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,
Respondents.

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

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BRIEF OF THE INDIVIDUAL RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a legislative petitioning boycott, directed at both furthering the Constitutional rights of indigent criminal defendants and the economic benefit of their "striking" lawyers, is beyond the scope of the antitrust laws.

2. Whether a legislative petitioning boycott, in which the primary motive of the boycotters is to engage in political expression, is beyond the scope of the antitrust laws, even if such conduct causes incidental commercial effects.

3. Whether, if a legislative petitioning boycott is subject to the antitrust laws, it can be found unlawful without proof of anticompetitive purpose or effect.

PARTIES TO THE PROCEEDINGS

Respondents (and Cross-Petitioners), all of whom were respondents in the proceedings before the Federal Trade Commission, include 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 are incorporated.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

> shall have been committed, which district shall have been previously ascertained hy law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for ohtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The First Amendment to the Constitution and Section One of the Sherman Act, 15 U.S.C. § 1, are set forth in the Appendix filed with the FTC's Petition for Certiorari in No. 88-1198 at App. 230a, and are herehy incorporated by reference.

STATEMENT OF FACTS

As detailed in the brief filed concurrently in this appeal by the Superior Court Trial Lawyers Association ("SCTLA"),[1] in Septemher 1983, some 100 private attorneys staged a boycott to pass a law. Virtually all were solo practitioners providing voluntary assistance to indigent criminal defendants in the District of Columbia Superior Court under the D.C. City Council's Criminal Justice Act of 1974. D.C. Code Ann. § 11-2601 *et seq.* Many were members of the SCTLA. They were seeking to increase the rates of compensation, legislatively set in 1974, which it was widely conceded provided neither fair compensation to the attorneys, nor adequate representation to their clients. (Tr. 1082 (Pickering); C.A. App. 324; Tr. 1451 (Lefstein)). The hoycott was staged as a two week strike during which the striking lawyers continued to represent previously assigned clients, but took no new ones. The strike drew substantial media attention

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[1] The broad background to this case is set forth in the Statement of Facts in the SCTLA brief ("SCTLA Br."). To reduce repetition it is hereby incorporated by reference, including all citation forms set forth at note 1. This supplemental statement contains additional facts reflecting the perspective of the four Individual Respondents, Ralph Perrotta, Karen Koskoff, Reginald G. Addison and Joanne Slaight.

and coverage, previously unavailable. The coverage elicited sympathetic public support. Broader public support gave Court officials, the Mayor and the City Council an incentive and opportunity to declare an "emergency," enabling them to make their private support public, and to pass the law.

The strike's only purpose, not in dispute, was to influence the passage of legislation to appropriate more substantial funding to raise the inadequate level of compensation received by the volunteers ("CJA lawyers"), and thereby to improve the quality of legal services provided in the D.C. criminal justice system. Criminal justice experts testified that inadequate funding for legal counsel to indigent criminal defendants, in the District and elsewhere, undermines fulfillment of the government's responsibility for providing effective counsel, a responsibility with which it is charged by the Sixth Amendment to the U.S. Constitution. (C.A. App. 770-71).

In the words of Geoffrey Hazard, Director of The American Law Institute:

> It is a Constitutional question with a capital "C." It is a constitutional question with a small "c." It goes to the question of the social order, the decency with which the least attractive part of our citizenry is treated by authority. It has long been said that a society is known by the quality of its criminal justice. I believe that is true. . . . And the quality, therefore, of criminal justice, the quality of our civilization, is determined in part by the seriousness and substantiality of our provision for representation of indigents. (C.A. App. 326-27).

The strike succeeded. The Council passed legislation increasing the fee paid to CJA lawyers and thereby improved the quality of legal counsel provided to indigent defendants in the Superior Court. It is undisputed that, after the strike, twice as many lawyers volunteered to take

cases. (C.A. App. 140, 143, 161, 201-02). After the City Council had approved the law that was the object of the protest, and after the Mayor had invited three of the Individual Respondents to the signing ceremony and reception that followed (C.A. App. 193-94, 240, 961), the Federal Trade Commission brought this action, alleging that legislative petitioning by strike was *per se* price fixing.

The Individual Respondents were the strike's leaders. Mr. Perrotta was, at the time, President of the SCTLA; Ms. Koskoff was Vice-President; Mr. Addison was Secretary; and Ms. Slaight was Chairperson of the SCTLA's Strike Committee. (Pet. App. 6a, 8a).

All four were relative newcomers to CJA practice, but they had strong commitments to public interest work. Mr. Perrotta, a 1960 graduate of Harvard Law School, entered CJA practice only in 1979 after a varied career drafting Medicaid and child abuse legislation; establishing antipoverty, Head Start, legal services, and neighborhood health programs; and dealing with urban issues. (Pet. App. 148a-149a). Ms. Koskoff graduated from Antioch Law School in 1979 and began accepting CJA cases in 1981; she was active in high school and college in counselling drug addicts. She had been employed as a social worker and in a prison work release program and had been a staff attorney at the Public Defender Service in Pittsburgh. (Pet. App. 149a; Tr. 790 (Koskoff)). Mr. Addison graduated from George Washington University Law School in 1981 and began accepting CJA cases in 1982. He grew up in Southeast Washington and went into CJA practice determined to help those from a similar background. (Pet. App. 150a). Ms. Slaight graduated from Catholic University Law School in 1980 and began taking CJA cases in 1981. Before entering law school, she had been employed by the New York Public Interest Research Group and the California Department of Consumer Affairs. (Pet. App. 150a-151a; Tr. 950 (Slaight)).

There were several reasons why these four individuals assumed an active leadership role. 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; see also C.A. App. 235-40, 263-67, 450, 474-77, 480-81, 497-98, 504-05). They also did so because they were young and idealistic and "just didn't know any better." (C.A. App. 258-59).

> I had not been in the system so long that I would think that it wouldn't work, . . . I was idealistic and I just went on into this thinking that I came here . . . to do a good job for [my clients]. (C.A. App. 259).

The Individual Respondents believed that the best way "to upgrade the practice . . . for indigents was to raise the rates" because higher rates "would bring in more lawyers" and eliminate a "sense that any lawyer who walked in off the street, if he was a member of the bar, was not only qualified to take cases but was entitled to have cases." (Tr. 673-75 (Perrotta)).

While the CJA lawyers were not disenfranchised, as were many of their clients, they received little respect as assigned poverty defense lawyers within the criminal justice system. According to Mr. Perrotta:

> There was also a sense that the lawyers were treated by everyone in the system as though they were almost interchangeably in terms of the way they were treated with their clients. That is kind of, that is an interesting phenomenon.
>
> To some extent that is desirable because it means you are identifying with your client and you relate to him and you convey that sense that you identify with him, so it is understandable in those circumstances that you may be treated like him. Of course, it is not nice that even clients are treated that way and they ought not to be but the fact is from the marshals up to the judges, there was a sense that we

> were there almost to be punished or at least we were always, there was an expectation that there always ought to be, it was useful to us to always be anxious about the possibility of being punished along with our clients.
>
> * * * *
>
> And there was, I have heard, one judge express, I thought sarcastically, but be was expressing his true feelings, the desire, the wish that he could sentence the lawyer as well as bis client, he was so furious at him.
>
> There was that sense and I think that sense is contributed to by the fact that there was a feeling, an atmosphere that we were dependent on the courthouse and cases were being tossed at us like crumbs and we were all scrambling for them to get as many as we could to try to make some kind of decent living.

(C.A. App. 158-60). They were working for an improvement in the system and to them this necessarily meant improving their own circumstances.

Ms. Koskoff testified that "[t]he main purpose of supporting the bill was adequate representation of counsel. . . . We are hoping that when the $35 goes into effect, that it would generate more of an interest from attorneys who bad been previously disinclined to come down, and hopefully that will generate some kind of life into the system. And the quality of representation should, I think, become better because of that." (C.A. App. 236). Ms. Koskoff described a two step process:

> The first step [recognizes that] one had to take under the old system an enormous number of cases. . . . So the idea of the bill . . . was that if you or if I, Karen Koskoff, only had to take half of them or two-thirds, that meant the case, because of the hourly rate, so you could work on more per case. . . . But there is a converse to that, that is, that the only way that that can work is if more lawyers are coming down.

