in the courts.

in the antitrust laws requires so constricted a view of how political processes work.[23]

The FTC's repeated incantation of the term "price-fixing"[24] does not change this analysis. As this Court has observed, "easy labels do not always supply ready answers." *Broadcast Music*, 441 U.S. at 8. One can dispute whether the governmental action in this case flowed from persuasion or coercion—and, indeed, that is what the Court of Appeals' market power test was designed to sort out. One *cannot* dispute, however, that the only

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[23] The noted economist Albert O. Hirschman, whose name is well-known to antitrust practitioners as part of the Herfindahl-Hirschman index, once remarked on the aversion of economists to the "messy" concepts needed to understand the political sphere:

> [V]oice [political expression] is just the opposite of exit [individual decisions to stop buying or selling a product]. It is a far more 'messy' concept because it can be graduated, all the way from faint grumbling to violent protest; it implies articulation of one's critical opinions rather than a private, 'secret' vote in the anonymity of a supermarket; and finally, it is direct and straightforward rather than roundabout. Voice is political action par excellence.
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> The economist tends naturally to think that his mechanism is far more efficient and is in fact the only one to be taken seriously . . . .
>
> * * * *
>
> [T]he decision to voice one's views and efforts to make them prevail are contemptuously referred to . . . as a resort to 'cumbrous political channels.' But what else is the political, and indeed the democratic, process than the digging, the use, and hopefully the slow improvement of these very channels?

A. Hirschman, *Exit, Voice, and Loyalty* 16-17 (1970).

[24] FTC Br. (I), 10, 11, 12, 13, 14, 16, 17, 23, 24, 26, 28, 29, 32, 35-36, 37 n.34, 39 n.36, 40, 42, 43, 44, 45. A notable example of characterization-by-calling-it-so is the first heading in the FTC's argument: "THE USE OF PRICE-FIXING TO LOBBY IS NOT IMMUNE FROM ANTITRUST LIABILITY UNDER THE FIRST AMENDMENT." (FTC Br. 14.)

effect on *price* in the "market" for legal services for indigent criminal defendants flows solely from governmental action, since the price is fixed by statute. That effect on *price* cannot be what this case is about. *See Parker v. Brown*, 317 U.S. 341 (1943). Rather, the issue is whether either the Sherman Act or the *per se* rule reaches the way in which that governmental action was achieved.

We explained in Part I why the Sherman Act does not, in fact, reach the way in which the governmental action was achieved. But even if the Sherman Act were to reach such conduct, and even if "coercion" of the governmental desire for increased quality of representation could be treated as an anticompetitive effect, there would be no *a priori* reason to assume that the CJA lawyers' strike succeeded through such "coercion" rather than through publicity and persuasion. As the concurring opinion below pointed out, "a boycott . . . [can] be either expressive or coercive," and the issue "is determining whether [the lawyers] in fact prevailed because of political appeal or commercial might." (Pet. App. 58a.)

The perversity of conclusively presuming anticompetitive effect, purpose, or coercion in the case of a petitioning boycott is graphically illustrated by this case. The Superior Court had the power to order any of the 14,000 active members of the D.C. Bar in private practice—including the 100-odd strikers themselves—to accept appointments under the Criminal Justice Act.[25] Although it appears that the judges generally refrained from appointing or even requesting the strikers to take cases,[26]

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[25] *See supra* p. 16 n.7.

[26] This may be because the strikers apparently enjoyed considerable support among the judges. Quite a number of the judges attended the CJA lawyers' press conference on the first day of the

