Comment

SITTING ON A THRONE OF LIES: USING RICO AND WIRE FRAUD TO HOLD POLITICIANS ACCOUNTABLE AND DEMONETIZE CAMPAIGNS THAT INTEND TO DEFRAUD*

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> What I worry about is, that when problems are not addressed, people will not know who is responsible. And when the problems get bad enough . . . some one person will come forward and say, "Give me total power and I will solve this problem." That is how the Roman Republic fell. . . .
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> If we know who is responsible, I have enough faith in the American people to demand performance from those responsible. If we don't know, we will stay away from the polls; we will not demand it. And the day will come when somebody will come forward, and we and the government will in effect say, "Take the ball and run with it. Do what you have to do." That is the way democracy dies.
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> And if something is not done to improve the level of civic knowledge, that is what you should worry about at night.[1]

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* This heading was inspired by Elf (New Line Cinema 2003).

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1. PBS News Hour, *Former Supreme Court Justice Souter on the Danger of America's 'Pervasive Civic Ignorance'*, YouTube (Sept. 17, 2012), https://www.youtube.com/watch?v=rWcVtWennr0&t=48s [https://perma.cc/2ZRE-BYBT] (interviewing former Justice David Souter discussing the importance of civic education); *see also* Margaret Warner, *Justice Souter's Old Warning Finds New Life in This Election*, PBS (Oct. 24, 2016, 5:50AM), https://www.pbs.org/newshour/politics/justice-souters-old-warning-finds-new-life-election [https://perma.cc/A6D6-MDFY] (discussing past interview with Justice Souter and the importance of civic education).

I. "THE TRUTH IS RARELY PURE AND NEVER SIMPLE" (BUT IT IS HERE): POLITICIAN SUCCESS IN USING FALSE SPEECH AND DECEPTIVE TACTICS TO ATTRACT SMALL-DOLLAR DONORS[2]

Before the attack on the United States Capitol on January 6, 2021, President Donald Trump's campaign raised nearly $250 million in donations with statements that these "donations could stop Democrats from 'trying to steal the election,' and that Vice President Biden would be an 'illegitimate president' if he took office."[3] According to the Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol, these statements were made with knowledge that they were false.[4] In particular, the Committee suggested that the violent attack was driven by the concerted belief in a stolen election and supported by a resourceful movement to spread this belief.[5] This messaging remains lucrative, with some politicians fundraising on a similar theme and with similar success in raising donations.[6]

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2. The title for this part was inspired by OSCAR WILDE, THE IMPORTANCE OF BEING EARNEST.

3. H.R. REP. NO. 117-663, at 27–28 (2022). Many of these donations were small-dollar donations and President Trump's campaign asked for donations frequently. *Id.* at 771. In some cases, President Trump's campaign sent nearly twenty-five solicitations each day to potential donors. *Id.* The Committee report described that a number of staffers from the Republican National Committee (RNC) and President Trump's campaign team coordinated the emails and text messages to ask for donations. *Id.* at 772–74. The Republican National Committee and President Trump's campaign continued to send emails after other leaders in the Republican Party accepted the results of the 2020 election. *Id.* at 781. The Select Committee's report concluded that: "Even though the RNC had closely held reservations about repeating the most extreme and unsupportable claims of fraud, the RNC stayed the course with a coordinated, single fundraising plan with the Trump Campaign." *Id.* at 780.

4. *See id.* at 770 ("[T]he Select Committee's investigation shows that the RNC knew that President Trump's claims about winning the election were baseless and that post-election donations would not help him secure an additional term in office. Yet, both the Trump Campaign and the RNC decided to continue the fundraising after the election, a decision that would have come from President Trump himself." (emphasis omitted)).

5. *See id.* at 789 ("There is evidence suggesting that numerous defendants charged with violations related to the January 6th attack on the U.S. Capitol and others present on the Capitol grounds that day were motivated by false claims about the election.").

6. *See* Wes Henricksen, *Disinformation and the First Amendment: Fraud on the Public*, 96 ST. JOHN'S L. REV. 543, 544 & n.6 (2022) (describing this messaging as a "profitable falsehood," which Professor Henricksen defines as "a false or misleading statement made by one who stands to gain, either financially or otherwise, from others believing it"); Luke Broadwater, Catie Edmondson & Rachel Shorey, *Fund-Raising Surged for Republicans Who Sought to Overturn the Election*, N.Y. TIMES (Apr. 17, 2021), https://www.nytimes.com/2021/04/17/us/politics/republicans-fund-raising-capitol-riot.html [https://perma.cc/NAY6-TM8K] (discussing certain lawmakers who allegedly "brought in more than $3 million in campaign donations" after objecting to electoral college vote receipts).

The unprecedented events of January 6th represent the dangerous product of a pervasive problem at the intersection of campaign fundraising and consumer protection.[7] Moreover, it is an example of the seemingly unchallenged ability of politicians and campaigns to manipulate people's beliefs to perpetrate fraud.[8] In recent years, political campaigns have increasingly depended on small-dollar donations to qualify for debates and have used polarizing messages to generate interest in donating.[9] Among the billions of text messages campaigns send to potential donors, many of these texts have been the subject of fraud complaints.[10] Some individuals have gone so far as to create fake political action committees (PACs) or "Scam PACs" to take advantage of a devoted political base and convert those donations to personal use.[11]

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7. *See* H.R. REP. NO. 117-663, at 789 ("As President Trump used the Big Lie as a weapon to attack the legitimacy of the 2020 election, his Campaign used that same Big Lie to raise millions of dollars based on false claims and unkept promises. Not only did President Trump lie to his supporters about the election, but he also ripped them off.").

8. *See infra* notes 9–11 and accompanying text (discussing that campaigns have used more polarizing messages in campaign solicitations and increased the number of small-dollar donations, but some of these campaign solicitations have generated fraud complaints).

9. *See* Anjali Huynh, *Desperate to Debate: Why a G.O.P. Candidate Is Offering $20 for $1 Donations*, N.Y. TIMES (July 10, 2023), https://www.nytimes.com/2023/07/10/us/politics/doug-burgum-donations-debate.html [https://perma.cc/K24B-GPEW] (discussing a presidential candidate allegedly offering $20 gift cards in exchange for donations of at least one dollar in order to qualify for primary debates). Recent political science research has demonstrated that the most "ideologically extreme" voters contribute small-dollar donations and to attract these donors, campaigns would message with polarizing statements in return. *See* Thomas B. Edsall, Opinion, *For $200, a Person Can Fuel the Decline of Our Major Parties*, N.Y. TIMES (Aug. 30, 2023), https://www.nytimes.com/2023/08/30/opinion/campaign-finance-small-donors.html [https://perma.cc/JY8Z-QN79] (finding that there were sharp increases in the number of small dollar donations between 2006 and 2020, targeted fundraising, and tactics "designed to make specific constituencies angry or afraid, primarily by demonizing the opposition").

10. *See* Natasha Singer, *Fed Up with Political Text Messages? Read On.*, N.Y. TIMES (Nov. 5, 2022), https://www.nytimes.com/2022/11/05/technology/political-text-messages-pelosi-trump.html [https://perma.cc/2WYE-PRXP] (reporting that in 2022, 1.29 billion text messages were sent in October relating to political advertising). As a result of these texts, nearly 9,477 fraud reports were filed with the Federal Trade Commission and 2,100 complaints were filed with the Federal Communications Commission. *Id.*; *see also* Nicholas Nehamas, Rebecca Davis O'Brien & Shane Goldmacher, *DeSantis's Striking, Risky Strategy: Not Trying to Trick Small Donors*, N.Y. TIMES (July 11, 2023), https://www.nytimes.com/2023/07/11/us/politics/desantis-donations-trump.html [https://perma.cc/D6NB-42YE] (describing campaign tactics in auto-enrolling donors into making monthly donations).

11. *See* Matthew S. Raymer, *Fraudulent Political Fundraising in the Age of Super PACs*, 66 SYRACUSE L. REV. 239, 242 (2016) (discussing that some of these "scam PACS" not only misrepresent the targeted issues for donations, but also misrepresent whether the donations will go towards political aims). Recently, prosecutors convicted a number of defendants linked to one of these kinds of fundraising campaigns and ordered them to pay restitution for "using false statements and then stealing the donations." *Two Sentenced to Prison for 'We Build the Wall' Online Fundraising Fraud Scheme*, U.S. ATT'YS OFF. (Apr. 26, 2023), https://www.justice.gov/

Scholars and researchers use the "Fraud Triangle" framework to explain why people commit fraud, and it can be applied to a candidate's needs to raise money.[12] When the campaign finance system is viewed under this framework, all three environmental conditions are present.[13] The first element of the Fraud Triangle is incentive or pressure: United States Senators raise on average $11,400 per day, and Members of the U.S. House of Representatives in competitive contests raise on average $5,500 per day.[14] Candidates raise money not only to keep their own election prospects high, "but also [to] discourage would-be challengers; pay dues to political party committees; and help build clout within the party by funding contributions to other legislators."[15] The second prong is opportunity: as campaigns conduct more and more political communication over social media, the opportunity is certainly growing to manipulate beliefs with any statement people want to hear.[16] The third prong is rationalization: the First Amendment generally tolerates candidates lying during a campaign and most courts expect a politician to tell a few lies.[17] This environment and culture for politicians to raise

usao-sdny/pr/two-sentenced-prison-we-build-wall-online-fundraising-fraud-scheme [https://perma.cc/6BD8-K5UV]. According to the Department of Justice, the defendants created a fundraising campaign that brought in more than $25 million in donations with statements that one hundred percent of the funds would help build a wall along the southern border of the United States. *Id.* Instead, the defendants converted funds to personal use. *Id.* In this case, the Southern District of New York held during sentencing that schemes to take fraudulently from political donors go "well beyond defrauding individual donors. They hurt us all." *Id.*

12. *See infra* notes 13–17 and accompanying text (discussing the elements of the Fraud Triangle and its application to the campaign finance system).

13. *See* Leandra Lederman, *The Fraud Triangle and Tax Evasion*, 106 IOWA L. REV. 1153, 1156 (2021) (discussing that the elements of the fraud triangle are "incentive or pressure to commit fraud, a perceived opportunity to do so, and some rationalization of the act" (emphasis omitted) (quoting CODIFICATION OF ACCT. STANDARDS & PROCS., CLARIFIED STATEMENTS ON AUDITING STANDARDS, AU-C § 240.A1 (AM. INST. OF CERTIFIED PUB. ACCTS. 2020))).

14. Amisa Ratliff, *The Congressional Fundraising Treadmill*, ISSUE ONE (Apr. 19, 2023), https://issueone.org/articles/the-congressional-fundraising-treadmill-first-reports-2024-cycle/ [https://perma.cc/3TTL-XMCM] (discussing "recently filed campaign finance reports that cover [Members of the 118th Congress's] fundraising between January 1 and March 31, 2023").

15. Kedric L. Payne, *How to Survive the Next Scandal: Replace Obsolete Campaign Finance Reform with Political Law Reform?*, 17 U. PA. J.L. SOC. CHANGE 329, 333 (2014) (discussing that the "need for lawmakers to raise campaign contributions daily is well known").