> The other part of that is, aside directly from the money, is that. . . [o]ur idea was that if new lawyers were coming into the system it breathes life into a system, makes things move, and that as those new lawyers go through the system and judges get to see them in trial [and through the appointment process] eventually it will have the effect of better appointments, particularly in very serious cases. That is obviously essential. It is essential in any case. That is what all this means. (C.A. App. 236-39).

The Individual Respondents' concern with improving the quality of CJA representation did not end at the close of the strike. As Respondent Koskoff testified, regular meetings with Judge Moultrie continued to discuss "establishing certain competency standards for representation of indigents now, that they have enough people that they can choose from to represent them." (Tr. 838 (Koskoff)).

Nor were the Individual Respondents interested in increasing their yearly income; an increase in the ceiling on annual fees was not sought:

> There were yearly ceilings, and that they had not changed then. So that the assumption was, well, I could still make up to the ceiling each year. So that wouldn't change. It would just be the focus of the work. You would be able to work on less cases and spend more time on each individual case. (C.A. App. 237).

Ms. Slaight joined the strike because

> I didn't feel that I could adequately represent my clients at those rates. . . . Because it was the right thing to do, ... [B]ecause I didn't feel that clients could get quality representation at the rates that were presently in effect, which was $20 an hour and $30 an hour, because the attorneys could not afford to give them the kind of representation that they deserved. . . . I felt that I was doing more for my clients by supporting the increase in legislation than

> I had done for the last two and a half years. (C.A. App. 263-67).

She had already decided to leave the CJA program and Washington law practice and had stopped assuming new cases even before the strike began (C.A. App. 265).

Mr. Addison felt that the low rates

> forced [CJA Lawyers] to take so many cases in order to make a living that we were not able to provide the quality of representation that we thought was Constitutionally mandated and that our clients deserved. . . . [T]he issue was a decreased case load, not a pay raise per se. The pay raise was the mechanism through which the decreased case load would be accomplished. . . . Better conditions for us means better representation for them. There is no way to help our clients without doing something for us. (Tr. 55-56, 118 (Addison)).

The FTC did not rebut this testimony.[2]

Notwithstanding substantial pre-strike efforts, the CJA lawyers were unable to secure legislation. The effort was trapped in two catch 22's. The first involved the Chief Judge of the Superior Court, Judge Moultrie. He expressed private support for the CJA lawyers, but refused to express public support because, he said, at a later point he might have to pass on the Constitutionality of any legislation (C.A. App. 164). The Mayor, through his Counsel, Herbert Reid, said he could not act if the Chief Judge of the Superior Court would not even publicly request him to. (C.A. App. 166-67, 217, 529). The second catch 22 was set by the Mayor and members of the City Council. The Mayor said he could not act until asked to by the City Council (C.A. App. 208-209). From the Council's vantage, however, as stated by one of its

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[2] Judge Needelman found that "the record shows that the CJA lawyers sincerely believed that protection of the constitutional rights of their clients was directly related to reducing caseloads, which, in turn, was a function of rate change." (Pet. App. 227a).

spokesmen, because the Council relies on the Mayor for analysis of the fiscal impact of the District of proposed legislation, he had to be the initiator. (C.A. App. 252). Without public encouragement to break those traps no one moved, even though no one in the D.C. government spoke out against legislation to raise the fees (Pet. App. 226a, 228a-229a; C.A. App. 717).

It was becoming increasingly clear that without some form of direct, dramatic action that would try to draw the attention of the media and, through the media, to seek the support of the public, there would be no legislation. (C.A. App. 285-86).[3] The previous, traditional legislative efforts to increase CJA fees were hardly even reported during the 7½ month period from January 1 to August 11, 1983. Only 1 story about the issue was published in the *Washington Post* during this period (on June 13, at p. B2).

On the advice of the late Wiley Branton, then Dean of Howard Law School, (C.A. App. 410-11), and with the "knowing wink" of Mayor Barry,[4] who, when advised of the intent to strike, told the Individual Respondents "you do what you have to do and I will do what I have to do," (C.A. App. 177, 223-24, 515a-b, 517), the CJA lawyers went on strike.

According to Mr. Perrotta, by their action the CJA Lawyers provided "the community at large, beyond the handful of leaders whom we had seen" the opportunity "to respond to our request and react to it." (C.A. App.

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[3] According to Sterling Tucker, former Chairman of the D.C. City Council, media coverage is "vitally important" to local politicians in this media-conscious city, and D.C. Government officials and Councilmembers pay considerable attention to the media. (C.A. App. 353-56).

[4] Judge Needelman described the government officials' collective response to the strike as "the buyer's knowing wink," as contrasted with that of a buyer "determined to deal at arms length with the seller." (Pet. App. 226a).

184). The strike was designed to prompt public debate in the popular media and, as a result, provide the necessary public figures with the impetus to take a public position on the CJA rates issue:

> There 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 follow suit.]
>
> * * * *
>
> 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).

More importantly, the strike provided the D.C. government with a quick and accurate picture of public opinion on the issue. Lacking this prior to the strike, the Mayor and City Council simply would not act:

> [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.
>
> And I think it was a process that everybody understood, that we had to go through and the reason I know and I feel deeply in my bones that that is what

> was happening is that we never got an unkind word from anybody after the strike.
>
> * * * *
>
> And after the strike, several judges went out of their way to volunteer to me how pleased they were at our success. That was true about Judge Moultrie as well as judges generally.

(C.A. App. 186-87).

The strike received broad and sympathetic media attention, from, among others, *The Economist* of London and the CBS Network Morning News. (C.A. App. 900, 921-22, 930, 954). During the 6 week period after the strike was announced, on August 11, 1983, the *Washington Post* and *Washington Times* published a total of at least 25 stories about the CJA legislative effort.[5]

The resulting public support broke both the catch 22 between Judge Moultrie and the Mayor (the Judge was finally able to declare to the Mayor his support for the fee increase), (C.A. App. 396-97, 948, 955), and the

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[5] *Washington Post*

August 12	p. B1	September 9	p. B1
August 22	p. B2	September 10	p. B3
August 27	p. B8	September 12	p. D2
August 29	p. B2	September 12	(a second article)
August 30	p. C1	September 13	p. C4
September 5	p. B2	September 15	p. B1
September 7	p. A1	September 16	p. B1
September 8	p. C9	September 16	p. B1 (a second article)
September 8 (a second article)		September 17	p. B1
		September 19	p. D1

Washington Times

August 11 (C.A. App. 897)
August 12 (*id.* at 898)
September 6 (*id.* at 927)
September 6 (a second article) (*id.* at 928)
September 7 (*id.* at 932)
September 16 (*id.* at 952)

catch 22 between the Mayor and the Council (the Mayor was finally able to write a letter to the City Council requesting passage of emergency legislation). (Pet. App. 200a-202a). During the strike, no indigent accused was denied legal representation (Tr. 103 (Francis D. Carter)).

In the initial decision at trial, Judge Needelman held that the CJA strike did not violate the antitrust laws because it caused "no harm." (Pet. App. 227a). He found that the strike was viewed by City officials responsible for passing the legislation "as the only feasible way of getting a rate increase, which was unpopular with the general public but was supported by virtually all elements of the community concerned with implementing the public policy behind the Sixth Amendment." (Pet. App. 228a-229a). Judge Needelman refused to decide the case on the basis of whether the strike was "politically motivated action" or "coercion directed at the 'competitive process,'" recognizing that the FTC's "bright line separation . . . assumes a purity of purpose that may not reflect the actual mixed motivation of lawyers for the indigent." (Pet. App. 226a).