one of the individual Respondents took a case during the strike, *pro bono*, at the request of a judge. (C.A. App. 822-23 (Koskoff).) Another stood to gain nothing from increased rates because she had already stopped taking cases in anticipation of leaving CJA practice, yet served as one of the leaders of the strike because she thought it was the "right thing to do." (C.A. App. 265-67 (Slaight).) Other CJA lawyers actually thought an increase in CJA rates would be harmful to their economic self-interest because it would attract more and better lawyers to CJA practice. (C.A. App. 498.) Attracting additional lawyers to CJA practice was articulated by some of the leaders of the strike as being a major purpose of seeking CJA rates. (CX 38-I (Tr. 167); C.A. App. 235-37 (Koskoff), 160-61 (Perrotta).) Finally, as the ALJ found, the targets of the strike, the city officials, were "supportive of the boycotters' demands" and viewed the strike as "the only feasible way of getting a rate increase," which was "supported by virtually all elements of the community concerned with implementing the public policy behind the Sixth Amendment." (Pet. App. 226a, 228a-29a.) Such facts might well compel a finding that—regardless of whether the strikers had market power and therefore *could* coerce the government—there was neither anticompetitive effect, nor purpose, nor *actual* coercion here. They surely invalidate any presumption to the contrary.

Thus, the underlying rationale of the *per se* rule itself militates against its application in this case.

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strike, and several went out of their way to congratulate the lawyers on the success of the strike after it was over. (JX 13 at 81-82 (Tr. 66) (Koskoff); C.A. App. 187 (Perrotta).)

2. *Where Market Power is Lacking, a Boycott Whose Sole Purpose is to Petition the Legislature and to Generate Public Support for Legislation Falls Squarely Within the Policy of the* Noerr *Doctrine*

If examination of the *per se* rule itself were not sufficient to caution against its indiscriminate use in the context of a petitioning boycott, consideration of the policies underlying *Noerr* surely would be. *Noerr* teaches that the right to petition the government is a fundamental one, and that an intent to invade it is not to be lightly imputed to Congress. 365 U.S. at 138. As demonstrated above (pp. 23-27), the CJA lawyers' strike constituted political petitioning and served the traditional functions of such petitioning. The only conceivable policy reason for holding *Noerr* inapplicable to a petitioning boycott is that such a boycott could be coercive. But even assuming *arguendo* that the policy of *Noerr* does not extend to economic coercion of governmental action, Respondents simply could not have achieved their political ends through the exercise of economic coercion if they lacked market power. They would have had no ability to do so. The effects of their conduct, then, could only have resulted from the public attention and debate generated by the strike. Hence, any success Respondents achieved would be purely a political success—and that kind of persuasion in the context of the legislative process is at the core of what *Noerr* protects.

The FTC argues that to require proof of market power in a case such as this one is "fundamentally inconsistent with the delicate balance" articulated by this Court in cases such as *Noerr* and *Claiborne Hardware*. (FTC Br. 26.) The FTC fails to explain, however, how the court below strikes that balance less "delicately" than does a *per se* rule—which would condemn alike a strike by all 14,000 active members of the D.C. Bar in private practice, by the approximately 100 lawyers involved in this

case, or by any two of the four individual Respondents, acting in concert only with each other to make a symbolic point. Surely the FTC's rigid view of the boundaries of *Noerr* is not what this Court had in mind when it declared in *Allied Tube* that the entire "context and nature" of the challenged activity must be taken into account.[27]

3. *Withholding Application of the* Per Se *Rule in the Case of Political Boycotts Would Not Require Departure From Basic Antitrust Principles*

In its petition for certiorari, the FTC acknowledged the flexibility that has been required in giving content and boundaries to the *per se* rule, but argued that such flexibility is totally inapplicable here:

> To be sure, this Court has sometimes reinterpreted the Sherman Act to alter the categories of restraints subject to *per se* condemnation. *E.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (non-price vertical restraints). But these changes

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[27] 108 S. Ct. at 1939-42 & nn.10, 11. The FTC's only apparent answer to this is that it will exercise its prosecutorial discretion, which "a reviewing court may [not] second-guess." (FTC Br. 37.) But with respect to the antitrust laws (unlike the speed limits cited by the FTC), the primary protection against harmful misapplication has been construction by the courts, not the talisman of prosecutorial discretion—in part, perhaps, because the antitrust laws are also enforced by private parties.

Moreover, the suggestion that the protection of important constitutional rights should he entrusted to prosecutorial discretion runs counter to the principle that where potential deprivations of such rights are at issue,

> it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use . . . . Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them.