16. *See* Samantha Lai, *Data Misuse and Disinformation: Technology and the 2022 Elections*, BROOKINGS INST. (June 21, 2022), https://www.brookings.edu/articles/data-misuse-and-disinformation-technology-and-the-2022-elections/ [https://perma.cc/577T-QQPV] ("As users regularly encounter content that aligns with their political affiliation and personal beliefs, this enables confirmation biases. In turn, this allows the spread and cementing of misinformation among given circles, cumulating in tensions that fueled both the Stop the Steal Movement after the 2020 U.S. presidential elections and the January 6 insurrection.").

17. *See* Indictment at 1, United States v. Trump (D.D.C. 2023) (No. 23-cr-00257) (arguing that President Trump had a right to lie but he had no right to combine those lies with criminal actions); Domenico Montanaro, *The Truth in Polit-*

money by any means possible incentivizes a system of unethical and even dangerous behavior, in which politicians of any ideology or party could be complicit.[18]

Nonetheless, it is not easy for courts to distinguish fraudulent campaigns from legitimate ones because the interest in protecting donors from campaign misinformation runs against the interest in guaranteeing free discourse under the First Amendment.[19] In response, some recent literature suggests that courts should recognize exceptions to the First Amendment doctrine to curb a politician's ability to distort the truth.[20]

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ical Advertising: 'You're Allowed to Lie', NPR (Mar. 17, 2022, 5:00 AM), https://www.npr.org/2022/03/17/1087047638/the-truth-in-political-advertising-youre-allowed-to-lie [https://perma.cc/8ZUX-FZED] (discussing that politicians are free to lie under the First Amendment and that lies alone cannot be grounds for either criminal or civil liability). Some courts may take "judicial notice" that political puffery is typically an unreliable statement. *See* Cleveland Police Patrolmen's Ass'n v. Voinovich, 472 N.E.2d 759, 764 (Ohio Ct. App. 1984) (discussing allegations involving political promises). Along these lines, Judge Learned Hand observed:

> There are some kinds of talk which no sensible man takes seriously, and if he does[,] he suffers from his credulity. . . . Such statements, like the claims of campaign managers before election, are rather designed to allay the suspicion which would attend their absence than to be understood as having any relation to objective truth.

Vulcan Metals Co. v. Simmons Mfg. Co., 248 F. 853, 856 (2d Cir. 1918) (discussing that some forms of advertising may be puffery and are therefore unreliable).

18. *See supra* notes 11–17 and accompanying text (discussing instances of allegedly deceptive tactics to raise money for political campaigns).

19. *See* United States v. Menendez, 291 F. Supp. 3d 606, 613 (D.N.J. 2018) (holding that in order to convict someone for bribery on the basis of a campaign contribution, a showing of an "explicit *quid pro quo*" is required because otherwise, the court would be convicting an acceptable form of political discourse protected by the First Amendment); *see also* J. KELLY STRADER, JOHN P. ANDERSON, MIHAILIS E. DIAMANTIS & SANDRA D. JORDAN, WHITE COLLAR CRIME: CASES, MATERIALS, AND PROBLEMS 172 (4th ed. 2021) (ebook) (discussing *Menendez* and quid pro quo involving campaign contributions).

20. *See* Joshua S. Sellers, *Legislating Against Lying in Campaigns and Elections*, 71 OKLA. L. REV. 141, 145 (2018) (arguing that a politician's lies can be curbed "(1) when foreign nationals engage in intentionally false speech that includes express advocacy, (2) when intentionally false speech is used to undermine election administration, and (3) when a campaign or outside political group intentionally falsifies a mandatory disclosure filing"); *see also* Robert Size, *Publishing Fake News for Profit Should Be Prosecuted as Wire Fraud*, 60 SANTA CLARA L. REV. 29, 32–33 (2020) (discussing the parallels between "traditional scheme[s] to defraud" under federal wire fraud statutes and the actions of alleged fake news outlets); David A. Logan, *Rescuing Our Democracy by Rethinking* New York Times Co. v. Sullivan, 81 OHIO ST. L.J. 759, 812–13 (2020) (proposing, among other considerations, that the "actual malice" requirement to libel be reconsidered to hold those accountable for telling lies); Michael Kang & Jacob Eisler, *Rethinking the Government Speech Doctrine, Post-Trump*, 2022 U. ILL. L. REV. 1943, 1960 (2022) ("The primary limitations that is recognized is that where a lie causes direct harm, its social value (and thus its prospective value as a subject of constitutional protection from regulation) is lost."); Helen Norton, *(At Least) Thirteen Ways of Looking at Election Lies*, 71 OKLA. L. REV. 117, 139 (2018) ("In offering this long—yet no doubt incomplete—litany of falsehoods, I don't propose to solve the problem of election lies. I hope instead to show that election lies pose many problems, plural. . . . [S]ome may threaten greater or more direct harm than

However, the Court in *Citizens United v. Federal Election Commission*[21] notes that: "Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints."[22] Regulating political speech is presumptively unconstitutional because the government should not be trusted to regulate truth and compel its citizens to believe that truth.[23]

Nonetheless, the First Amendment protects neither commercial speech that could mislead consumers nor speech as an element of a crime—both of which could tangibly harm the public.[24] Furthermore, the question remains whether those who intend to procure financing with misrepresentations could obtain a form of immunity—or, at least, reduced scrutiny—by running for office.[25] Shortly after the Supreme Court's decision in *Citizens United*, commentators expressed concerns that unchecked political contributions could lead to racketeering activity infiltrating the campaign finance system.[26]

Candidates who seek to create a cult of personality seem increasingly successful in obtaining campaign contributions with lies and conspiracy

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others, and some may be more responsive to different forms of constraint than others.").

21. 558 U.S. 310 (2010).

22. *Id.* at 340 (holding that restrictions on independent campaign expenditures violates the First Amendment).

23. *See* Buckley v. Valeo, 424 U.S. 1, 56–57 (1976) (per curiam) (exploring those questions and generally regarding suspect government's ability "to equalize the opportunities of all candidates," especially if the unintended effects would be to shut out a candidate who is fairly new to politics); W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.").

24. *See* Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563–64 (1980) (holding that the government may regulate commercial speech which either is misleading or an element of a crime, while other regulation of commercial speech is subject to intermediate scrutiny).

25. *See* John A. Barrett, Jr., *Free Speech Has Gotten Very Expensive: Rethinking Political Speech Regulation in a Post-Truth World*, 94 ST. JOHN'S L. REV. 615, 629–31 (2020) (discussing that because the First Amendment protects political speech and even lies, candidates would not face legal consequence for running campaign advertisements with false assertions); *see also* Trump v. United States, 144 S. Ct. 2312, 2344 (2024) (discussing that there is a form of presidential immunity for "acts pursuant to [the President's] exclusive constitutional powers"). Nonetheless, the Court notes the possibility that certain presidential speech "in an unofficial capacity—perhaps as a candidate for office or party leader" would not have immunity protections. *Id.* at 2340 (discussing that this kind of candidate speech requires a "fact specific [analysis] and may prove to be challenging").

26. *See, e.g.*, Jillian Henzler, Note, *Political Gangsters: The Future of Racketeering Law in Politics*, 59 CLEV. ST. L. REV. 435, 460–61 (2011) (discussing that a large "influx" of cash into the campaign finance system as well as the risk of increased coordinated spending efforts could incentivize corruption); Eugene McCarthy, *A Call to Prosecute Drug Company Fraud as Organized Crime*, 69 SYRACUSE L. REV. 439, 485–86 (2019) (discussing that if drug companies contribute campaign contributions in the form of bribes, politicians could be liable under RICO for accepting them).

theories.[27] In light of this emerging problem, this Comment argues that prosecutors should look to pursue wire fraud charges and criminal actions under the Racketeer Influenced and Corrupt Organizations Act (RICO) for politicians, associates, and PACs who coordinate together to raise money with misrepresentations.[28] This Comment further argues that the goal of these prosecutions is not to silence speech, but to demonetize campaigns that lie, ensure that campaigns do not have the resources to defraud, and encourage campaigns that do raise money to make a good faith effort to educate the public and present realistic solutions to social problems.[29]

Part II discusses the First Amendment, wire fraud, and the purpose of RICO in order to explain how these doctrines can be used together to pursue fraudulent campaign activity. Part III explains how wire fraud applies to soliciting campaign contributions and how RICO applies to political campaigns. Part IV argues that prosecutors may appropriately charge RICO and wire fraud to demonetize campaigns that intend to defraud. Part V contemplates the impacts of the proposal in Part IV and emphasizes the importance in prosecuting only provably false statements.

II. LETTING "YOUR CONSCIENCE BE YOUR GUIDE": FIRST AMENDMENT DOCTRINES ON FALSE SPEECH IN CAMPAIGNS, WIRE FRAUD, AND RICO[30]

Applying wire fraud and RICO to campaigns that intend to defraud involves a discussion of political speech and the First Amendment, the standards of wire fraud, and the history and purpose of racketeering

27. *See* Sam Cabral, *RFK Jr's Conspiracy Theories and Republican Supporters*, BBC NEWS (July 17, 2023), https://www.bbc.com/news/world-us-canada-66226103 [https://perma.cc/53FZ-K8XD] (discussing how one presidential campaign gained more than twenty percent favorability in national polls while allegedly spreading conspiracy theories about the Covid-19 pandemic and the 2020 Election); *see also* Mike Cummings, *Study: Americans Prize Party Loyalty Over Democratic Principles*, YALENEWS (Aug. 11, 2020), https://news.yale.edu/2020/08/11/study-americans-prize-party-loyalty-over-democratic-principles [https://perma.cc/G8KW-BRSU] (discussing a recent political science study that found voters may be more likely to reward candidates for challenging democratic norms because they have more loyalty to the candidate than the institution); William M. Brooks, *Democracy on the Edge: Use the First Amendment to Stop False Speech by Government Officials*, 53 U. MEM. L. REV. 255, 343 (2022) ("[S]peech has been so valued because of its contribution to society. False speech does not contribute to society. All too often government officials speak falsely or misleadingly for the sole purpose of gaining a partisan advantage by deceiving listeners, particularly those susceptible to false or misleading speech.").

28. For further discussion of the argument that RICO can be used against campaigns that raise money based on misrepresentations, see *infra* Part IV.

29. For further discussion of the precedent regarding the First Amendment, wire fraud, and RICO related to soliciting donations on the basis of false statements, see *infra* Section IV.C.2.

30. This titles and headings for this Part are inspired by PINOCCHIO (Walt Disney Animation Studios 1940).

statutes such as RICO.[31] Section A discusses the elements of wire fraud relating to the acts of accepting political donations. Section B examines the relevant doctrine on the First Amendment and makes clear that wire fraud may be distinguished from constitutionally protected conduct. Section C discusses the history and purpose of RICO. Section D describes how RICO was designed to prosecute leaders of an organized criminal entity and make criminal activity unprofitable.

A. *No Strings: Intent and Scheme Under Mail and Wire Fraud*

Titles 18 U.S.C. §§ 1341 and 1343 govern the prohibitions on mail and wire fraud statutes respectively.[32] A person commits mail or wire fraud when they form a "specific intent to defraud" and use mail or wired communication services to deprive someone of "money, property, [or] honest services."[33] According to the Supreme Court, a person uses the mail or wires to accomplish a fraud when the use "is part of the execution of the scheme as conceived by the perpetrator at the time."[34] Courts distinguish an intent to deceive from an intent to defraud.[35] A person may intend to deceive when that person makes false representations about a product, but not necessarily those that are "essential in deciding whether to enter the bargain."[36] Accordingly, there is a higher standard for schemes to defraud, as courts require a material deception "reasonably calculated to deceive."[37] For example, schemes to defraud in the

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31. For further discussion of the First Amendment, wire fraud, and RICO precedent, see *infra* Part II.