The decision of the FTC reversed Judge Needelman's initial decision, holding that CJA lawyers "coerced" the D.C. government into raising fees in *per se* violation of Section 5 of the FTC Act (Pet. App. 71a, 87a, 92a, 138a). The FTC rejected any notion that the asserted political dimensions of a case involving the provision of effective counsel mandated by the Sixth Amendment "alter the nature [of] paradigmatic examples of restraints of trade." (Pet. App. 92a). The FTC also found the strike illegal under a rule of reason analysis, rejecting, *inter alia*, Judge Needelman's finding that the City was "supportive of the boycotters demands and that the strike was 'accompanied by the buyer's knowing wink'." (Pet. App. 96a).

The Court of Appeals rejected both decisions. It concluded that the strike was primarily motivated by economic concerns, and was therefore "commercial activity

with a political impact." (Pet. App. 44a). As such, the conduct was not totally beyond the reach of the antitrust laws. The Court further concluded, however, that the SCTLA boycott contained elements of expression justifying First Amendment protection. Because of the presence of important First Amendment rights, the Court rejected the FTC's *per se* condemnation of the CJA lawyers' conduct. The Court vacated the order of the Commission and remanded the case for a determination of whether the striking lawyers possessed market power. The purpose of the market power inquiry is to determine whether the D.C. City Council approved the CJA rate increase in response to the exercise of market power, or in response to changes in public attitudes from the publicity generated by the strike.

Judge Silberman, in a concurring opinion, expressed concern with the majority's analysis of the CJA lawyers' "subjective motivation" as a basis for determining whether they were engaging in political speech, because "[t]he setting of reimbursement levels for publicly appointed defense counsel is a political issue [and] petitioners' self-interest does not strip their speech of its political character." (Pet. App. 59a). Instead, he said, the distinction between commercial activity with political impact and political activity with commercial impact should focus on the *means* employed in eliciting a governmental response (*i.e.*, political persuasion or economic power). Nevertheless, he agreed that a market power test was proper to determine whether the strike succeeded due to persuasion or coercion.[6]

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[6] The Court of Appeals did not rule on the CJA lawyers' contention that the FTC's order is overly broad and not reasonably related to the remedial purpose of the FTC Act. If this Court reverses the Court of Appeals and finds the Individual Respondents in violation of the FTC Act, it should remand to the Court of Appeals for a determination on this issue.

The FTC's petition for reconsideration 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. On April 17, 1989, certiorari was granted on both petitions.

SUMMARY OF ARGUMENT

This case involves the government restricting the participation of the Individual Respondents in a boycott (they called a strike) to petition for legislative change. The boycott was aimed directly at promoting the passage of legislation by the District of Columbia City Council. The Individual Respondents led the boycott. Among their motives was a concern with the extent to which their clients were receiving effective assistance of legal counsel as required by the Sixth Amendment to the Constitution. The boycott sought passage of legislation that was intended to, and did, have the effect of increasing the supply of competent attorneys providing legal services under the CJA System and of improving their conditions of employment. This is the first appeal heard by this Court to address the application of the antitrust laws to a legislative petitioning boycott and, if the antitrust laws do apply, to consider whether the appropriate antitrust analysis includes scrutiny of the purpose and effect of the conduct under a rule of reason.

There are two rules, each supported by sound authority and the facts of this case, which lead to the conclusion that the legislative boycott here in issue is not subject to the jurisdiction of the Sherman Act (the applicable antitrust law). The first rule is that a legislative boycott aimed directly at petitioning the legislature is by that fact alone beyond the Sherman Act. The Sherman Act should, as a matter of political history, democratic theory and legislative construction, be construed to exclude such conduct. The second rule is that even if legislative petitioning boycotts are not always beyond the Sherman Act, when the primary motive of the boycotters is to engage in political expression, the incidental commercial

effects of such conduct are outside the Sherman Act, especially where the legislation sought is believed necessary to vindicate the Constitutional rights of a disadvantaged group.

Legislative boycotts are a form of political expression that have played an important role in the history of this nation, especially to provide a means of political access to those in our society who are either economically disadvantaged and/or disenfranchised, and who thereby lack "normal," (C.A. App. 92), means of access. If such political boycotts are subject to the antitrust laws, access to the political process, particularly by the disadvantaged, will be substantially foreclosed. Such a radical step should not be for the courts to take. It should be for the legislature to determine in the first instance when it needs help in protecting itself from petitioning conduct.

To apply the Sherman Act under a rule of reason standard in which market power becomes the surrogate for determining whether a legislative boycott is primarily commercial or political, would seriously damage the process of legislative petitioning and impose an imprecise, prospective standard significantly chilling such petitioning. If, however, the Sherman Act is held to apply to legislative petitioning boycotts, to avoid these mischiefs, a rule of reason must be applied. The strike in this case should be found reasonable because its primary purpose was pro-competitive and it had no significant anticompetitive effect.

ARGUMENT

I. THE CJA LAWYERS' STRIKE WAS LEGISLATIVE PETITIONING, BEYOND THE SCOPE OF THE SHERMAN ACT.

This is the first case, so far as we can determine, in which a federal or state court has sought to apply the Sherman Act to legislative petitioning by boycott,[7] conduct which plays an important and constructive role in the American political process. In so doing, the FTC and the Court below not only made new law, but did so in a way that assumes responsibilities properly belonging to legislatures. Under either of two formulations of the appropriate legal standard, the strike is not subject to the antitrust laws.

The Court of Appeals found that the "immediate purpose" of the strikers was "increasing the price they were paid for their services," and that their motive in improving the quality of legal services available to indigent defendants was "distinctly secondary." (Pet. App. 42a). The Court of Appeals thereupon concluded that a primarily self-interested boycott cannot be political conduct outside the Sherman Act. (Pet. App. 44a-45a). A determination that a boycott is substantially self-interested thereby becomes a surrogate for finding that it is commercial, not political. Behind this reasoning, it appears, is a fear that:

> immunizing all non-violent boycotts aimed at affecting the legislative process [would be] the stuff of

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[7] There have been several lower court decisions addressing the applicability of the antitrust laws to governmental boycotts. Virtually all such cases, however, involved the lobbying of non-legislative government officials. Two cases relating to boycotts of legislatures other than the decision below have found them not to be within the ambit of restraint of trade laws. *See NAACP v. Claiborne Hardware Co.*, 393 So. 2d 1290, 1301 (Miss. 1980), *rev'd on other grounds*, 458 U.S. 886 (1982) (Mississippi restraint of trade statute). *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1300 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980) ("*NOW*") (Sherman Act). *See also* n.11, *infra*.

> which economic chaos is made in countries that tolerate coercive political action by industry, and from which the Sherman Act has shielded this country for almost a century. (Pet. App. 45a).

The Court of Appeals ignores that the strike had to have been legislative petitioning first and foremost, because only the legislature had the power to change the CJA rates. It also ignores the fact that the antitrust laws have played little if any role heretofore in restraining "coercive political action" by industry or others, and therefore deserves no credit for the fact that such "chaotic" action has not been a "problem" in American history. The Court's concern begs the critical question: it assumes the Sherman Act has always applied to legislative petioning by boycott if economic pressure is applied, and if the boycott is self-interested, and that courts have never "immunized," (Pet. App. 45a), such conduct. The assumption is false. Conduct not reached by a law requires no immunity from it.

Having wrongly assumed that the Sherman Act must, absent a specific exemption or immunity, reach self-interested legislative petitioning by boycott, both the Court below and the FTC then looked to see whether the *Noerr-Pennington* doctrine goes so far as to immunize self-interested petitioning boycotts based on the imperatives of the First Amendment.[8] Since the *Noerr* Court was not faced with such a boycott, they conclude that a narrow reading of *Noerr* does not insulate the strike. (Pet. App. 32a-45a; FTC Br. 4-7). But the proper question is not whether *Noerr* immunizes or shields the strike.

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[8] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138-40 (1961) ("*Noerr*"); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) ("*Pennington*") ("Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent of purpose."). Although courts frequently refer to *Noerr-Pennington* immunity (*e.g.*, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 108 S. Ct. 1931, 1938 (1988) ("*Allied Tube*"), the doctrine is correctly one of statutory construction. *See Noerr*, 365 U.S. at 132 n.6.