Greene v. McElroy, 360 U.S. 474, 507 (1959) (citation omitted).

> have always flowed from changes in economic learning about the effect of certain categories of restraints upon competition.

(Petition at 13 n.10.) The FTC's position, in other words, is that the *per se* rule is sufficiently supple to accommodate the shifting tides of economic learning, but not the most fundamental values of the freedoms of expression and petition.[28]

This odd proposition apparently rests on the FTC's misperception that withholding application of the *per se* rule in a case such as this one requires a court to balance the interest in competition against some unrelated social good, contrary to the principle enunciated in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 694-96 (1978).[29] Such is not the case. The issue here is not whether a presumed exercise of market power can be justified by some other social good, but whether the presumption itself has any validity in the political context in which the conduct took place. (*See supra* pp. 32-36.) As Judge Silberman noted in the concurrence below,

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[28] *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). "[E]xpression on public issues 'has always rested on the highest rung of tbe hierarchy of First Amendment values.' '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" (Citations omitted).

[29] FTC Br. 38. The right to petition might, in fact, be the rare case in which sucb balancing would be required, for far from having "no redeeming virtue," political activity—even of a heavy-handed variety—was deemed in *Noerr* to be so fundamental to our system of government that Congress could not have intended, in a law aimed at trade restraints, to restrict it. *Noerr*, 365 U.S. at 140-41. *Cf. Claiborne Hardware*, 458 U.S. at 914 n.48, quoting with approval a lower court statement that "the right to petition is of such importance that it is not an improper interference [under state tort law] even when exercised by way of a boycott." For the reasons stated in text, however, this Court need not reach that possibility here.

> Since a boycott has the potential either to persuade or coerce . . . the only proxy we have for whether SCTLA relied on political or commercial power . . . is the degree of market power they enjoy. If they have none, the boycott must have succeeded out of persuasion and been a political activity.

(Pet. App. 60a.)

4. *Application of a Market Power Test Will Not Lead to the Dire Consequences Predicted by the FTC*

The FTC paints the consequences of the Court of Appeals' holding in apocalyptic terms, both within antitrust and beyond. (FTC Br. 33-40.) Its predictions are overdrawn.

In the first place, although the FTC finds it ironic that the federal antitrust laws might not be available to help in suppressing the next petitioning boycott (FTC Br. 34 n.29), it nowhere explains why it is *those* laws that must be invoked. Should this Court hold that a market power test governs on statutory grounds, any government—federal, state, or local—that feels its political processes to be threatened unduly by the spectre of boycotts by the economically powerless will remain free to test the accommodation between First Amendment values and its interest in protecting the purity of its political processes by drawing its own line in a different place.[80]

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[80] This also disposes of the FTC's suggestion that laws prohibiting public employee strikes could not survive the Court of Appeals' holding. (FTC Br. 38-39.) Both the interpretation of Congressional intent and the degree to which the means employed are adequately tailored to the governmental interest to be served vary with the specific statute in question. The FTC's citation (FTC Br. 27-28 n.21) of *International Longshoremen's Association v. Allied International, Inc.*, 456 U.S. 212 (1982) is inapposite for the same reason, particularly since antitrust liability on the same facts was *rejected*. *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1379-81 (1st Cir. 1981), *aff'd on separate issue*, 456 U.S. 212 (1982).

Moreover, the possibility that doctors, insurance companies, or others might also seek rule of reason treatment for similar conduct is an argument against a market power test only if it is *assumed* that in virtually all such cases the conduct would have a pernicious effect on competition and lack any redeeming virtue. In many cases, that assumption is untenable (as, for example, where the boycott is too limited in duration or participation to have any effect other than through publicity and persuasion). In other words, the FTC's example simply begs the question and amounts, at bottom, merely to a complaint about the government having to meet its burden of proof.