32. *See* 18 U.S.C. § 1341 (2024) (defining mail fraud); 18 U.S.C. § 1343 (defining wire fraud).

33. STRADER, ANDERSON, DIAMANTIS & JORDAN, *supra* note 19, at 126 (describing elements of wire fraud); *see also* CHARLES DOYLE, CONG. RSCH. SERV., R41930, MAIL AND WIRE FRAUD: A BRIEF OVERVIEW OF FEDERAL CRIMINAL LAW 3 (2019) (discussing that the interpretation of each statute is "considered to apply to the other").

34. Schmuck v. United States, 489 U.S. 705, 711–12, 715 (1989) (holding that a reasonable jury could find a scheme to sell cars with rolled-back odometers to be mail fraud when mailing title registrations is required for the scheme).

35. *See* United States v. Regent Off. Supply Co., 421 F.2d 1174, 1182 (2d Cir. 1970) (holding an intent to deceive is not the same as an intent to defraud "where the deceit did not go to the nature of the bargain itself"). The Second Circuit held that an intent to defraud must "affect[] the customer's understanding of the bargain [or] . . . influenc[e] his assessment of the value of the bargain to [the customer]." *Id.* The Court in *Regent Office Supply Co.* reversed a conviction for a defendant where the government could not demonstrate that there was an exchange of goods for less than fair value and where no customer felt cheated by the transactions. *Id.* at 1175–76, 1182.

36. *See id.* at 1182 (discussing that some representations are beyond an intent to deceive such as those that "are directed to the quality, adequacy or price of the goods themselves").

37. United States v. Sloan, 492 F.3d 884, 891 (7th Cir. 2007) (holding that a scheme to defraud must be "reasonably calculated to deceive individuals of ordinary prudence and comprehension"); *see also* Neder v. United States, 527 U.S. 1, 22 & n.5 (1999) (defining material deception as one which a "reasonable [person] would attach importance to its existence or nonexistence . . . [and that] the maker of the representation knows or has reason to know that its recipient regards or is

context of a contract could involve one party never intending to fulfill the contract.[38] To show that advertising is not only deceptive but also fraudulent, some courts may require that advertising be "scientifically and factually false."[39] This is to demonstrate that the "claims or statements in advertising may go beyond mere puffing and enter the realm of fraud where the product must inherently fail to do what is claimed for it."[40] Courts have also held it unnecessary to apply an objective reasonable person test to find that a fraudulent scheme took place.[41] Most significantly, a person can commit wire fraud even when the intended recipients had not relied on that person's fraudulent actions.[42]

Cases on "honest services fraud" are instructive because courts consistently hold that a claim of wire fraud is strongest against a public official when that public official intends to take property or deprive honest services of discernable value.[43] In *McNally v. United States*,[44] the Supreme Court held that under honest services wire fraud, there was no "intangible right of the citizenry to good government."[45] The Court in *McNally* considered the legality of an alleged kickback scheme between a public official and a number of insurance agencies bidding for contracts

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likely to regard the matter as important" (quoting RESTATEMENT (SECOND) OF TORTS: MATERIALITY OF MISREPRESENTATION § 538 (AM. L. INST. 1977))).

38. *See* United States *ex rel.* O'Donnell v. Countrywide Home Loans, Inc., 822 F.3d 650, 662 (2d Cir. 2016) ("Only if a contractual promise is made with no intent ever to perform it can the promise itself constitute a fraudulent misrepresentation.").

39. *See* United States v. Andreadis, 366 F.2d 423, 428 (2d Cir. 1966) (discussing that defendant used evidence that was "scientifically and factually false, that [defendants] knew them to be false, and, despite this falsity and [defendants'] knowledge thereof, [defendants] continued to include these representations and statements in their advertising").

40. *See Regent Off. Supply Co.*, 421 F.2d at 1180 (discussing the kinds of advertisements actionable under wire fraud). The Court discusses further that: "[P]romotion of an inherently useful item may also be fraud when the scheme of promotion is based on claims of additional benefits to accrue to the customer, if the benefits as represented are not realistically attainable by the customer." *Id.*

41. *See* United States v. Svete, 556 F.3d 1157, 1166 (11th Cir. 2009) (overturning its previous precedent that schemes to defraud must meet an objective reasonable person test and instead holding that schemes to defraud may fool less than prudent persons).

42. *See* Bridge v. Phx. Bond & Indem. Co., 553 U.S. 639, 649 (2008) ("[O]ne can conduct the affairs of a qualifying enterprise through a pattern of such acts without anyone relying on a fraudulent misrepresentation."); United States v. Goodpaster, 769 F.2d 374, 378–79 (6th Cir. 1985) ("It is well established that a conviction under [the mail fraud statute] does not require proof that the intended victim was actually defrauded.").

43. *See infra* notes 44–53 and accompanying text (discussing that honest services wire fraud applies mostly to attempts to take physical property).

44. 483 U.S. 350 (1987), *superseded by* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346 (2024)).

45. *Id.* at 356, 358 (interpreting the "honest services" provision of the wire fraud statute does not apply to the deprivation of an "intangible right").

with the Commonwealth of Kentucky.[46] Reversing the district court's conviction, the Court held that mail fraud schemes should either intend to take property of discernable value or to deprive one of honest services by making promises without intending to fulfill them.[47]

The Court revisited this principle from *McNally* in *Kelly v. United States*[48] when it held that perpetrators of the Bridgegate scandal did not commit wire fraud because they did not intend to take property.[49] The issue in *Kelly* was that the property allegedly taken was not the target of the fraud.[50] Although the Bridgegate scandal could have been the result of fraud because there was property loss, it was not the intent of the government officials to cause the property loss.[51] Thus, in terms of "honest services" fraud, government actors must still intend to take the property

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46. *See id.* at 352–53 (discussing the facts of the *McNally* case).

47. *See id.* at 356 ("Insofar as the sparse legislative history reveals anything, it indicates that the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property."). The Court held further that honest services refers to "false promises and misrepresentations to the future as well as other frauds involving money or property." *Id.* at 359. The Court ended up reversing the district court's conviction. *Id.* at 361. Congress later added 18 U.S.C. § 1346 to include "intangible rights" as a property interest covered by mail or wire fraud. *See* STRADER, ANDERSON, DIAMANTIS & JORDAN, *supra* note 19, at 141.

48. 140 S. Ct. 1565 (2020).

49. *See id.* at 1568, 1573–74 (holding that wire fraud under 18 U.S.C. § 1346 only extends to a specific intent to take physical property). The Court, in its opinion, discussed the allegations in the Bridgegate scandal:

> For four days in September 2013, traffic ground to a halt in Fort Lee, New Jersey. The cause was an unannounced realignment of 12 toll lanes leading to the George Washington Bridge, an entryway into Manhattan administered by the Port Authority of New York and New Jersey. For decades, three of those access lanes had been reserved during morning rush hour for commuters coming from the streets of Fort Lee. But on these four days—with predictable consequences—only a single lane was set aside. The public officials who ordered that change claimed they were reducing the number of dedicated lanes to conduct a traffic study. In fact, they did so for a political reason—to punish the mayor of Fort Lee for refusing to support the New Jersey Governor's reelection bid.

Id. at 1568. The Court warned that "[i]f U.S. Attorneys could prosecute as property fraud every lie a state or local official tells," it could expand criminal liability to a point of unsustainability and confuse the purpose of mail and wire fraud statutes. *Id.* at 1574.

50. *See id.* at 1574 (discussing that incidental property loss cannot be prosecuted under mail or wire fraud). Justice Kagan explains that: "Every regulatory decision . . . requires the use of some employee labor. But that does not mean that every scheme to alter a regulation has that labor as its object. . . . The cost of employee hours spent on [the plan to close the bridge] was its incidental byproduct." *Id.*

51. *See id.* (discussing the facts of the case). Justice Kagan explains that: "For no reason other than political payback, [defendants] used deception to reduce Fort Lee's access lanes to the George Washington Bridge—and thereby jeopardized the safety of the town's residents. But not every corrupt act by state or local officials is a federal crime." *Id.*

actually lost.[52] A prosecutor who charges a candidate that solicits campaign donations with lies distinguishes the concern of the *Kelly* Court; in such a case, that person *does* intend to take personal property from other people.[53]

B. *Wishing Upon a Star: Candidate Speech and Misrepresentations*

In most instances, candidates for elected office have a right to free speech even if they lie.[54] The public policy behind this right comes largely from John Stuart Mill, stating that the best defense against lies is not prohibition, but counterspeech, which allows speech to compete for significance in the marketplace of ideas.[55] Mill theorized the marketplace of ideas would be self-correcting in its production of truth because disproving lies could lead to a more "livelier impression of truth, produced by its collision with error."[56] According to Mill, lies are better confronted with truth than with government regulations.[57]

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52. *See id.* ("Because the scheme here did not aim to obtain money or property, [defendants] could not have violated the federal-program fraud or wire fraud laws.").

53. *See id.* at 1573–74 (discussing that "a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme").

54. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964) ("That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive . . . .'" (first alteration in original) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963))). The Court continued by stating: "Even a false statement may be deemed to make a valuable contribution to public debate." *Id.* at 279 n.19. According to Professor Erwin Chemerinsky, one cannot discuss the legality in condemning false speech without interpreting the, albeit inconsistent, First Amendment doctrine that protects political speech. *See* Erwin Chemerinsky, *False Speech and the First Amendment*, 71 OKLA. L. REV. 1, 5–6 (2018) (arguing that "the Court never will be able to say that all false speech is outside of First Amendment protection or that all false speech is constitutionally safeguarded").

55. *See* Daniela C. Manzi, Note, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 FORDHAM L. REV. 2623, 2626 (2019) ("False opinions have value, Mill says, because they provoke people to investigate the proposition further, thereby leading to discovery of the truth."). Manzi explains further Mill's proposition that: "If misguided ideas are censored, discovery of truth will be stifled. Continuous debate requires people to defend and articulate the truth, thereby reinforcing its vigor." *Id.* at 2626 (footnote omitted).

56. JOHN STUART MILL, ON LIBERTY; REPRESENTATIVE GOVERNMENT; THE SUBJECTION OF WOMEN: THREE ESSAYS 24 (Oxford Univ. Press 1960). Mill posits that:

> [T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of changing error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

Id.; *see also* Manzi, *supra* note 55, at 2626 (discussing Mill's theories).

57. *See* Henricksen, *supra* note 6, at 577 & n.172 (discussing Mill as well as other theorists and jurists discussing that lies are best confronted with truth).