The question is whether the Sherman Act applies to this boycott at all, for if the Act does not apply, then the conduct need not be immunized.

The *Noerr* Court recognized that the Sherman Act should not be construed to conflict with Constitutional principles. *See Noerr*, 365 U.S. at 138 ("The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."); *id.* at 141 ("Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation.").[9]

Contrary to the assumption of the Court of Appeals (Pet. App. 16a), Section 1 of the Sherman Act[10] was never intended to proscribe direct legislative petitioning in the form of a boycott, whether or not the boycotters would benefit significantly if the petitioning were successful.[11] The Court below, finding that the strikers were

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[9] *E.g., Frisby v. Schultz*, 108 S. Ct. 2495, 2501 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring), *cited in* 3A *Sutherland Stat. Const.* § 74.11 (1986).

[10] In this proceeding, the FTC states that the jurisprudence of Section 1 of the Sherman Act, 15 U.S.C. § 1, controls its decision (FTC Br. 5 n.7). This is accepted by the Court of Appeals. Accordingly, the relevant antitrust statute whose applicability in this case is to be considered is the Sherman Act of 1890, not the Federal Trade Commission Act of 1914.

[11] The Court below refers to several lower court decisions that have applied the antitrust laws to efforts, including boycotts, to "coerce" the government. None of the cases cited by the Court below, however, (Pet. App. 34a n.23) involved legislative petitioning. *E.g. Westborough Mall, Inc. v. City of Cape Giradeau*, 693 F.2d 733 (8th Cir. 1982) (alleged illegal influence of local zoning board whose decisions were subject to City Council review), *cert. denied*, 461 U.S. 945 (1983); *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local 150*, 440 F.2d 1096 (9th

economically self-interested, characterized the CJA lawyers' strike as "commercial activity with a political impact" (Pet. App. 44a). But no label can change the undisputed record that the exclusive purpose of the boycott was to promote the passage of a law by a legislative body. The Court of Appeals explicitly accepted that this boycott was aimed at obtaining legislation from the District of Columbia government, (Pet. App. 2a), took place in the "legislative arena," (Pet. App. 37a), and involved political expression. (Pet. App. 46a, 47a). It is irrelevant whether the CJA lawyers pressured the legislature, whether the legislature was also a buyer, or whether the strikers were economically self-interested.[12]

Cir.) (threats and intimidation of State Fair officials), *cert. denied*, 404 U.S. 826 (1971); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971) (false statements to Texas Railroad Commission), *cert. denied*, 404 U.S. 1047 (1972); *United States v. North Dakota Hosp. Ass'n*, 640 F. Supp. 1028 (D.N.D. 1986) (agreement denying contractual price discounts for medical services to Indian Health Services, an agency of the Department of Health and Human Services); *COMPACT v. Metropolitan Gov't*, 594 F. Supp. 1567 (M.D. Tenn. 1984) (private agreement by architects not to compete for public contracts for the Metropolitan Nashville Airport Terminal and the Nashville Convention Center).

[12] It is conceded that the CJA lawyers wanted a living hourly fee for work performed and that many of them believed they stood to benefit directly if legislation to that effect was adopted. But the record amply supports a finding that as to the Individual Respondents, and many of the others, the motive was, more significantly, to bring more and better lawyers into the CJA system to improve the environment in the Superior Court where the lawyers worked, and generally to enable CJA lawyers to provide more effective representation. (*Supra* pp. 6-8). It also supports a finding that improving the fees was, as Professor Hazard testified, directly related to securing the Constitutional right to effective counsel. (*Supra* p. 3). Furthermore, no increase was sought in the maximum annual level of fees the CJA lawyers could receive for taking cases. (Tr. 834 (Koskoff)). The record is less clear than the Court below would see it that the joint action had an anti-competitive purpose. (See *infra* p. 40) Since the FTC and the Court below construe the Sherman Act in a way which adversely

A. American Political History And The Legislative History Of The Sherman Act Show No Purpose To Outlaw Legislative Petitioning By Boycott.

That the Sherman Act is "important to the preservation of economic freedom," as the FTC reminds us (FTC Br. 28-29), and that boycotts *outside the legislative arena* are usually, but not always,[13] proscribed by that law, do not justify the FTC's or the Court's assumption that the Act applies to boycotts which constitute self-interested *legislative* petitioning. The precise scope of the Act's prohibtions is unclear from its face and therefore "courts should interpret its words in the light of its legislative history and of the particular evils at which the legislation was aimed." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940) ("*Apex Hosiery*").

The Act "was intended to apply existing common law principles to the trusts and other business organizations of the day." [14] Virtually all forms of anticompetitive

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implicates the Individual Respondents' First Amendment rights, this Court is free to undertake a *de novo* review of the factual record. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 n.50 (1982) ("*Claiborne*"); *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984).

[13] *E.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985).

[14] 1 E. Kintner, *The Legislative History of the Federal Antitrust Law and Related Statutes* 30 (1978). *See, e.g.*, 21 Cong. Rec. 2460 (1890) (remarks of Senator Sherman); *id.* at 3146 (remarks of Senator Hoar). There were four identifiable categories of restrictive trade practices in the common law in 1889, each addressing a different competitive evil. There was the law concerning chartered monopolies, setting limits on state-created monopolies; there was the law against the evasion of market regulations, such as forestalling (selling out of hours), regrating (acting as a middleman, buying and selling in the same market), and engrossing, or cornering the market; there was the law against restrictive contracts; and there was the law against unreasonable combinations in restraint of trade. The fourth category is the one at issue here. Over the preceding 500 years there had been many cases at common law dealing with restrictive combinations. Some dealt with con-

conduct that have been held to be violations of the Act can be found as the subject of litigation in pre-Act common law.[15] We have, however, been unable to find a single case before 1890 in which political boycotts of any kind, let alone such boycotts constituting legislative petitioning, provided the basis for antitrust liability, or even for antitrust challenge.[16] Reading the language of the Sherman Act, one is to be "guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary." *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911). For this reason alone, protection of legislatures from lobbying combinations should not be considered a concern of the Sherman Act Congress.

The lack of specific reference to legislative boycotts in the Sherman Act is not because Senator Sherman and his colleagues were unaware of the economic pressures on legislatures that could be applied in the context of political boycotts. The late 19th Century was a period of rough and tumble aggressive legislative politics and legislators were constantly subjected to intense econom-

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certed refusals to deal, and a few involved collective efforts by workers to raise the price of their labor to private employers. *See generally* Peppin, *Price-Fixing Agreements Under the Sherman Antitrust Law*, 28 Calif. L. Rev. 297 (1940). *See also* Dewey, *The Common-Law Background of Antitrust Policy*, 41 Va. L. Rev. 759 (1955).

[15] *See Apex Hosiery*, 310 U.S. at 498 ("This Court has . . . repeatedly recognized that the restraints at which the Sherman law is aimed, and which are described by its terms are only those which are comparable to restraints deemed illegal at common law . . . .").

[16] We have reviewed the common law cases cited by Senator Sherman, the cases cited by then Judge Taft in his famous review of the common law in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899), Justice Stone's exhaustive opinion in *Apex Hosiery*, 310 U.S. at 469, as well as several scholarly law review articles on the history of the Sherman Act.

ically-motivated pressures.[17] The legislators of that period were no doubt familiar with the important part such boycotts played in the founding of our nation and thereafter. Boycotts analogous to the CJA lawyers strike, boycotts aimed at influencing legislation in the English Parliament (the legislative sovereign of the colonies), received the support and participation of our founding leaders.[18] In many instances, direct economic benefits

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[17] The years leading up to the Sherman Act saw the birth and growth of "lobbying" by big business. Railroads, in particular, resorted to such measures as bribery, providing free passes for transportation, and selling stock to Congressmen at attractive prices. *See* D. Rothman, *Politics and Power, The United States Senate 1869-1901* 199-201 (1966). As Rothman notes, however, "Senators, corporations discovered, were not loyal allies . . . . [W]hatever corruption existed did not settle the fate of legislative questions." *Id.* at 201. By the 1890's, public attitudes about conflicts of interest led to more circumspect behavior by Senators and lobbyists. At the same time, state legislatures had begun to regulate lobbying directly. *See* G. Galloway, *The Legislative Process in Congress* 499 (1953) (reviewing enactment of lobbying laws by Georgia (1877), Massachusetts (1890), Wisconsin (1899), and New York (1905)).