Finally, the FTC concedes that boycotts of the kind it fears "have thus far been infrequent." (FTC Br. 33.) But this is not because, as the FTC would have it, "most people have considered them illegal *per se*." (*Id.*) Many potential political boycotters probably have never heard of the *per se* rule against group boycotts, if indeed they are even familiar with the antitrust laws. Rather, the rarity of such boycotts reflects the fact that the target—the government—typically exercises a great deal of control over the fate of potential political boycotters, since such boycotters often depend on the government for their livelihood and are generally at its mercy. Consequently, most political boycotts are in fact carried out by picturesque "little people" in the Jeffersonian tradition—independent farmers, gasoline station operators, and the like—who have few alternative means of political expression (C.A. App. 272-73, 286, 291-92 (Salisbury); C.A. App. 415-16 (Branton)), and can hope for sympathetic coverage when they appear on the evening news pouring milk down the drain or otherwise dramatizing their plight. The extent to which such protests rely on sympathy to succeed is poignantly illustrated in the instant case, in which the court refrained from exercising its appointment power, the PDS refrained from contacting many of the law firms that might have offered help in keeping the court system operating, and the Mayor gave the protesters ad-

vice about how he would approach the matter "as an old organizer." (C.A. App. 110-11, 117-30, 193, 234, 310, 315-18, 330, 332-33, 342, 373, 422-28, 487-89, 521-22.)

Thus, regardless of how this Court rules, actions such as the lawyers' strike are likely to remain rare; the government, even without the antitrust laws, is far from powerless; and, as former D.C. Council Chairman Sterling Tucker put it, the government would "probably laugh in their faces" if these lawyers or some other group tried to repeat the strike without a strongly meritorious case. (C.A. App. 366-67.)[31]

B. Application of the *Per Se* Rule to Petitioning Boycotts Would Unnecessarily Restrict Political Expression and Would Therefore Violate the First Amendment

The court below held that application of a *per se* rule to Respondents' petitioning boycott would be more restrictive than essential to the government's interest in preserving competition, and hence barred by *United States v. O'Brien*, 391 U.S. 367 (1968). In this it was clearly correct. For all the reasons set forth above (pp. 38-40), application of the *per se* rule is not only unneces-

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[31] The infrequency of petitioning boycotts for reasons entirely independent of the antitrust laws also disposes of the fear of the court below that, in the case of parties *with* market power, applying the *Noerr* doctrine would be "the stuff of which economic chaos is made . . . from which the Sherman Act has shielded this country for almost a century." (Pet. App. 45a.) Indeed, there is no indication that in the century *before* the Sherman Act, "economic chaos" engulfed the Republic as a result of political boycotts by powerful groups. The FTC's suggestion that large corporations might be tempted to engage in expressive boycotts (FTC Br. 35 n.31) is belied by the fact that such corporations, which were not thought by the Sherman Act Congress to be shy about expressing their power in other respects, seem to have had no penchant for petitioning boycotts. Rather, the petitioning boycott has traditionally been the tool of the disenfranchised and the powerless. (*See* C.A. App. 272, 279, 286 (Salisbury).)

sary to the governmental interest in preserving competition, but is contrary to basic principles underlying the *per se* rule itself.

The FTC challenges this holding, arguing that the *per se* rule makes it easier to find defendants guilty of antitrust violations and that this ease serves administrative convenience and efficiency. It relies on *United States v. Albertini*, 472 U.S. 675 (1985), and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), as establishing that administrative convenience is itself a substantial governmental interest that may justify abridgement of First Amendment freedoms. (FTC Br. 30, 31.)[32]

The FTC apparently reads *Albertini* and *Clark* as freeing the government from the need to distinguish the harmless from the harmful unless it can do so at no cost whatsoever. That cannot be the law, however. A complete ban on handbilling is, no doubt, the most efficient way of preventing that activity from contributing to litter, yet this Court has held that more tailored means were constitutionally required. *Schneider v. State*, 308 U.S. 147, 162-63 (1939); *see also Martin v. Struthers*, 319 U.S. 141, 147-48 (1943). To prevent unnecessary restrictions of expression, this Court has consistently required that the government pursue its ends through means "narrowly tailored to serve the government's legitimate content-neutral interests." *Ward v. Rock Against Racism*, 57 U.S.L.W. 4879, 4884 (U.S. June 22, 1989). Thus, even where only the lesser interests served by commercial speech are at stake, there must be

> a 'fit' between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents

[32] The FTC also argues that the strike was not petitioning or communicative activity at all, and hence does not even trigger the *O'Brien* analysis. (FTC Br. 25-28.) This argument may be dismissed out of hand. As demonstrated above (pp. 23-27), the record is replete with evidence of the petitioning and communicative functions of the strike.