However, courts do not protect speech that defrauds.[58] Further, courts do not protect lies when those lies may cause harm or form the basis of a traditional cause of action.[59] State statutes articulate this principle as well: a handful of states contain prohibitions on false campaign speech.[60] Nonetheless, courts in the United States hesitate to apply some of these exceptions to political speech under the First Amendment.[61] Courts follow the principle of allowing "breathing space" when reviewing

58. *See* Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 52 (1988) (discussing whether someone may be liable for defamation when that person makes knowing and reckless false statements). In *Falwell*, the Supreme Court recognized that "[f]alse statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot be easily repaired by counterspeech, however persuasive or effective." *Id.*; *see also* Henricksen, *supra* note 6, at 573 ("Although the First Amendment does not protect fraudulent speech, the kinds of speech deemed to fit within the fraud category are normally confined to long-established civil and criminal fraud doctrines, such as common law deceit, mail fraud, securities fraud, and false advertising.").

59. *See* Stephen D. Sencer, Comment, *Read My Lips: Examining the Legal Implications of Knowingly False Campaign Promises*, 90 MICH. L. REV. 428, 463–65 (1991) (discussing that campaign statements could be actionable under a number of theories of liability—including breach, promissory estoppel, common law deceit—as well as a number of state statutes that prohibit false statements used in a campaign); Chemerinsky, *supra* note 54, at 9 (discussing that the First Amendment does not protect false commercial speech or lies to government officials); *see also* Illinois *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 619–20, 624 (2003) ("Consistent with our precedent and the First Amendment, States may maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about how their donations will be used."). In *Madigan*, the Court considered a state attorney general case against a telemarketing operation which told donors that most, if not all, of their donations would go to charity when only fifteen percent did. *Id.* at 607–08.

60. *See, e.g.*, UTAH CODE ANN. § 20A-11-1103 (West 2023) ("A person may not knowingly make or publish, or cause to be made or published, any false statement in relation to any candidate, proposed constitutional amendment, or other measure, that is intended or tends to affect any voting at any primary, convention, or election."); ALASKA STAT. § 15.13.095 (2023) (detailing provisions that provide damages for candidates injured by false statements); COLO. REV. STAT. § 1-13-109 (2023) (providing criminal sanctions for those who "knowingly make . . . any false statement designed to affect the vote on any issue submitted to the electors at any election or relating to any candidate for election to public office"). *See generally* Catherine J. Ross, *Ministry of Truth: Why Law Can't Stop Prevarications, Bullshit, and Straight-Out Lies in Political Campaigns*, 16 FIRST AMEND. L. REV. 367, 383 (2017) (discussing that at the time of that writing, at least 16 states had laws on their books that regulate campaign speech).

61. *See* Sencer, *supra* note 59, at 440 ("Of the few cases that address broken campaign promises, most appear to rely on the assumption that the political process better handles these issues than does the judicial system." (footnote omitted)); *see also* Winter v. Woinitzek, 834 F.3d 681, 693 (6th Cir. 2016) (discussing Missouri's prohibition on judicial candidates making materially false statements, which could "survive[] strict scrutiny," but ultimately ruling in favor of the candidate to allow "breathing space," as the candidate's statement could reasonably be interpreted as true); Ross, *supra* note 60, 395–96 & n.161 (discussing that *Winter* is an example of courts applying "strict scrutiny" to states that ban certain kinds of false campaign speech).

false speech so that they do not intervene hastily to correct a lie.[62] Breathing space is a form of judicial lenity to speakers as courts will interpret misleading statements in ways that could be true.[63] In this way, courts have forgiven misleading candidate statements that are not necessarily false.[64]

Recently, the Supreme Court in *United States v. Alvarez*[65] held that prohibitions on false speech may be constitutional depending on whether that speech is likely to cause harm.[66] In a plurality decision, the Court struck down a statute criminalizing lying about receiving honors in the military because the statute was overbroad.[67] Although the Court struck down this statute, the plurality and the dissent recognized that false speech furthering fraud should not receive First Amendment

62. *See* Brown v. Hartlage, 456 U.S. 45, 60 (1982) (reaching a similar decision as *New York Times v. Sullivan* to apply the concept of "breathing space" to false campaign speech). In *Brown*, the Court considered a corruption case against a winning candidate for county commissioner who promised to reduce his salary if elected. *Id.* at 47–48. Realizing that this proposal would be illegal, the candidates who promised this retracted the statements but was nonetheless elected. *Id.* at 48–49. The opposing candidate brought an action to declare the election void according to the state's statute. *Id.* at 49. The Court held that invalidating the election under a good faith misrepresentation would not be consistent with the guarantees of the First Amendment. *Id.* at 61. But the Court indicated that there could be a different outcome under that state's statute if the candidate made a false statement knowingly or with reckless disregard for the truth. *Id.*; *see also* Sencer, *supra* note 59, at 438–39 (discussing that *Brown v. Hartlage* "leav[es] open the possibility that a state may legislate against some misrepresentations"); *see also* Martin H. Redish & Julio Pereyra, *Resolving the First Amendment Civil War: Political Fraud and the Democratic Goals of Free Expression*, 62 ARIZ. L. REV. 451, 462–63 (discussing the facts of *Brown* and that *Brown*'s holding may stand for the proposition that "political frauds made with actual malice can be regulated consistent with the First Amendment").

63. *See Brown*, 456 U.S. at 61 (discussing that misrepresentations in campaigns that can be interpreted true merit "breathing space" under the First Amendment).

64. *See, e.g.*, *Winter*, 834 F.3d at 694 (holding that "only a ban on conscious falsehoods satisfies strict scrutiny" and thus a ban on judicial candidates making only misleading statements cannot "undermine the integrity of the judiciary in the same way that knowing lies do").

65. 567 U.S. 709 (2012) (plurality opinion).

66. *See id.* at 723 ("Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment."); *id.* at 739 (Alito, J., dissenting) ("By holding that the First Amendment nevertheless shields these lies, the Court breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest."); *see also* Ross, *supra* note 60, at 393 (discussing that *Alvarez* "suggests that the hierarchy of First Amendment values which, if anything, privilege political and campaign speech, should remain in place until 'something more' (such as defamation within the context of political speech) is proven that removes the particular statement from constitutional protection").

67. *See id.* at 724–26 (Kennedy, J.) (discussing that the statute was not narrowly tailored to the interest in curbing campaign lies because the government did not demonstrate why "counterspeech" would not be just as effective); Manzi, *supra* note 55, at 2635 ("[T]he plurality worried that the Act would create a dangerous precedent for overly broad regulation of lies without a judicial backstop.").

protection.[68] Nonetheless, some courts in civil cases held it unlikely that false candidate statements cause detrimental harm, as they may not be "relied on by rational adults."[69]

But when considering cases of candidate dishonesty that amounts to criminal wire fraud and racketeering, courts may likely find the First Amendment principle of "breathing space" to be, well, long-winded.[70] As Professor Ciara Torres-Spelliscy notes, "[P]rosecutors have long relied on wire fraud when charging individuals with sundry campaign finance related crimes."[71] The Court's decision in *McCormick v. United States*[72] exemplifies the tension between protecting First Amendment freedom to obtain campaign contributions and enforcing criminal statutes.[73] There, the Court held that the act of receiving a political contribution cannot be extortion under "color of official right" (an element of Hobbs Act extortion) because "[t]o hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law[,] but also conduct that in a very real sense is unavoidable."[74] Nonetheless, the

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68. *See supra* note 66 accompanying text (discussing that both the plurality and the dissent recognize that fraudulent speech is not protected by the First Amendment); Henricksen, *supra* note 6, at 576 (discussing that both the plurality and concurrence in *Alvarez* recognize that the government can regulate lies in order to prevent injuries related to those lies).

69. Alpine Bank v. Hubbell, 555 F.3d 1097, 1107 (10th Cir. 2009) (discussing that campaign statements may be an example of an unreliable statement). *See generally* Foster v. Schock, No. 15-cv-03325, 2017 WL 1178349, at *2–3 (N.D. Ill. Mar. 30, 2017) (discussing political puffery). According to the Ohio Court of Appeals, examples of political puffery are candidate statements that "sometimes outrun the facts without overstepping the line that divides 'hype' from accepted standards of fraud." Cleveland Police Patrolmen's Ass'n v. Voinovich, 472 N.E.2d 759, 764 (Ohio Ct. App. 1984) (defining political puffery).

70. *See* Martin H. Redish & Julio Pereyra, *Resolving the First Amendment's Civil War: Political Fraud and the Democratic Goals of Free Expression*, 62 ARIZ. L. REV. 451, 479–80 (2020) (discussing the limits of the breathing space doctrine and arguing that in cases where "frauds are material, i.e., said with knowledge of falsity, and non-*de minimis*[,] . . . regulation of political fraud is necessary, not in spite of the First Amendment's protection of free speech, but because of it"); Sencer, *supra* note 59, at 442 ("Reliance solely on the corrective mechanisms of the electoral process to ensure campaign truth is analogous to reliance on the market to ensure the honesty of business people.").

71. Ciara Torres-Spelliscy, *How Jack Smith May Charge Trump PAC with Fraudulent Fundraising Within the Bounds of First Amendment*, JUST SECURITY (Aug. 24, 2023), https://www.justsecurity.org/87782/how-jack-smith-may-charge-trump-pac-with-fraudulent-fundraising-within-the-bounds-of-first-amendment/ [https://perma.cc/96DB-AMH5] (discussing that federal prosecutors have charged political campaigns of both parties with wire fraud).

72. 500 U.S. 257 (1991).

73. *Id.* at 274 (holding that receipt of a campaign contribution alone is not enough to convict on an extortion charge under "color of official right").

74. *Id.* at 272 (discussing that in regard to receiving campaign donations, not all activity for "the benefit of constituents or support legislation furthering the interests of some of their constituents" is considered extortion). *See generally* 18 U.S.C. § 1951(b)(2) (2024) (defining extortion under the Hobbs Act as "the obtaining of property from another, with [their] consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right"). As one

Court held that accepting political contributions with the "use of force, violence, or fear" would be subject to extortion.[75]

C. *Brave, Honest, and Unselfish: RICO's Legislative Purpose in Guarding the Rule of Law*

Defendants who plan to commit wire fraud may be liable under federal conspiracy, but Congress enacted RICO to criminalize racketeering enterprises, namely those associated with organized crime.[76] Racketeering statutes originated as a targeted response to concerns that organized crime had taken hold of legitimate enterprises.[77] Between the 1920s and 1960s, organized crime became prevalent and profitable in several major cities.[78] Organized crime syndicates (including the Mafia) acquired interests in legitimate businesses, underwrote loans that no one could afford, and bribed law enforcement to look the other way.[79] Organized crime's power to corrupt local politicians became the subject of national attention when the United States Senate created a committee to investigate this corruption.[80]

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casebook discusses: "Extortion [under the Hobbs Act] is a crime that is closely related to bribery . . . . and is often used to prosecute political corruption." STRADER, ANDERSON, DIAMANTIS & JORDAN, *supra* note 19, at 343.

75. *McCormick*, 500 U.S. at 272–73 (describing Congress could not have intended the definition of extortion to include only the act of accepting campaign contributions when that act is not coupled with other illegal actions).

76. *See* 18 U.S.C. § 371 (2024) (defining conspiracy as "two or more persons conspire . . . to commit any offense against the United States, or to defraud the United States"); Jonathan Turley, *Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation*, 29 WM. & MARY L. REV. 441, 477 (1988) (discussing that RICO's focus was targeting organized crime).