[18] For example, George Washington helped draft an agreement signed by the Virginia House of Burgesses in 1769 protesting English adoption of the Townshend Acts, imposing high duties on imports. J. Flexner, *George Washington: The Forge of Experience (1732-1775)* 312, 327 (1965). In 1774, the First Continental Congress approved the Continental Association, a consumer (import) and supplier (export) boycott agreement to pressure Parliament into relieving the colonies from excessive taxation. A. Schlesinger, *The Colonial Merchants and the American Revolution* 393-473 (1939). Thomas Jefferson drafted the model on which the Continental Association's agreement was based, and Franklin, Madison, John Adams and John Jay were active supporters. D. Malone, *Jefferson and His Time: Jefferson: The Virginian* 137-38, 192 (1948), A. Schlesinger, *supra*, at 220, 415, 416. R. Ketcham, *James Madison: A Biography* 61, 63 (1971). Nor were these revolutionary agreements. The signers affirmed that they petitioned as "his majesty's most loyal subjects" and that their purpose was to achieve the repeal of "several acts of parliament passed since the close of the last war." I *Journals of the Continental Congress 1774-1789* (W.C. Ford ed. 1904).

were derived by such boycotters as George Washington, Thomas Jefferson, and James Madison.[19]

Boycotts promoting legislation have also been a part of the legitimate political heritage of our nation since its foundation. Before the Civil War, abolitionists organized a boycott of goods produced by slaves. H. Laidler, *Boycotts and the Labor Struggle* 55 (1913) and, at approximately the time of Sherman Act passage, The National Consumers' League promoted "white-list" boycotts of "sweat-shop" department stores. *Id.* at 33-35. At the same time, prohibitionists were boycotting liquor dealers. *Id.* at 55. These boycotts were not, apparently, subjected to common law challenge.

With this historical background, and with the absence of concern with economically self-interested political boycotts in the pre-Act common law, there is no basis for the FTC or the Court below to have assumed that the Act was intended to treat legislative boycotts as a commercial evil. On the contrary, portions of the Sherman Act debates provide support for the proposition, endorsed by this Court in *Apex Hosiery*, that the Sherman Act was intended to reach commercial restraints in commercial markets, *Apex Hosiery*, 310 U.S. at 502-03, not boycotts aimed at moral-public policy issues, 21 Cong. Rec. at 2658-59 (Mar. 26, 1890) (remarks of Senators Wilson, Hoar and Sherman relating specifically to temperance boycotts of saloons),[20] or most disputes over employment.[21]

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[19] For example, many non-exportation agreements contained provisions divesting courts of their ability to hear cases involving foreclosure based on debts colonials owed to English creditors. George Washington, concerned about the debt attaching to his own estate, explicitly favored provisions against exportation to frustrate foreclosures. J. Flexner, *supra* n.18 at 312, 327. Non-exportation agreements also kept precious metals within the U.S. market, to the advantage of some dealing in them. C. Andrews, *Boston Merchants and the Non-Importation Movement* 199 (1919).

[20] *See also NOW*, 620 F.2d at 1302-09.

[21] The FTC points out that to the extent the CJA lawyers are employed by the District of Columbia when they participate in the

B. Political Boycotts Like The Strike Play An Indispensable Role In The Legislative Process In Our Democracy.

The FTC considered the strike a "disruption of the normal channels of government decision-making [that] is wholly unlike lobbying, and the policy reasons for protecting lobbying do not apply to it" (Pet. App. 122a). They reveal a misunderstanding of the legislative process. That process is fundamentally different from administrative and judicial functioning. The legislative process was designed to deal with the intense political pressure by various interest groups which the exercise of power invites and requires. The very nature of the legislative process encourages competing commercial interests to attempt to gain economic advantages through legislation. The legislative branch of government was perceived by the framers as being the forum in which interest groups, in the pursuit of their narrow, economic self-interest, would drive the engines of government:

> "A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations . . . . The regulation of these various and interfering interests forms the principal task of modern legisla-

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CJA system, they are prevented by statute (5 U.S.C. § 7311(3)) from striking (FTC Br. 27). It should be noted that the relevant statute cited by the FTC is not the Sherman Act. The legislature is manifestly capable of passing legislation, where necessary, to deal with disruptive conduct, without the aid of Sherman Act enforcement. (*Infra* p. 36). Nothing better illustrates the FTC's misapprehension of the scope of the antitrust laws than its citation (FTC Br. 18 n.13) of *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982), for its holding that the First Amendment does not protect an expressive boycott from application of a Congressional enactment specifically aimed at secondary labor boycotts. The FTC fails to mention that the application of the *antitrust* laws was *rejected* by the Court of Appeals, for reasons present here. *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1379-81 (1st Cir. 1981), *aff'd on other grounds*, 456 U.S. 212 (1982).

> tion and involves the spirit of party and faction in the necessary and ordinary operations of government.[22]

Because the Constitution grants to Congress the power to tax and to appropriate funds, much of the legislative process revolves around self-interested factions pressuring Congress to promote various economic activities through tax and fiscal policies.[23] Those who participate in the process almost certainly have the most direct, economic self-interest in the outcome. Indeed, citizens driven by personal economic motive "provide much of the information upon which the government must act." *Noerr*, 365 U.S. at 139. Although "corruption" of the legislative process through, for instance, bribery, can be properly regulated through specific statutes, narrowly drawn to address the offending conduct (*e.g.*, 18 U.S.C. § 203), petitioning boycotts have not been so singled out.

Legislators are used to self-interested pressure and threats. The process is ofen described as "no-holds-barred." *Noerr*, 365 U.S. at 144. Those with money often threaten to withhold it, or give it to a rival, if dissatisfied with a legislator's position. Those who appear to control a group of voters often threaten the loss of voter support. Those with access to the media frequently threaten negative publicitv. It is rare indeed where those whose onlv resource is their time and ability to work, mav threaten to withhold that modest resource to promote public debate and legislative action. Individual CJA lawyers threatening to strike in isolation would not have been listened to any more than if they had only been

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[22] *The Federalist* No. 10, at 79 (J. Madison) (C. Rossiter ed. 1961). The legislative process, for example, tolerates misrepresentations to government officials. Courts or administrative agencies are not structured for such rough political tactics. *E.g. California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) ("Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.").

[23] Page, *Interest Groups, Antitrust, and State Regulation:* Parker v. Brown *in the Economic Theory of Legislation*, 1987 Duke L. J. 618, 654.

permitted to employ the "normal" forms of political speech, less dramatic and pressuring than a strike, forms which had been ignored for the preceding 8 years. "'Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.'" *Buckley v. Valeo*, 424 U.S. 1, 15 (1976), (quoting, *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)); *accord Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 296 (1981) ("There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them."). It is a misapprehension of the legislative process to view this strike or any similar petitioning boycott as any more threatening to legislators than the more powerful threats with which they routinely deal.

As regularly elected public officials, legislators must be alert to public opinion, skilled in recognizing what their constituents want and adept at shaping that opinion and deflecting unwelcome lobbying pressure. They find or invent conflicting interests and, by using techniques such as the catch 22's used by the politicians with the CJA lawyers, (*supra* pp. 8-9), deflect responsibility until public support is established. As former D.C. Council Chairman Sterling Tucker observed, if the CJA lawyers had tried to seek an excessive fee increase by threatening a second strike, the D.C. government would "probably laugh in their faces." (C.A. App. 366-67).