> not necessarily the single best disposition but one whose scope is 'in proportion to the interest served' that employs . . . a means narrowly tailored to achieve the desired objective.

Board of Trustees v. Fox, 57 U.S.L.W. 5015, 5018 (U.S. June 29, 1988) (citations omitted). Moreover, "the State bears the burden of justifying its restrictions," and "must affirmatively establish the reasonable fit . . . require[d]." *Id.*

That "fit" cannot be established here. Congress' ends simply do not require the degree of overinclusiveness the FTC seeks. Even where no First Amendment interests are at stake, the *per se* rule is only appropriate where the likelihood that it would correctly identify anticompetitive conduct is so great that further examination is unjustified. *NCAA*, 468 U.S. at 103-04. Given that petitioning boycotts have been a traditional tool of the disenfranchised, rather than the economically powerful (C.A. App. 272-73, 286, 291-92 (Salisbury); C.A. App. 415-16 (Branton)), and given the reasons why, as an economic and political matter, such a boycott can succeed without at all implicating competitive concerns (*see supra* pp. 32-36), there is no reason to believe that a *per se* rule would be correct even in a majority of petitioning boycotts, let alone the overwhelming majority that would be required. In sum, the infringement of expression which application of the *per se* rule would impose is far out of proportion to the advancement of statutory objectives it would serve.

Of course, the government need not show that the rule it has applied is the least restrictive available in judicial hindsight. But there is no hindsight involved here. The rule of reason was no stranger to the FTC when it decided that an entire method of expression and petitioning should be subordinated to the ease of labeling conduct "price-fixing." To the contrary, the rule of reason is the "traditional framework of analysis" under Section 1 of the Sherman Act, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977), and the standard

under which most restraints are analyzed. *United States v. Topco Assocs.*, 405 U.S. 596, 607 (1972). *See also Business Elecs. Corp. v. Sharp Elecs. Corp.*, 108 S. Ct. 1515, 1519 (1988).

Clark and *Albertini* also teach that a court should not arrogate to itself a regulatory role properly reserved to a legislature or delegated to an agency. *See Clark*, 468 U.S. at 299; *Albertini*, 472 U.S. at 689. But this principle has no application here. Unlike *Clark* and *Albertini*, which involved statutes or regulations whose plain language proscribed the challenged conduct, this case involves a statute that is cast in the broadest terms, has always required extensive judicial elaboration, and has purposes that are far removed from the conduct at issue. Determining the scope of the *per se* rule is quintessentially a judicial function, and it is hardly likely that the court below was insensitive to the administrative practicalities of proving an antitrust case.

This Court's recent decision in *Ward v. Rock Against Racism*, 57 U.S.L.W. 4879 (U.S. June 22, 1989), is instructive. In testing whether a noise regulation burdened more speech than necessary to further the government's legitimate interests, the Court reiterated the principle that "[a] complete ban can be narrowly tailored . . . only if each activity within the proscription's scope is an appropriately targeted evil." *Id.* at 4884, quoting *Frisby v. Schultz*, 108 S. Ct. 2495, 2503 (1988). The Court emphasized the limited restriction of expression at issue, noting that the

> guideline does not ban all concerts, or even all rock concerts, but instead focuses on the source of the evils the city seeks to eliminate . . . and eliminates them *without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils.*

57 U.S.L.W. at 4884 n.7 (emphasis added).[83]

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[83] *Rock Against Racism* also notes that if the regulatory scheme had a "substantial deleterious effect" on the speech involved, the