77. *See* Toby D. Mann, *Legislative History of R.I.C.O.*, *in* TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME 70–71 (G. Robert Blakely ed. 1980) (discussing that racketeering statutes originated out of fear that racketeering activity, especially racketeering activity which results in violence, would result in anti-competitive practices).

78. *See* James B. Jacobs, *The Rise and Fall of Organized Crime in the United States*, 49 CRIM. & JUST. 17, 29–38 (2019) (discussing the prevalence of organized crime and the industries that organized crime infiltrated). Organized crime was prevalent in union organizations and in creating cartels out of local shops and grocery stores. *Id.* at 28–29.

79. *See id.* at 38 ("[O]rganized crime bosses functioned as power brokers, supporting and promoting their favored political candidates with funds and get-out-the-vote assistance. In return, politicians gave [the Italian American Cosa Nostra crime families] protection from apprehension and prosecution."). In particular, "[g]ambling has always been an important source of revenue for Cosa Nostra families." *Id.* at 31. Organized crime organizations would also underwrite "usurious loans backed up by intimidation and threats of force to obtain repayment." *Id.* at 33.

80. *See id.* at 38 (discussing that Senator Estes Kefauver convened the Senate Committee to Investigate Crime in Interstate Commerce to "investigate[] the symbiotic relationship between Cosa Nostra families and big city politicians"). Other Congressional committees were convened: "In 1956, Arkansas Senator John McClellan initiated hearings for the Senate Select Committee on Improper Activities in the Labor or Management Field that [lasted] for 15 years." *Id.* at 41.

Combatting organized crime became a national priority in the late 1960s and 1970s.[81] Those who sought to combat organized crime recognized a more fundamental problem in the normalization of criminal activity: its potential to undermine the rule of law.[82] The Senate Report on the Organized Crime Control Act of 1970 (the Act) echoed these concerns and recognized that organized crime would "subvert and corrupt our democratic processes."[83] The Act included RICO, which prosecutors began to apply to convict of organized crime syndicates with one trial.[84]

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81. *See id.* at 20 (discussing that organized crime was not the focus of the FBI under Director J. Edgar Hoover). When support to fight organized crime increased in 1968, the Department of Justice "established more than a dozen organized crime strike forces in jurisdictions where [organized crime] was thought to be the strongest." *Id.* at 20. In addition to RICO, Congress authorized additional tools for pursuing organized crime, including the authority to wiretap conversations and the creation of the "Witness Security Program" for former members of organized crime syndicates to safely become witnesses for the federal government. *Id.*

82. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 209 (1967) [hereinafter CRIME COMMISSION REPORT] ("As the leaders of Cosa Nostra and their racketeering allies pursue their conspiracy unmolested, in open and continuous defiance of the law, they preach a sermon that all too many Americans heed: The government is for sale; lawlessness is the road to wealth; honesty is a pitfall and morality is a trap for suckers. The extraordinary thing about organized crime is that America has tolerated it for so long."); *see also* Benjamin Levin, *American Gangsters: RICO, Criminal Syndicates, and Conspiracy Laws as Market Control*, 48 HARV. C.R.-C.L L. REV. 105, 142 (2013) (discussing that other motivations to treat "radical political dissent as a form of organized crime," while not definitive legislative intent, were present in adopting the Organized Crime Control Act of 1970).

83. S. REP. NO. 91-617, at 1 (1965) (discussing the purpose of the Organized Crime Control Act of 1970). The House Report on the Organized Crime Control Act of 1970 states that one purpose of a new racketeering law is to hold accountable state and local politicians who aid criminal activity. *See* H.R. REP. NO. 91-1549, at 95 (1970) (discussing that illegal gambling finances organized crime, and in turn, is used to bribe local government officials to turn the other way). In a floor statement, Senator Hruska stated:

> In recent years, organized crime has become increasingly diversified and has become entrenched in legitimate businesses and in labor unions where it employs terrorism, extortion, tax evasion, bankruptcy fraud and manipulation, and other measures to drive out lawful owners and officials. Also, wherever organized crime exists, it corrupts public officials and wields extensive political influence which insulate its activities from governmental interference.
>
> Corrupt officials and bribed law enforcement officers operate as "a silent conspiracy" in support of organized crime. *The syndicate could not continue to operate without corrupt judges and prosecutors, or without the assistance of a handful of bribed police.*

116 CONG. REC. 601 (1970) (statement of Sen. Roman Hruska) (emphasis added) (discussing, in relation to the Organized Crime Control Act, organized crime and political corruption).

84. *See* Ashley Starnes, Comment, *Can Anybody Be a Gangster?: Differences Between Georgia RICO and Federal RICO with Anecdotal Examples*, 16 J. MARSHALL L.J. 306, 308 (2023) (discussing that "[a] successful prosecution could dismantle multiple generations of an entire crime family via one case"). Starnes explains that RICO aimed to solve a problem in prosecuting crime families when prosecuting some of those leaders may not necessarily prevent another leader from continuing the racketeering operations. *Id.* at 308–09. Famously, then-U.S. Attorney Rudy Giuliani used

Since its adoption, prosecutors have used RICO broadly to charge criminal enterprises involved in political corruption.[85] Additionally, RICO serves as an antitrust statute by prohibiting individuals from acquiring or investing in legitimate businesses with proceeds from racketeering activity.[86]

D. *A Lie Can Keep Growing and Growing: Using RICO to Hold Powerful Groups Accountable*

RICO contains both criminal and civil provisions and contains specific provisions to divest funds from organizations that finance criminal activities.[87] Section II.D.1 discusses the differences between criminal and civil RICO and particular concerns of civil RICO for protected First Amendment activity. Section II.D.2 discusses how RICO provisions work beyond common law conspiracy to target the directors of organized crime and to divest proceeds from those organizations.

1. *Criminal vs. Civil RICO*

The criminal RICO statute prohibits "[1] *any person* employed by or associated with any [2] *enterprise* [3] *engaged in*, or *the activities of which affect, interstate or foreign commerce*, to [4] *conduct or participate*, directly or indirectly, in the conduct of such enterprise's affairs [5] *through a pattern of racketeering activity or collection of unlawful debt.*"[88] The scope of RICO is

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RICO in the 1986 "commission case," prosecuting the heads of the major crime families in New York for forming a de facto "commission" that coordinated a number of its activities between the crime families. *See* Jacobs, *supra* note 78, at 24, 49 (discussing that the "commission" would also order hits, specifically authorizing the killing of one of its own members).

85. *See, e.g.*, Jacobs, *supra* note 78, at 40 (explaining federal prosecutors convicted the Bruno-Scarfo mafia family in Philadelphia for racketeering and colluding with a city councilmember to provide funding for a construction project in exchange for a kickback). At the time, "Philadelphia's Bruno-Scarfo family thoroughly corrupted Philadelphia city government and politics." *Id.*; *see also Why Was RICO, a Mafia-Targeting Act, Used to Charge Donald Trump?*, THE ECONOMIST (Aug. 15, 2023), https://www.economist.com/the-economist-explains/2023/08/15/why-was-rico-a-mafia-targeting-act-used-to-charge-donald-trump [https://perma.cc/RZJ5-XA29] (discussing that prosecutors have used RICO in a broader context than organized crime).

86. *See* 18 U.S.C. § 1962(a) (2024) (prohibiting a person from investing in an enterprise affecting interstate commerce with income obtained through a pattern of racketeering or the collection of unlawful debts); *see also* 18 U.S.C. § 1962(b) (prohibiting a person to acquire or control an interest in an enterprise through a pattern of racketeering activity or the collection of unlawful debts); Marie Bussey-Garza, Note, *Say Hello to My Little Friend Civil Rico: The Third Circuit Green Lights Insurance Shakedown of Big Pharma with* In re Avandia, 61 VILL. L. REV. 625, 628 (2016) ("Congress's expressed purpose in enacting RICO was to keep organized crime from infiltrating legitimate businesses." (footnote omitted)).

87. For further discussion on RICO forfeiture provisions and civil RICO, see *infra* Section II.D.

88. 18 U.S.C. § 1962(c) (2024) (emphasis added) (defining racketeering enterprise). To further clarify, RICO has five elements to convict someone for

not limited to countering criminal infiltration of a legitimate industry; it also criminalizes forming an organization with an illegitimate purpose.[89] A person who "controls" an enterprise under § 1962(c) must play some role in directing the affairs of the enterprise.[90] According to the Court in *Boyle v. United States*,[91] an enterprise is loosely defined and applies broadly to most informal associations, whether or not they resemble formal organizations.[92] The Court in *Boyle* held that RICO only requires that an enterprise have three features: "[A] purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."[93] This enterprise must also affect "interstate commerce," which can be demonstrated easily if defendants use an enterprise to bring in goods from out of state.[94] As

directing the affairs of a criminal enterprise under RICO: "[I]t [is] unlawful for (1) any person, (2) employed by or associated with, (3) a commercial enterprise, (4) to conduct or participate in the conduct of the enterprise's affairs (5) through (a) the collection of an unlawful debt or (b) a pattern of predicate offenses." CHARLES DOYLE, CONG. RSCH. SERV., 96-950, RICO: A BRIEF SKETCH 6 (2021) (quoting § 1962(c)) (discussing background on RICO). One casebook has been particularly helpful in finding relevant precedent and materials on RICO, wire fraud, and mail fraud. *See generally* STRADER, ANDERSON, DIAMANTIS & JORDAN, *supra* note 19 (containing cases, materials, and notes on RICO, wire fraud, and mail fraud).

89. *See* United States v. Turkette, 452 U.S. 576, 591–93 (1981) (holding that despite extensive legislative history supporting RICO as a measure to prevent organized crime's infiltration of legitimate industries, the term "enterprise" can mean an illegitimate enterprise). In *Turkette*, the Court considered a RICO conviction against a member of a group engaged in trafficking narcotics. *Id.* at 579–80.

90. *See* Reves v. Ernst & Young, 507 U.S. 170, 179 (1993) (interpreting the terms "conduct" and "participate" in § 1962(c) to mean that one must be involved in an "enterprise" to an extent that they at least conduct some of its activities). In *Reves*, the Court held that preparing an audit report does not mean that one directs the enterprise in furtherance of a racketeering scheme to justify liability under § 1962(c). *Id.* at 186.

91. 556 U.S. 938 (2009).

92. *See id.* at 941, 948 (2009) (upholding a jury instruction that RICO enterprises need not have a formal structure). In *Boyle*, the Court considered a conviction against a member of a group of bank robbers which was "loosely and informally organized" without a "leader or hierarchy" and without "any long-term master plan or agreement." *Id.* at 941; *see also* Doyle, *supra* note 88, at 16 ("[T]he Supreme Court in *Boyle* rejected the suggestion that such enterprises must be 'business-like' creatures, having discernible hierarchical structures, unique modus operandi, . . . or even a separate enterprise name or title.")

93. *Id.* at 946 (defining enterprise under § 1962(c) and discussing that RICO enterprises do not require any particular structure). An association-in-fact enterprise is one where "a group of people or entities have not formed a legal entity but have a common or shared purpose and maintain an ongoing organizational structure through which the associates function as a continuing unit." *Enterprise*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining association-in-fact enterprise).