The Court of Appeals points out that "[m]ore than one-fifth of the gross national product is purchased by government entities with money derived from legislative appropriations." (Pet. App. 45a). It is true that government agencies often act as ordinary buyers in commerce for products and services. Virtually all government procurement is made by executive or administrative agencies under non-specific appropriations which give them the responsibility for determining the price to pay. Legislatures, too, have administrative personnel to buy light bulbs and contract for food service. Such procurement,

however, almost never raises legislative issues.[24] Conspiracies to cheat the government, through, for example, predatory conduct,[25] do not involve legislative petitioning. Unlike this case, such joint activity is not itself political, nor is it aimed at affecting the legislative process.

In the ordinary procurement situation, bureaucrats typically lack political power to resist a supplier trade restraint. Their function is largely commercial.[26] Here, the legislature was the governmental body that had the power to address the strikers' issues. Only the legislature has the power and responsibility to alter "the legal rights, duties, and relations of persons . . . outside the Legislative Branch." *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 952 (1983). Because of this power and responsibility, a legislature like the D.C. City Council cannot properly be characterized as a mere commercial buyer when it is considering legislation to set a specific price for a service to be provided to another branch of the government. Its decision, especially where an issue of Constitutional rights in involved, is never purely commercial. In each legislative enactment, it acts for the people.

The FTC suggests that a broad rule of exclusion from the antitrust laws for legitimate legislative petitioning will provide a loophole for, *e.g.*, insurance industry, (FTC Br. 34-35), or other conspiracies by powerful lobbies that will mask price fixing in the guise of an appeal for public and legislative support. Such appeals, we are warned, will inevitably be followed by coercive action against the

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[24] When it does, it is almost always due to public indignation at perceived waste and fraud. Such has nothing to do with this case.

[25] *See Pennington*, 381 U.S. at 663 (an alleged collusive bidding arrangement to drive low-bid coal suppliers from the spot market for coal purchased by the Tennessee Valley Authority would not be exempt from the antitrust laws).

[26] *See, e.g., United States v. Mobile Materials, Inc.*, 871 F.2d 902 (10th Cir. 1989) (Oklahoma Department of Transportation and Oklahoma Turnpike Authority).

public[27] and the legislature, coercion which will force the legislature to knuckle under to their demands. (FTC Br. 32-34). Based on the non-existence of such incidents of big business coercion by boycott in the legislative context at any time in our nation's history, the horrible is fanciful.

But assume that it is not. What makes the legislature unique among the branches of government is that it has the tools to prevent such coercion. As this Court recognized in *Buckley v. Valeo*, 424 U.S. at 25 (upholding in part and striking in part provisions of the Federal Election Campaign Act), Congress has the power to prevent corruption and the appearance of corruption spawned by real or imagined coercive influence. Because they can legislate to avoid or defeat coercion, legislatures cannot be coerced in the sense implied by the FTC.

If the City Council had been opposed to a fee increase, or if the CJA lawyers had sought an unrealistically high fee level, the City Council could have mounted its own publicity campaign. Media access is easier for it and an attack on the "over reaching" lawyers for the criminally accused might well have been received positively by the public. As Geoffrey Hazard observed, "the legislature is being asked to provide more money for lawyers for muggers." (C.A. App. 325). Or, the City Council could have authorized a new appropriation to expand the Public Defender Service, so that paid government employees took substantially more cases and the City would be less dependent on CJA lawyers. Alternatively, it could have legislated a community service program, directing that members of the D.C. Bar with relevant litigation experience take, say, three assigned indigent criminal cases per year for the existing or no fee. The record supports a finding that even if the strike were viewed as theoretical legislative coercion, there was no court "crisis."

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[27] The strike did not "coerce" the public as, for example, did the boycott, arguably, in *Claiborne* (*see infra*, pp. 30 n.29, 32-33). Coercion of the public is therefore irrelevant to this case.

How could there have been a crisis when so few qualified lawyers were invited to take cases, and when the court had the power it had exercised in 1974 over a two-month period to order lawyers to take CJA cases? (SCTLA Br. 16, n.7). Respondent Perrotta recognized from the beginning that if the Superior Court chose to exercise this power, which it might, it could break the strike (C.A. App. 451-52).[28]

If a new and sinister trust tries to abuse a rule which protects direct legislative boycotts, assuming it can overcome tbe hurdle of showing genuine petitioning, it can be neutralized by a new law rendering its objectionable conduct irrelevant or illegal. As long as that legislation is narrowly tailored to serve a substantial government interest, an interest in preventing a more precisely identified harm than eliminating boycotts merely because they put pressure on legislatures, as long as the restriction is unrelated to the suppression of free expression, and as long as meaningful alternative forms of expression are reasonably available to the potential boycotters, then the legislation could pass muster under the First Amendment. *Ward v. Rock Against Racism*, 57 U.S.L.W. 4879 (U.S. June 22, 1989); *United States v. O'Brien*, 391 U.S. 367 (1968).

There is nothing radical in concluding that the Sherman Act has recognized limits. The Sherman Act has been held not to reach local, violent conduct that more properly is addressed by state tort law, *Apex Hosiery*, 310 U.S. at 513; state action, *Parker v. Brown*, 317 U.S. 341, 352 (1943); or legislative petitioning, *Noerr*, 365 U.S. at 127. It would be more radical to conclude that the Sherman Act regulates the legislative petitioning in this case.

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[28] Judge Needelman, during testimony related to the D.C. government's ability to operate the criminal justice system through pro bono stated "I can't think of a single employer in the United States who has a better way to break a strike." (Tr. 1460 (Lefstein)).

II. THE STRIKE IS ALSO OUTSIDE THE SCOPE OF THE SHERMAN ACT BECAUSE ITS PURPOSE WAS TO GENERATE PUBLICITY, NOT TO APPLY ECONOMIC PRESSURE.

Even if a legislative boycott which is arguably self-interested and applies economic pressure is reached by the Sherman Act, when the challenged conduct, as here, is primarily *motivated* by a desire to engage in political expression, *Noerr* and *Claiborne* exclude it.

Noerr refused to extend the Sherman Act to concerted conduct designed to secure public support for anticompetitive legislation when such conduct did not involve direct economic pressure on the public. The conspirators' economic self-interest in securing legislation that would lessen competition was irrelevant. *Noerr*, 365 U.S. at 138-40. *Claiborne* recognized that even a boycott involving direct economic pressure on the public to support governmental action cannot be categorically prohibited under broad state economic regulation. *Claiborne*, 458 U.S. at 914. If the ultimate goal of the boycotters in securing governmental action is not lessening competition in the boycotted market, then *Claiborne* places such conduct beyond economic regulation. *Id.*; *see also Allied Tube*, 108 S. Ct. at 1941 (discussing *Claiborne*). *Claiborne* left open the possibility that conduct, the main purpose of which is exerting "economic pressure," could be prohibited when the ultimate goal is primarily economic self-benefit.

The Court of Appeals erred in classifying the strike as *Claiborne*-type "economic pressure", and engaging in an analysis of the strikers' ultimate goal in seeking the legislation, rather than focusing on the direct objective of the boycott.[29] It ignored the expressive component of

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[29] The rule below puts in doubt the *Claiborne* result if the Mississippi Supreme Court had found that the Sherman Act did apply. The conduct there did involve substantial economically self-interested behavior, (Cross Petition 3-6), and did involve signifi-

the strike aimed at the public (conduct not involving direct economic pressure on the public), and begged the question of whether the CJA lawyers were primarily engaged in *Noerr*-type conduct.

The Court of Appeals, in one possible reading of *Claiborne*, was correct in stating that "the motivation for the SCTLA boycott [is] a crucial factor in determining whether it constituted protected 'political' activity." (Pet. App. 40a-41a). But the proper motive test in a case where a single course of conduct has the potential to serve arguably both as political expression outside the scope of the Sherman Act under *Noerr*, and as economic pressure potentially within the scope of the Act, is a direct inquiry into whether the lawyers were primarily

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cant elements of economic pressure on the public outside of the legislative arena. (458 U.S. at 903-04.) *Claiborne* also demonstrates the inappropriateness of a market power test to determine whether a boycott is political. Had a market power test alone been employed to determine whether the *Claiborne* boycott was an antitrust violation, it might well have been found to have been illegal. Blacks in Claiborne County made up more than three-fourths of the population. *Claiborne*, 393 So.2d at 1294.