In contrast, the *per se* rule adopted by the FTC would ban *all* expressive boycotts by competitors, no matter how clearly symbolic, no matter how small a fraction of the available suppliers they may represent, no matter how brief in duration their boycott is, and no matter how much power the putative victim may have to end the boycott by legislative or judicial fiat. That such a total ban on politically motivated boycotting is unacceptably overbroad has already been established. In *Claiborne Hardware*, this Court acknowledged "the right of the States to regulate economic activity," yet held that it "could not justify a *complete prohibition* against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." 458 U.S. at 914 (emphasis added). No reason is apparent for the First Amendment to be more tolerant of a "complete prohibition" adopted for the administrative convenience of the FTC.

III. A "TRUNCATED" RULE OF REASON IS NOT APPROPRIATE FOR ASSESSING RESPONDENTS' CONDUCT

The FTC suggests that it might satisfy its burden of showing market power by the mere fact that the lawyers succeeded in getting the legislature to increase the price for the service they provided. (FTC Br. (I), 40-45.) It

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speakers' concerns "would have considerable force." 57 U.S.L.W. at 4885. In light of the statements made by Dean Branton and the Mayor to Respondents prior to the strike, the findings of the ALJ regarding the perceived total ineffectiveness of other means of petitioning, and the testimony of Prof. Salisbury regarding the relative effectiveness of various means of seeking media attention, the deleterious effect of a broad, untailored rule cannot be doubted. (*See* C.A. App. 402-05, 409-11 (Branton); Pet. App. 227a; C.A. App. 285-88 (Salisbury).)

seeks, in other words, to sustain its order on the basis of the only "rule of reason" analysis it has ever undertaken —a "truncated" analysis of the type used in *NCAA v. Board of Regents*, 468 U.S. 85, 113 (1984). (Pet. App. 92a-98a.)

Applying a truncated analysis to these facts, however, ignores the very reason for using a rule of reason analysis in the first place. Unlike the case where a party advances plausible efficiencies to justify an otherwise naked restraint, the political aspects of the conduct here raise the issue of whether there was an adverse competitive effect in the first instance. To treat the legislative increase in price as a "demonstrated anticompetitive effect," obviating the need for a market power inquiry, is simply to beg the question.[84] As the court below noted:

> The normal assumptions regarding cause and effect in an economic market cannot be transplanted wholesale into the political arena. . . . There are reasons to pause before inferring market power from detrimental effects when political power may be the more explanatory variable.

(Pet. App. 53a.)

Indeed, if there was any failing in the Court of Appeals' handling of the market power issue, it was in failing to hold as a matter of law that the record dem-

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[84] Such question-begging appears to have infected the FTC's handling of the market power issue at all levels. The ALJ's opinion, in language omitted from the quotation at FTC Br. 41-42 n.37, stated: "The best proof of the power of the CJA lawyers lies in the fact that the boycott succeeded." (Pet. App. 205a.) The FTC's opinion contains an unexplained statement in a single footnote (cited twice in the FTC's brief at 41-42 nn.37, 38) that "we agree with the finding of the Administrative Law Judge that the respondents had market power." The FTC's citation of *NCAA*, and the context of its opinion as a whole, suggest that it, too, was relying on the legislative increase in the statutory maximum CJA rate for its cryptic statement on market power.

onstrated a lack of market power on the part of the striking lawyers. The CJA lawyers clearly lacked both long-term [35] and short-term [36] market power. In par-

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[35] In the long term, it is undisputed that the increase in maximum CJA rates resulted in a dramatic increase in the number of lawyers volunteering to take CJA cases compared to those taking cases before the strike. Undisputed testimony as well as the records of the office responsible for administering the CJA program showed that the number of lawyers calling in to volunteer for CJA cases each day rose substantially the day after the new law was enacted (as compared with the period before the strike) and more than doubled within three weeks. (C.A. App. 140, 143, 161, 201-02.) The Court of Appeals acknowledged this, but noted that the rate increase that drew forth this new entry was substantially larger than that ordinarily used by the Justice Department in defining markets under the merger guidelines. (Pet. App. 52a.) The fact is, however, that those lawyers who had not previously volunteered for CJA cases on a regular basis could and would do so at a higher price. Thus, the only justification for treating legal services rendered by CJA lawyers as a distinct market is that none of the other 14,000 members of the bar were willing to work for such low wages. This is akin to the suggestion rejected in *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 621-22 (1977) ("Fortner II"), that market power could be shown by "a willingness to provide cheap financing in order to sell expensive houses."