94. *See* United States v. Robertson, 514 U.S. 669, 671–72 (1995) (holding that the government may prosecute defendants under RICO for running a gold mine because its operations involved buying equipment and hiring employees from out of state). In deciding the meaning of the "affecting interstate commerce" prong of RICO, the Court approvingly cites its own precedent that the federal government's jurisdiction to regulate under the Commerce Clause extends to "purely intrastate

such, RICO does not require enterprises to have a purpose in seeking profit: they must only "affect" interstate commerce.[95]

Civil RICO is an alternative to criminal RICO as a means to deter fraudulent behavior.[96] Civil RICO allows victims to recover for any damages related to a defendant's "pattern of racketeering activity" under § 1962(a)–(c).[97] This kind of civil case requires a plaintiff to demonstrate an injury to business or property connected to the racketeering activity.[98] RICO's civil provisions are also focused on divesting racketeering proceeds because plaintiffs may privately enforce RICO and seek treble damages against alleged racketeers.[99] Plaintiffs would be required to plead all the elements of RICO and the predicate acts that define the racketeering activity (and with particularity if alleging fraud).[100] Civil RICO can have advantages for victims to directly seek damages from fraudulent actors and deter future perpetrators intimidated by the potential costs of defending civil litigation.[101]

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commercial activities that nonetheless have substantial interstate effects." *Id.* at 671 (emphasis omitted) (citing Wickard v. Filburn, 317 U.S. 111, 124 (1942)).

95. *See* Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 252–53, 257–58, 260 (1994) (holding that RICO's statute does not require an "economic motive" to an association's racketeering activity, and thus, a number of groups may state a claim that anti-abortion advocates formed a racketeering enterprise under RICO with the intent to shut down multiple abortion clinics).

96. *See* Turley, *supra* note 76, at 481–82 (discussing that Congress intended for the damages provision of civil RICO to impose sanctions, which "is meant to deter any occurrence of an activity").

97. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 (1985) (describing that to establish a civil RICO claim under § 1964, the plaintiff must demonstrate that the defendant caused an injury by committing an act that meets the activity described under § 1962(a)–(c)), *superseded by statute on other grounds by*, Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737, 758 (1995).

98. *See* 18 U.S.C. § 1964(c) (2024) (authorizing suits to recover damages for injuries related to "business or property"); *Sedima, S.P.R.L.*, 473 U.S. at 495 ("Given that the 'racketeering activity' consists of no more and no less than the commission of a predicate act, . . . we are initially doubtful about a requirement of 'racketeering injury' separate from the harm from the predicate acts."); Turley, *supra* note 76, at 481–82 (discussing that, unlike RICO, the purpose of antitrust suits are to compensate victims for injuries stemming from the loss of competition and not to punish actors for committing antitrust violations).

99. *See* 18 U.S.C. § 1964(c) (2024) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the costs of the suit, including a reasonable attorney's fee . . . ."). Section 1964 includes an exception for racketeering activity involving the "sale of securities." *Id.*

100. *See* James A. Johnson & Thomas Cranmer, *Civil RICO: A Tool of Advocacy*, AM. BAR. ASSOC. (June 11, 2024), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2023-24/winter/civil-rico-tool-advocacy/ [https://perma.cc/H9RB-6GY6] (discussing that plaintiffs must plead "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity," and if pleading mail or wire fraud, to plead them with particularity according to FED. R. CIV. P. 9(b))

101. *See* Turley, *supra* note 76, at 498 (arguing that the incentive for private parties to sue racketeers "are part of RICO's underlying agenda to ruin racketeers through private litigation").

Nonetheless, plaintiffs run the risk of pleading RICO claims too often and frustrating legitimate First Amendment activity with RICO suits.[102] Civil RICO has come under controversy as plaintiffs have plead RICO for injuries related more to unethical business conduct and less related to racketeering.[103] This had led to considerable scrutiny of RICO pleadings in which courts often dismiss RICO cases if defendants have not sufficiently demonstrated causation or the pattern of racketeering activity.[104] Moreover, civil RICO suits have the potential to act as Strategic Lawsuits Against Public Participation, or SLAPP suits.[105] For example, companies could plead RICO to "maximize the intimidating effect of their suit by selecting a cause of action that enables multiple damages."[106] Ostensibly, these would be the treble damages authorized under RICO.[107]

2. *Holding Leaders Accountable Under RICO and Divesting Proceeds from Racketeering Activity*

Congress intended RICO to criminalize organizations that finance criminal behavior, divest funds from those organizations, and hold

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102. *See, e.g.*, Charlie Holt & Daniel Simons, *RICO as a Case-Study in Weaponizing Defamation and the International Response to Corporate Censorship*, 9 J. INT'L MEDIA & ENT. L. 1, 31 (2020) (discussing that RICO "allows corporations to stand in for federal prosecutors and harass critics").

103. *See* Bussey-Garza, *supra* note 86, at 626 (discussing criticism that more recent RICO suits allege fraudulent business activity instead of what is commonly recognized as organized crime). Bussey-Garza explains that "civil RICO attracts private plaintiffs for three key reasons: (1) mandatory treble damages and attorney's fees; (2) access to federal courts; and (3) broad judicial discretion." *Id.* at 630 (footnote omitted). Moreover, "the Supreme Court has consistently taken an expansive view of civil RICO, while lower courts have sought to limit RICO's use." *Id.* at 633–34 (footnote omitted).

104. Andrew S. Boutros & Roger Dickson, *RICO's Demanding Elements Prove Too Much Yet Again: RICO Claim Dismissed for Failing to Allege a "Pattern" of Racketeering Activity*, DECHERT LLP (March 25, 2020), https://www.dechert.com/knowledge/onpoint/2020/3/rico-s-demanding-elements-prove-too-much-yet-again—rico-claim-d.html [https://perma.cc/ADW2-CTSM] (discussing that courts scrutinize civil RICO claims to dismiss "[e]fforts by plaintiffs to cobble together unrelated acts to establish a pattern of racketeering activity").

105. *See* Holt & Simons, *supra* note 102, 6–7 (arguing that plaintiffs may use civil RICO in SLAPP suits for cases that do not clearly have a connection to organized crime). A strategic lawsuit against public participation (or SLAPP suit) is often brought by more powerful interests against those who "protest against some type of high-dollar initiative or who take an adverse position on a public-interest issue." *SLAPP*, BLACK'S LAW DICTIONARY (12th ed. 2024).

106. Holt & Simons, *supra* note 102, at 28 (discussing corporations using RICO). The commentators express a concern that "a common defendant in a SLAPP suit is a campaign or advocacy group that is capable of paying for its legal defence, but does so at the expense of activities that are part of its core mission." *Id.* at 28–29.

107. *See id.* at 18 ("With its treble damages and criminal connotations, the RICO SLAPP model intensifies these effects and creates an even more poisonous environment for campaigners and public watchdogs to operate.").

directors of those organization accountable.[108] Like federal conspiracy, RICO criminalizes actors working together to commit crimes.[109] Although prosecutors could use federal conspiracy effectively against low-level soldiers of a criminal syndicate, the purpose of RICO is to place blame on those who stand to gain the most, especially when they hide their involvement through multiple, seemingly disconnected entities.[110] As *The Guardian* notes, RICO statutes are designed to counter "hyper-centralized organization with an insulated leadership that can't be caught up in street-level crimes."[111] Because RICO aims to hold multiple defendants accountable for the same crime, the Justice Department's Criminal Division must grant permission to a prosecutor to charge a person with RICO.[112]

Because RICO's forfeiture provisions can be applied post-conviction and without a separate civil forfeiture proceeding, RICO prosecutions are focused on forfeiture as a consequence of the crime.[113] The Department

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108. Turley, *supra* note 76, at 478 (arguing that Congress "sought to pierce the mask of legitimacy used by mob-infiltrated businesses").

109. *See* 18 U.S.C. § 371 (2024) ("If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both."); Krulewitch v. United States, 336 U.S. 440, 449–50 (1949) (Jackson, J., concurring) (discussing that parties to a conspiracy may only agree to commit a crime, but are nonetheless culpable to another's overt act). In a RICO prosecution under 18 U.S.C. § 1962(c), defendants must not only agree to the activity, but also direct the activity of the racketeering enterprise. *See* 18 U.S.C. § 1962(c) (2024).

110. *See* Jack Queen, *What Is RICO and Why Are Prosecutors Using It Against Trump*, REUTERS (Aug. 16, 2023, 4:45 PM), https://www.reuters.com/world/us/trump-charged-under-law-used-prosecute-mafia-bosses-2023-08-15/ [https://perma.cc/85KS-MXKN] ("RICO was originally conceived as a tool to go after mafia kingpins who kept their hands clean by parking ill-gotten gains in shell corporations and leaving the dirty work to underlings."); Turley, *supra* note 76, at 478 (arguing that Congress "sought to pierce the mask of legitimacy used by mob-infiltrated businesses").

111. Akin Olla, Opinion, *Why Is Georgia Prosecuting Leftwing Activists with the Same Law as Trump?*, THE GUARDIAN (Sept. 20, 2023, 1:02PM), https://www.theguardian.com/commentisfree/2023/sep/20/georgia-prosecuting-cop-city-activists-rico-trump [https://perma.cc/6QZG-VQKZ] ("The laws allow for different crimes to be linked together and used to prosecute an entire organization at the same time, with increased charges for everyone involved. These increased charges also make it easier to coerce lower-level mobsters to snitch on their higher-ups."); *see also* Sarah Baumgartel, *Criminal Law: The Crime of Associating with Criminals? An Argument for Extending the* Reves *"Operation or Management" Test to RICO Conspiracy*, 97 J. CRIM. L. & CRIMINOLOGY 1, 17 (2006) (discussing the legislative history "support[ing] the idea that Congress was considering liability for those who managed enterprises through racketeering, and not for those who merely associated with such enterprises").

112. U.S. Dep't of Just., Just. Manual § 9-110.101 (2018) ("No RICO criminal indictment or information or civil compliant shall be filed, and no civil investigative demand shall be issued, without the prior approval of the Criminal Division.").

113. *See* STRADER, ANDERSON, DIAMANTIS & JORDAN, *supra* note 19, at 885–88 (discussing RICO criminal forfeiture provisions under § 1963). RICO convictions could also require defendants to pay restitution. *See* Doyle, *supra* note 88, at 19 ("Most RICO violations also trigger mandatory federal restitution provisions, that is, one

of Justice Manual recommends that a prosecutor charge RICO in cases of complex criminal activity, like those involving powerful individuals who raise large amounts of illicit funds.[114] Under 18 U.S.C. § 1963, a court may sentence a person convicted under RICO to up to twenty years in prison.[115] A judge may also order forfeiture including "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from the racketeering activity."[116] Therefore, the built-in RICO forfeiture provisions have potential to make criminal activity unprofitable and to compensate victims.[117]

An organization committing a few crimes without a meaningful connection between those crimes do not engage in a pattern of racketeering activity.[118] A number of enumerated predicate offenses, including mail and wire fraud, constitute racketeering activity.[119] The Supreme Court characterized a "pattern" of predicate crimes as one with "a specific threat of repetition extending indefinitely into the future."[120] Such a

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of the RICO predicate offenses will be a crime of violence, drug trafficking, or a crime with respect to which a victim suffers physical injury or pecuniary loss."); *see also* 18 U.S.C. § 3663A(c)(1)(B) (2024) (providing mandatory restitution for crimes "in which an identifiable victim or victims has suffered a physical injury or *pecuniary loss*." (emphasis added)).