To the extent that *Claiborne* protects economically self-interested direct economic pressure, it cannot be distinguished merely because it involves a boycott seeking "to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself." 458 U.S. at 914. The record demonstrates that the Individual Respondents in this case sought to effectuate the Sixth Amendment rights of indigent defendants to effective assistance of counsel, which they and many experts and government officials believed to be threatened by inadequate rates of compensation. (*Supra* pp. 2, 3, 5-7). Whether the Sixth Amendment was in fact being systematically violated is irrelevant. The decision in *Claiborne* did not turn on whether the boycott in that case remedies a proven violation of the Fourteenth Amendment: the fact that the boycott was intended "to effectuate rights guaranteed by the Constitution itself" necessarily implicated political speech and petitioning. *Id.* at 914. The CJA lawyers, the experts, and government officials *believed* that Sixth Amendment rights would be undermined if rates of compensation under the CJA were not increased.

motivated by a desire to "express" or to "coerce."[30] If the primary *purpose* of engaging in a strike, as opposed to some other course of conduct, was to open the eyes of the media and the public to an unfair and possibly unconstitutional situation, and to stage an event that created a political climate within which Mayor Barry and the D.C. City Council could pass the legislation without fear of losing public support, then it is necessarily "politically motivated" and outside the scope of the antitrust laws.

> The right of the States to regulate economic activity 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. *Claiborne*, 458 U.S. at 914 (emphasis added).

The primary motive of the CJA lawyers was to influence public opinion through expression, not coercion. Unlike *Claiborne* and *NOW*, where the boycotters economically pressured members of the public to secure public support for their cause, the strike here could not have had any coercive economic effect on members of

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[30] This test is a variation on the application of the *Noerr* "sham" exception. The "sham" exception requires a factfinder to determine whether conduct "ostensibly directed toward influencing government action, is a mere sham to cover what is actually nothing more than an attempt" to inflict direct harm on a competitor. 365 U.S. at 144. Here, it has already been determined that the conduct was genuinely intended to secure governmental action; the issue is whether the claim of securing public support is a mere sham to mask the application of direct economic pressure. *See also Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.) (explaining predatory pricing analysis, which may require a factfinder to determine whether pricing that has an anticompetitive effect was motivated by a legitimate desire to compete, or by an illegal desire to monopolize), *cert. denied*, 434 U.S. 879 (1977). *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 635-36 (1984) (O'Connor, J., concurring).

the public because the lawyers and the public were not in direct contact, and were not in the same economic "market place." The only component of the strike that could possibly have affected the public's position on the legislation was the expressive component. Because the boycott did not involve economic pressure as to the public, and was part of a genuine effort to secure legislation, it is the very activity protected in *Noerr*.

The record shows that the strike was a means, and the only effective means, of expressing the shared view of the CJA lawyers that the criminal justice system was unfair, that denying them a raise was unfair and that the situation had become so serious that a dramatic expression of protest was required to stimulate public awareness. The Court of Appeals acknowledged this when it found, in a separate analysis, that the "factual context" of the strike "suggests that the participants *intended* to communicate a message" and to "publicize the [lawyers'] claim that the prevailing CJA rates were inadequate." (Pet. App. 47a (emphasis added)).

The Individual Respondents were fully aware that individual CJA lawyers threatening to strike in isolation would not have been listened to attentively any more than if they had only been permitted to employ the "normal" forms of speech, less dramatic than a strike. They were told by an expert, Dean Branton, that something along the lines of a strike was their only chance to get the attention of the public and the legislators. (*Supra* p. 9). This advice was underscored by the Mayor's "knowing wink". (*Id.*) The Chief Judge said he would not speak out to the public on their behalf—even though he privately supported them. (*Supra* p. 8). Neither would the City Council or the Mayor without the reassurance of sympathetic public opinion. (*Supra* pp. 8-11) Without dramatic collective action, they had virtually no chance to appeal to the public. The media would not carry their message because it was not news and individ-

ual messages would have been too fragmented. The soundness of this judgment is demonstrated by a comparison of the number of stories carried by the *Washington Post* about the SCTLA legislative efforts during the 7½ *months* before the strike was announced—one (June 13, 1983, p. B2)—and the more than 19 stories carried during the 6 *weeks* after the strike's announcement (*supra* p. 4 n.5).[31]

The record shows the CJA lawyers intended the strike to accomplish two related objectives: (1) to communicate their position to the public; and (2) to create an event that the City Council could, assuming that public support warranted, declare an "emergency" within the meaning of D.C. Code Ann. § 1-229, and thereby invoke the emergency legislative powers to increase the CJA rates. Neither objective was, or was intended to be,

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[31] To condemn respondents' conduct under the antitrust laws would be particularly inappropriate here because the record demonstrates that respondents had exhausted all their alternatives and had no other viable means available to get their message to the public. (*Supra* p. 9). The media and the public are generally uninterested in the plight of criminal defendants—a politically disenfranchised group with "virtually no resources to mobilize in their own behalf with any effective means at all." (C.A. App. 282). When speaking out for the rights of this disenfranchised and extremely unpopular group, the CJA lawyers suffered a form of guilt by association and were similarly ignored. (C.A. App. 325; Pet. App. 191a). The dramatic effect of a boycott is its ability to overcome such entrenched public apathy, which explains why it has traditionally been a tool of the disenfranchised and economically powerless. (C.A. App. 272, 279, 286, 415-16). Under the FTC's reasoning, respondents would be denied the only effective means for engaging the public.

Legislative boycotts should be considered outside the scope of the antitrust laws as long as the boycott is reasonably calculated to secure the particular legislative relief being sought. Yet surely, at a minimum, the Sherman Act cannot proscribe this sole remaining avenue of effective political expression because, in theory, less effective avenues of communication remain open. *Meyer v. Grant*, 108 S. Ct. 1886, 1893 (1988).

coercive. (C.A. App. 451-52). The CJA Lawyers announced their plans several weeks in advance of the effective date to encourage media attention well before the strike began, to allow, among other things, for orderly processing of indigent defendants after the strike, and to minimize the possibility of a "real" crisis, as opposed to a politically convenient "emergency".[32]

Like the publicity campaign in *Noerr*, the activity in issue here "[took] place in the open political arena . . . ." *Allied Tube*, 108 S.Ct. at 1940. The evidentiary record is clear that the strike was a "publicity campaign directed at the general public, seeking legislation." *Id.* at 1936, citing *Noerr*, 365 U.S. at 140-41. The strike was a choreographed dance, political theatre, not economic coercion.

It is unnecessary and irrelevant to inquire into whether the strikers were more self-interested than public-interested or whether they ultimately "coerced" or persuaded the City Council to raise the fees. Where, as here, the political boycott was intended to appeal to the public only through expression, it is "political activity" outside the scope of the antitrust laws.[33]

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[32] Respondent Koskoff went so far as to agree to represent an existing client *pro bono* during the strike. (C.A. App. 822-23).

[33] The fact that this politically motivated strike may have resulted in some direct pressure on the City Council and the Mayor is of no consequence:

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed.

Noerr, 365 U.S. at 143; *see also Allied Tube*, 108 S. Ct. at 1936 ("[W]here, independent of any government action, the anticompetitive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is 'incidental' to a valid effort to influence governmental action.").

Let us assume, arguendo, that reaffirmation in this case that the Act does not proscribe petitioning boycotts directed to legislatures will, as the FTC fears, invite several pseudo-petitioning boycotts in the future which threaten both the public and the political process. If the antitrust laws today are not adequate to deal with this development, is it not then for the legislature, rather than the courts, to correct the problem by antitrust or other legislation? Although it has proven a constructive, durable and dynamic statute over the past 100 years, the Sherman Act has not been the last word on needed antitrust laws.