[36] In the short term, there were approximately 100-200 CJA lawyers who regularly took cases under the D.C. CJA. (Tr. 323, 326, 378-80, 383 (Robinson); JX 13 at 47-58 (Tr. 66) (Koskoff).) At the time of the hearing, approximately 14,000 active members of the D.C. Bar were engaged in private practice. (C.A. App. 121 (Carter), 375 (Isbell).) Over 1,500 members belonged to the section of the bar dealing with civil litigation. (C.A. App. 375.) Approximately 500 private attorneys engaged in an active civil practice on a regular basis in Superior Court, and numerous others practiced there less frequently. (C.A. App. 337-39; 122 (Carter).) Almost 600 attorneys belonged to Division 5 of the D.C. Bar, the section dealing with criminal law and individual rights. (C.A. App. 375.) Because of turnover, many lawyers in the District had prior government criminal experience in the 180-185 lawyer U.S. Attorney's office, the 50-lawyer PDS, the Criminal Division of the Department of Justice, or the Corporation Counsel's office. (C.A.

ticular, the court below erred in its conclusion that the Superior Court's power to appoint any of the 14,000 active members of the D.C. Bar—including the strikers themselves—was not dispositive because, according to the Court of Appeals, "a group that engages in a supply-disrupting boycott against the government should not ordinarily be permitted to defend against an antitrust suit on the ground that the government failed to use its extraordinary powers to relieve the economic pressure they had brought against it." (Pet. App. 52a.) The power of the court to appoint, persuade, or request was unquestionably a part of the "context" of the strike that *Allied Tube* enjoins a court to consider in a case having elements of petitioning: it was known to the lawyers when they embarked on the strike, recognizing that the court could easily break it; it was known to Respondent Koskoff, who took a case at a judge's request but refused compensation; and it was known to the numerous lawyers not regularly involved in CJA practice who would, according to the uncontradicted testimony, have accepted CJA cases had they been asked. (C.A. App. 451-52, 229-30 (Koskoff), 310 (Pickering), 315-18 (Colbert), 330, 332-33 (Rill),

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App. 121 (Carter); *see also* C.A. App. 334-37, 385-87; Tr. 1023 (Pickering).)

Many of these lawyers would have volunteered to take CJA cases during the strike if they had been asked—which they were not. (C.A. App. 317-18, 331-33, 341-42, 371-72.) Virtually all of them would have taken cases had they been ordered to do so by the court (C.A. App. 318, 332-33, 342, 373)—as, indeed, would the CJA lawyers themselves. (C.A. App. 452; *cf.* C.A. App. 229-30.) These lawyers, even those without prior criminal experience, could have rendered effective assistance of counsel, aided by PDS training materials. (C.A. App. 310-11, 319-21, 341, 386-87.) Indeed, such lawyers have done so in the past under similar circumstances. (C.A. App. 310-11, 340-41, 373, 375-76, 425-28; RX 55-Z4 (Tr. 608).) In 1974, the D.C. court withstood a strike by using its appointment power for over two months (as compared with the two weeks that the current strike lasted) before the issue was resolved. (C.A. App. 125-27, 422-29.)

342 (Lopata), 373 (Loftis).) This context should have been considered by the court below, and based on that context, the court should have remanded with instructions to dismiss.

CONCLUSION

The judgment of the Court of Appeals should be affirmed insofar as it held that Respondents' conduct could not be condemned without a market power determination, and reversed insofar as it failed to require dismissal of the case.

Respectfully submitted,

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