114. *See* U.S. Dep't of Just., Just. Manual § 9-110.310 (2018) (describing that a prosecutor may bring RICO charges when, according to other factors, prosecutions involve individuals in "different jurisdictions," include "reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct," or the activity "consists of violations of State law, but involves prosecution of significant or government individuals, which may pose special problems for the local prosecutor").

115. *See* 18 U.S.C. § 1963 (2024) (defining penalties and forfeiture under RICO).

116. 18 U.S.C. § 1963(a)(3) (defining forfeiture in the penalty phase of a RICO prosecution); *see also* 18 U.S.C. § 1963(d) (allowing prosecutors to request restraining orders after indictment or temporary restraining order before indictment to "preserve the availability of property" likely to be forfeited as a result of the trial).

117. For a discussion of the RICO forfeiture provisions, see *supra* notes 113–116 and accompanying text. *See also* Ewan Palmar, *Donald Trump's Campaign Money Could Be Frozen as Part of Probe: Attorney*, NEWSWEEK (Aug. 11, 2023, 7:15 AM), https://www.newsweek.com/donald-trump-money-frozen-jack-smith-save-america-1819089 [https://perma.cc/5SUD-2YPZ] (describing restitution as a fitting remedy for victims of fraudulent campaign solicitations).

118. *See* H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239 (1989) ("RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.").

119. *See* 18 U.S.C. § 1961(1) (2024) (defining a number of crimes under Title 18, including mail or wire fraud, as racketeering activity). RICO defines a "pattern of racketeering activity" under 18 U.S.C. §1961(5) as two or more acts which occur within ten years of a "prior act of racketeering activity." *Id.* § 1961(5).

120. *H.J. Inc.*, 492 U.S. at 242 (holding that the pattern is defined not by the number of predicate of offenses, but the possibility that the defendants may commit predicate acts into the future). In *H.J. Inc.*, the Court faced the question whether a plaintiff could sue a telephone company under RICO after alleging only a few isolated instances of bribery over a six-year period. *Id.* at 250.

loose definition creates ambiguity in determining how frequently predicate crimes must occur in sequence and risks being vague.[121]

III. LIES SHOULD NOT LIVE LONG AND PROSPER: RICO, WIRE FRAUD, AND POLITICIANS TODAY[122]

Prosecutors have used criminal RICO and wire fraud actions to hold politicians accountable for illicit campaign activity.[123] Section A analyzes how courts may apply wire fraud to the act of donating to a political campaign. Section B describes how RICO has been used to hold politicians and campaigns accountable for illegal acts with a purpose in electing a candidate.

A. *"You Lied!—I Exaggerated": Fraud in Political Donations as Taking Advantage of Beliefs*

Courts have applied wire fraud to false statements used to obtain charitable donations, campaign donations, and in some cases, donations to programs claiming a religious purpose.[124] Section III.A.1 discusses the application of wire fraud to charitable giving and campaign misappropriation. Section III.A.2 discusses the application of wire fraud to donations obtained through insincere beliefs.

1. *Charities and Donations*

Courts have held that donors to charitable organizations have expectations regarding how their contributions should be utilized and violating these expectations could constitute a scheme to defraud.[125] Charities act fraudulently when they either misrepresent the purpose

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121. *See* Christopher J. Moran, Comment, *Is the "Darling" in Danger? "Void For Vagueness"—The Constitutionality of the RICO Pattern Requirement*, 36 VILL. L. REV. 1697, 1701 (1991) (discussing the argument that the "pattern" of racketeering activity under RICO may not be well defined). Justice Scalia's concurrence to *H.J. Inc.* echoed this vagueness principle when he challenged whether the Court's reasoning adequately defined a pattern. *See H.J. Inc.*, 492 U.S. at 253 (Scalia, J., concurring). The Court had held that a "closed period of repeated conduct" could not be a pattern, but admittedly, Justice Scalia "had no idea" what this meant. *Id.* Nonetheless, there is argument that the Supreme Court has "implicitly acknowledged that the statute is not unconstitutionally vague." Moran, *supra* note 121, at 1755.

122. The titles in this Part are inspired by STAR TREK II: THE WRATH OF KHAN (Paramount Pictures 1982).

123. For further discussion on RICO and wire fraud investigations under RICO, see *infra* Section III.B.

124. For further discussion on charitable contributions and misrepresenting sincerity in beliefs, see *infra* Section III.A.

125. *See* Turley, *supra* note 76, at 446, 459 (discussing these expectations in the context of raising money for religious organizations could come in the form of "general solicitation fraud" or "goal-specific solicitation fraud"); United States v. Reed, CA No. 15-100, 2015 WL 5944333, at *6 (E.D. La. Oct. 13, 2015) (denying the defendant's motion to dismiss wire fraud charges because "even if there were no state campaign finance laws, campaign contributors would have had certain expectations regarding how their donations would be spent").

in soliciting donations or the portion of proceeds going to charitable purposes.[126] Even one who makes a false statement that one hundred percent of donations would go to "charity" could make a material misrepresentation under mail or wire fraud.[127] Furthermore, courts have also held that misappropriating campaign contributions constitutes a scheme to defraud under wire fraud.[128]

For example, the Second Circuit in *United States v. Kinney*[129] held that defendants engaged in a fraudulent scheme when they solicited contributions on behalf of a non-profit police education program but promised those donors that their contributions would go towards police families and student program.[130] The defendants claimed that misleading donors as to the purpose of the contributions could not rise to the level of wire fraud because they did not misrepresent the charity that would receive the donations.[131] The Second Circuit disagreed and held that these kinds of statements would contribute to one's decision to donate which is actionable under wire fraud.[132] Further, the Second Circuit held that "because defendants' dishonesty was not incidental to the contributor's decision to make donations . . . but rather was aimed

126. *See* Turley, *supra* note 76, at 456–59 (explaining that fraudulent charities engage in general solicitation fraud when they either misappropriate funds or suggest that raising money could help solve a problem when it would not). A party engages in goal-specific solicitation fraud when they misrepresent the extent to which an organization will use funds towards a stated purpose—e.g., using only a part of the funds towards that goal. *Id.* at 459–61.

127. *See* United States v. Tomey, 222 F. Supp. 3d 1106, 1111 (N.D. Fla. 2016) (holding that despite a true claim that all proceeds would go to charity, the misrepresentation that all donations would be used for charitable purposes constituted wire fraud), *aff'd*, 783 F. App'x. 832 (11th Cir. 2019). The Court in *Tomey* held that promising donors that all donations would be used for charity was reasonably calculated to deceive donors. *Id.*

128. *See In re* Grand Jury Subpoena, 2 F.4th 1339, 1342, 1347–48 (11th Cir. 2021) (holding that a candidate committed wire fraud when misappropriating campaign contributions because those who contributed donations had a purpose to have that candidate elected; misrepresenting where the funds would go was essential to the heart of the "bargain" of a campaign contribution); United States v. Henningsen, 387 F.3d 585, 587, 590–91 (7th Cir. 2004) (holding a candidate's misappropriation of campaign contributions constitutes fraud because contributors expect their donations to contribute directly to the candidate's election). The Seventh Circuit notes that in diverting campaign contributions from the campaign, the defendant "represented one thing to donors, but did another." *Id.* at 589.

129. 211 F.3d 13 (2d Cir. 2000).

130. *See id.* at 15–16, 18 (holding "claim[s] that contributions would go to drug education and to a death insurance fund . . . were indeed false, material, and used in furtherance of a fraudulent scheme"). The indictment also alleged that defendants made promises to publish advertisements for contributors in exchange for donations. *Id.* at 17.

131. *See id.* at 18 (discussing defendant's argument that there was no "harm contemplated to the victim of the fraud that goes to the nature of the bargain itself").

132. *See id.* ("Here, the victims of defendant's fraud—the [non-profit] contributors—were given false information about *how* their money would be spent, and made a decision whether to donate money based on that information.").

at influencing those decisions directly, an intent to defraud was established."[133]

2. *Sincerity of Beliefs*

Beyond misappropriating funds, misrepresenting the sincerity of an organization's beliefs when soliciting donations constitutes wire fraud.[134] Courts have considered the sincerity of beliefs in regards to the legal issues surrounding "prosperity gospel" televangelism.[135] They both deal with potential fraud in a protected form of activity under the First Amendment.[136] Prosperity gospel televangelism promotes the idea that if one gives money to the church, that person would gain tangible benefits in return through faith.[137] The essential problem in prosecuting fraudulent televangelist statements with wire fraud is to avoid any judgment by the prosecution as to which religious beliefs are valid and which are not.[138] Nonetheless, a televangelist could form an intent to defraud when there is evidence that the televangelist did not have a sincere belief in what they were promoting.[139]

B. *Courts Don't Believe in a No-Win Scenario and View Political Campaigns as RICO Enterprises*

If candidates are liable under wire fraud for procuring campaign contributions on the basis of false statements, then their offices could be considered racketeering enterprises with a purpose in supporting

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133. *Id.* at 19 (discussing that misrepresentations made to solicit charitable contributions can be fraudulent if they "directly" influence decisions to donate).

134. *See* Jacob M. Bass, Note, *The Sermon on the Mount of Cash: How to Curtail the Prosperity Scheme and Prevent Opportunists from "Preying" on Vulnerable Parishioners*, 37 B.C. J.L. & SOC. JUST. 147, 170–72 (2017) (discussing that in wire fraud cases involving a "prosperity gospel" preacher, an intent to defraud hinges on finding "that the prosperity preacher did not have a sincere religious belief in the prosperity gospel" (footnote omitted)).

135. *See, e.g.*, *id.* at 162 (discussing that if "*any* religious doctrine could be put on trial, [this could] violate the First Amendment's Free Exercise Clause").

136. *See* McCormick v. United States, 500 U.S. 257, 272 (1991) (discussing that receiving political donations could run into issues with political expression); United States v. Rasheed, 663 F.2d 843, 847 (9th Cir. 1981) (discussing that mail frauds which touch on religious beliefs have to be analyzed under the First Amendment to determine whether those soliciting donations were sincere in their beliefs).

137. *See, e.g.*, Bass, *supra* note 134, at 153 ("A prosperity church's fundamental message is similar to that of a business: investing money in the business (the prosperity church) will cause the investor (the parishioner) to gain more money. . . . [H]owever, prosperity ministries often do not reinvest funds back into the community." (footnote omitted)).

138. *See Rasheed*, 663 F.2d at 849 ("If [the defendants] made assertions with knowledge of the falsity of those assertions, then they could not have been acting pursuant to sincere religious belief."); *see also* Bass, *supra* note 134, at 170 (discussing that in *Rasheed*, the central question was whether the beliefs were sincere and not necessarily whether those beliefs were valid).

139. *See supra* note 138 and accompanying text (discussing that if a defendant is insincere in their beliefs, they may be held accountable under wire fraud).

that politician's chances for election.[140] Two recent civil RICO cases considered directly whether a politician committed wire fraud by soliciting donations with misrepresentations, thereby engaging in a pattern of racketeering activity.[141] Both cases were dismissed because the plaintiffs could not allege that the misrepresentations were concrete and causal to injury.[142]

Nonetheless, under precedent on criminal RICO, political offices can be racketeering enterprises and the "power and prestige" of a political office can facilitate racketeering activity.[143] Courts such as the Third and Fifth Circuits have applied RICO to a politician situated at the "center" of a racketeering enterprise who directs at least some of its activity.[144] This is especially true when a political office is used to "plow[] the 'returns' from [a defendant's] deals back into the ongoing 'business of government.'"[145]

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140. For further argument discussing how political offices can be racketeering enterprises, see sources cited *infra* notes 143–153 and accompanying text.