> Courts that refuse to make basic policy choices for the legislature thereby force the legislature to face and decide questions they had previously been content to leave unanswered. In this way the courts help focus the issues to be addressed and make the legislative process more responsible. R. Bork, *The Antitrust Paradox* 83 (1978).

If the CJA strike, or the variety of other legislative boycotts which have been an important part of our political heritage and which continue to be an integral part of our political life,[34] are to be subjected to the antitrust laws, if such a profound and radical political step is to be taken for the first time, it should be by a legislature, not the courts.[35]

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[34] These boycotts are important for the less advantaged especially as here and in *Claiborne*, where they seek to vindicate important Constitutional rights, and where the boycott provides the only means for obtaining legislative relief that has any chance to work. (Pet. App. 187a-189a).

[35] This Court has even limited the Sherman Act when doing so was illogical, but reflected proper deference to Congress. *See Flood v. Kuhn*, 407 U.S. 258, 284 (1972) ("If there is any inconsistency or illogic in all of this, [exempting professional baseball from the antitrust laws] it is an inconsistency and illogic of long standing that is to be remedied by Congress and not by this Court.").

III. IF THE SHERMAN ACT APPLIES, THE STRIKE MUST NOT BE AN ANTITRUST VIOLATION UNDER A RULE OF REASON STANDARD BECAUSE IT WAS NOT, ON BALANCE, ANTICOMPETITIVE IN PURPOSE OR EFFECT.

The FTC attempts to hide behind the *per se* rule because, in this case, it cannot prove that the Individual Respondents engaged in the strike with an intent to reduce competition, or that their strike had an anticompetitive effect. The *per se* rule should be applied only to practices that "always or almost always tend to restrict competition and decrease output." [38] A temporary strike, in the context of this case, is not such a practice.

The FTC has not identified the competition that the strike eliminated. There was no possibility of price competition among the CJA lawyers, because the fees were fixed by the legislature. In such circumstances, the only parameters of competition are quality and availability of supply. The legislatively determined fee was inadequate to permit quality competition. Rather, it drove the CJA lawyers to take too many cases and to cut operating costs and efforts expended. (Pet. App. 175a-177a). The hourly fee ceiling not only inhibited quality competition, it perversely affected the incentive structure to drive down the overall quality of CJA representation, and made CJA work unattractive to many quality and otherwise interested lawyers. (Pet. App. 176a). In focusing on the striker's goal of increasing the hourly fee for work per-

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[38] *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979), *quoted in Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, ——, 108 S.Ct. 1515, 1519 (1988). As this court stated in *NCAA v. Board of Regents*, "*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the ultimate finding is the product of a presumption or of actual market analysis, the essential inquiry remains the same —whether or not the challenged restraint enhances competition." 468 U.S. 85, 103-04 (1984) (footnotes omitted).

formed, the FTC ignores the fact the Individual Respondents neither sought nor received as a provision of the legislation [37] an increase in the ceiling imposed on the annual CJA fees that could be earned by any one attorney. (C.A. App. 573). Many of the Respondents did not expect to work less or earn more as a result of the hourly fee increase. Rather, as Respondent Koskoff noted, they simply expected to be able to spend more time on fewer cases, providing better service, for what they had earned before. (C.A. App. 237). Thus, there was no competition in any relevant sense to be restricted by the strike.

One main goal of the strike for the Individual Respondents was to *increase* the number of qualified attorneys volunteering to take CJA cases. (*Supra* p. 5). This purpose was effected dramatically, by an approximate doubling of the number of attorneys daily seeking CJA appointments after the strike was settled. A related goal was to increase the quality of legal services provided to indigent clients. (C.A. App. 156-61). Expert testimony stated that this would be the result of raising the hourly fee level. (C.A. App. 325-26; Tr. 1539-40 (Lefstein)). The FTC offered no contrary evidence. (C.A. App. 140, 143, 161, 201-02).

The FTC asserts that the District's payment of higher fees is an anticompetitive effect of the strike.[38] But the FTC ignores the obvious fact that the District thereafter received an entirely different and higher level of CJA services under the new fee structure. Subsequently, the District enjoyed a much larger pool of qualified attorneys providing higher quality legal service. This Court recognized in *National Society of Professional Engineers v.*

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[37] Subsequent to the passage of the legislation, the Joint Counsel on Judicial Administration raised the ceiling from $42,000 to $50,000, although no request to do so was made by the CJA lawyers.

[38] Judge Needleman disagreed, concluding that "in the context of the special circumstances of this case, it cannot be presumed that the higher costs attributed to the 1983 boycott are adverse effects." (Pet. App. 228a-229a).

United States, 435 U.S. 679 (1978), that a "temporary and limited loss of competition" can serve to benefit *long-run* competition—and is therefore legal under rule of reason—where it "provid[es] incentives to develop [the] enterprise. . . . ." *Id.* at 689 (citing *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711)). That is exactly what happened here. By raising the CJA hourly fees, the District increased the supply of CJA attorneys and created a better opportunity for quality competition to occur, enhancing overall competition in the long run.

The absence of anticompetitive effects is not surprising here for three reasons. First, the absence of entry barriers made it impossible for such effects to develop. Typically, a price fixing conspiracy is designed to raise prices received by a limited group of suppliers who have the ability to prevent new entry from competing away the profitability of the price increase.[39] Here, however, the Individual Respondents wished to attract new entry, and the record shows that they were admirably successful in so doing.

Second, the ultimate effect—a higher hourly rate—was the result of legislation enacted by the City Council. As this court said in *Noerr*, 365 U.S. at 137 n.17 (citing *Parker v. Brown* 317 U.S. 341 (1943)), once passed, legislation is exempted state action. If the higher rate is the anticompetitive effect, it is caused by the intervening act of the legislature, not by the strikers. *Accord Kaiser Cement Corp. v. Fischbach and Moore, Inc.*, 793 F.2d 1100 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986) (no injury where arbitration award had been based on amount arbitrators thought a fair contract price regard-

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[39] If entry barriers are low, the market power necessary to sustain collusion is unlikely to persist. *Statement of Federal Trade Commission concerning Horizontal Mergers*, 4 Trade Reg. Rep. (CCH) ¶ 13,200 (1982). *See also Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119 n.15 (1986).

less of alleged bid-rigging); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) (intervening state action rendered non-justiciable alleged antitrust conspiracy to induce plaintiff to engage in conduct causing its nationalization).

Third, the Individual Respondents did not intend to restrain competition and it seems odd indeed to assume, as the application of a *per se* rule would, that such was their motive. Usually, those with anticompetitive intentions do not actively seek publicity and media coverage of their "conspiracy." Nor do they announce their plans well ahead of the effective date, in order to permit the intended victim to take steps to minimize, if not eliminate, the potential harmful effects of a conspiracy. It is also strange for the conspiracy to have, as an important objective, the immediate increase of supply. Finally, it is most unusual for conspirators with an economic stake in the success of the conspiratorial efforts not even to seek a higher ceiling for permitted yearly earnings.

The coexistence of these facts makes the inference of anticompetitive purpose "implausible." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 593 (1986). Any minimal restrictive effect of a joint program to withhold labor is, in the context of this case, ancillary to the main purpose of increasing the quantity and quality of lawyering.[40]

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[40] The FTC's reliance on *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978), is misguided. The CJA lawyers do not argue that the harm caused by unrestricted competition outweighs its presumed benefits, (although such might be the very case in which the Constitutional concerns for free speech and adequate legal representation for criminal defendants could combine to outweigh the economic benefit of competition, if this boycott had had the goal of restricting competition). The CJA lawyers were not concerned with a social harm caused by competition, but with the *lack* of effective competition resulting from the legislature's setting an unreasonably low rate. This Court distinguished the canon of ethics in *Professional Engineers*

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be reversed and this case should be dismissed.

Respectfully submitted.

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from the restriction in *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918) on the basis that the latter had "a positive effect on competition." *Professional Engineers*, 435 U.S. at 693 n.19 (1978). That was the intended and actual effect of the CJA lawyers strike.