141. *See* Foster v. Schock, No. 15-cv-03325, 2017 WL 1178349, at *1–4 (N.D. Ill. Mar. 30, 2017) (granting a motion to dismiss a suit brought by a donor against a former Congressman because the false statements alleged were puffery); Wayne Johnson for Congress, Inc. v. Hunt, No. 22-CV-118, 2023 WL 1767774, at *1, *3 (M.D. Ga. Feb. 3, 2023) (granting a motion to dismiss the claims of a primary candidate alleging that Fox News and the winning candidate colluded to commit racketeering, wire, and mail fraud offenses by elevating the winning candidate's profile with misrepresentations), *aff'd*, No. 23-10460, 2024 WL 471938 (11th Cir. Feb. 7, 2024).

142. *See Foster*, 2017 WL 1178349, at *3 ("Foster's complaint, at its most specific, alleges only that Schock referred to himself as 'honest' and 'different' from other Illinois politicians. More generally, he criticized other Illinois politicians who had gained notoriety for various misdeeds, which Foster interpreted to be a further assertion that Schock was different. Such statements are the sort of generic claims of honesty and integrity that are too vague to be considered definitive representations upon which Foster, or any reasonable person, could rely."); *Hunt*, 2023 WL 1767774, at *3 ("[I]t is speculation to suggest that any donations to [Defendant] that could be directly tied to his appearances on Fox News led to compensable injury to Plaintiffs. Quite frankly, from the election results, it appears that [the Plaintiff] would have lost the primary election campaign anyway.").

143. United States v. Grubb, 11 F.3d 426, 439–40 (4th Cir. 1993) ("[P]ower and prestige of [judicial] office placed [defendant] in a position to perform the discrete, corrupt and fraudulent acts of which he was convicted and which make up the RICO predicate offenses."); *see* United States v. Blandford, 33 F.3d 685, 703–04 (6th Cir. 1994) (finding that a state legislator's office was an enterprise because it was an association-in-fact).

144. United States v. Fattah, 914 F.3d 112, 166 (3d Cir. 2019) (discussing that the involvement of a politician at the "center" of an alleged conspiracy would be sufficient to establish involvement in a racketeering enterprise). According to the Fifth Circuit, when a politician's office serves as the "nexus" of racketeering activity, that office becomes a racketeering enterprise. *See* United States v. Dozier, 672 F.2d 531, 544 (5th Cir. 1982) (discussing a politician's office in relation to acquiring campaign donations).

145. *Dozier*, 672 F.2d at 544 (discussing that a defendant formed an "enterprise" under RICO where there are "vital connections between [the] office and [the] offense"). Here, the Fifth Circuit considered a RICO action against a state commissioner of agriculture. *Id.* at 535. Among the predicate acts of the RICO charge were several counts of extortion. *Id.* at 536. The defendant claimed that these were protected fundraising activities and not extortion. *Id.* at 536–37. The

According to the Third Circuit, a politician and their associates may form an association-in-fact enterprise when their purpose is to maintain a politician's "political stature."[146] Soliciting two or more campaign contributions may constitute this pattern of racketeering activity, and thus, politicians and associates who share a goal in preserving a politician's political stature may be liable under RICO.[147] For example, the Sixth Circuit found the pattern requirement satisfied when a politician "saw nothing wrong with putting campaign funds to personal use" and did not intend to prevent this commingling of funds.[148] More recently, the Southern District of New York rejected a First Amendment argument in a RICO and wire fraud case involving a party chair and a political candidate.[149] The court held that because a "[bribery] arrangement involved political-party officials, they are not entitled to immunity for their actions under the guise of protected speech."[150]

Fifth Circuit disagreed and held that to distinguish a legitimate campaign solicitation from a criminal one, "[a] moment's reflection should enable one to distinguish, at least in the abstract, a legitimate solicitation from the exaction of a fee for a benefit conferred or an injury withheld." *Id.* at 537. The Fifth Circuit then considered a challenge that the defendant never formed an "enterprise" under RICO. *Id.* at 543–44. The Fifth Circuit disagreed and held that the defendant's public office was not only an enterprise, but it was used as a

> cynical attempt to turn an elective office into a lucrative venture through the sale of official consideration. That [defendant] may have planned to spend all or a part of his illegally acquired funds on another campaign for office, thereby plowing the "returns" from his deals back into the ongoing "business" of government, only underlines the vital connection between his office and his offense. Only [defendant's] position in the Department of Agriculture and his control over its affairs enabled him to hawk its services for personal gain. The nexus is clear.

Id. at 544.

146. *Fattah*, 914 F.3d at 163–65 (discussing that concerted activity to support another's "political interests" could be an enterprise under RICO). Defendants challenged the conviction by arguing that the alleged conspiracy was not "hub-and-spoke." *Id.* at 165. The argument the defendants made was that although a politician was at the center of the conspiracy, the actions of each associate did not form a sufficient "rim" to the wheel and could not be considered concerted action i.e., there was little connection between the center of the operation and the outer workings. *Id.* The Third Circuit disagreed and held that where the parties aimed to further the political prospects of a politician, the associates "engaged in concerted activity and functioned as a unit." *Id.*

147. *See* Henzler, *supra* note 26, at 454 (discussing the threshold in which a campaign could be liable for racketeering activity).

148. United States v. Blandford, 33 F.3d 685, 704 (6th Cir. 1994) (holding that the predicate acts of misappropriating campaign finances satisfied the definition of "pattern" according to *H.J., Inc.*).

149. *See* United States v. Smith, 985 F. Supp. 2d 547, 609 (S.D.N.Y. 2014) (discussing the facts of the case).

150. *See id.* at 605 (discussing that the honest services fraud does not "criminalize mere association with a political party, or advocacy for certain political candidates"); *see also* Torres-Spelliscy, *supra* note 71 (describing *Smith* and how similar First Amendment claims had been unsuccessful in criminal prosecutions against politicians).

Just this past year, in Georgia, a Fulton County grand jury indicted President Donald Trump and many of his campaign associates with racketeering for allegedly attempting to overturn the results of the 2020 Election.[151] The charging documents alleged an association-in-fact between President Trump and officers in his political campaign, alleging that the group spread false statements to state officials.[152] Although the outcome of this prosecution is unclear, it is apparent that RICO and its similar statutes can be used against political projects, especially against political candidates who "seek or maintain elected office."[153]

IV. TAKING MR. SMITH TO WASHINGTON: CAN RICO DEMONETIZE CAMPAIGNS THAT LIE?[154]

Prosecutors can use RICO to hold the most powerful in political organizations accountable and demonetize campaigns that raise money with false statements.[155] Section A explains that courts can distinguish political puffery from provably false statements under wire fraud. Section B discusses that RICO can apply to politicians and associates who campaign with false statements. Finally, Section C argues that RICO is an appropriate statute for divesting proceeds from illicit campaign solicitations and countering potential political corruption.

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151. *See* Indictment at 15, Georgia v. Trump, No. 23SC188947 (Ga. Super. Ct. Aug. 14, 2023) (alleging that President Trump and several associates formed an unlawful enterprise under Georgia's racketeering law). The indictment stated: "[A]n ongoing organization whose members and associates functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise." *Id.* The indictment charged these associates with allegedly forming an enterprise with the purpose of making false statements to state legislatures and state officials, aiming to overturn President Biden's 2020 election in Georgia. *Id.* at 15–17. As of this writing, four of the defendants plead guilty to a limited number of charges and the rest plead not guilty. *See* Olivia Rubin, *Jenna Ellis Becomes 4th Defendant to Take Plea Deal in Georgia Election Case, Regrets Representing Trump*, ABC NEWS (Oct. 24, 2023, 11:04 AM), https://abcnews.go.com/US/jenna-ellis-4th-defendant-plea-deal-georgia-election/ [https://perma.cc/W32P-5B59] (discussing the Georgia indictment against Trump).

152. *See* Indictment at 15, *Trump*, No. 23SC188947 ("Members of the enterprise, including several of the Defendants, made false statements in Fulton County and elsewhere in the State of Georgia to Georgia officials, including the Governor, the Secretary of State, and the Speaker of the House of Representatives.").

153. James C. McKinley Jr., *Trump and Allies in Georgia Face RICO Charges. Here's What That Means*, N.Y. TIMES (Aug. 14, 2023), https://www.nytimes.com/2023/08/14/us/trump-georgia-rico-charges.html [https://perma.cc/J347-4HTL]; *see also* Olla, *supra* note 111 (arguing that RICO prosecutions against "Trump's alleged conspiracy—a centralized operation with vague attempts to obscure the leadership—fits the bill").

154. The titles in this part are inspired by MR. SMITH GOES TO WASHINGTON (Columbia Pictures 1939).

155. For further discussion on demonetization and campaign finance statements, see *infra* Section IV.C.I.

A. *They Aren't All Taylors and Paines in Washington: Distinguishing Provably False Statements from Political Puffery*

When politicians solicit donations with lies, they commit wire fraud when they impress upon their constituents that they could solve a problem that does not exist.[156] With regards to campaign finance, courts may find it difficult to define how a politician misrepresents the "bargain" inherent in a campaign contribution when those courts may not know why a person contributes to a campaign.[157] Nonetheless, the conclusion that politicians can commit wire fraud by soliciting donations with lies comes from a number of holdings regarding wire fraud.[158] Because fraudulent schemes with regards to advertising should be "scientifically and factually false," this implies that the level of misrepresentation should be a lie proven beyond a reasonable doubt.[159] Moreover, the Supreme Court held that advertisements could constitute wire fraud

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156. *See* Size, *supra* note 20, at 32–33 (discussing that fake news could constitute a fraudulent scheme). Size notes that:

> To obtain money by means of a false statement of fact ordinarily constitutes fraud. Yet almost no one has suggested that publishing fake news for profit may constitute fraud. Most legal analyses do not even mention fraud as a possibility. This omission is baffling given that "fake news" is often referred to as "fraudulent news." The whole enterprise—the lying, the manipulation, and the profit motive—is reminiscent of a traditional scheme to defraud.

Id. (emphasis omitted) (footnotes omitted).

157. *See* Buckley v. Valeo, 424 U.S. 1, 21 (1976) (per curiam) (discussing that "[a] contribution serves as a general expression of support for the candidate[,] . . . but does not communicate the underlying basis for support"). Although the Court modified *Buckley* in its later decisions, *Buckley*'s holding on campaign contributions as a general expression of support still stands as of this writing. *See* MICHAEL STOKES PAULSEN, MICHAEL W. MCCONNELL, SAMUEL L. BRAY & WILLIAM BAUDE, THE CONSTITUTION OF THE UNITED STATES 1029 (5th ed. 2022).

158. For further discussion of precedent supporting the conclusion that politicians can commit wire fraud by soliciting donations with false statements, see *infra* notes 159–168 and accompanying text.

159. United States v. Andreadis, 366 F.2d 423, 428 (2d Cir. 1966) (discussing that statements made knowing that they were "scientifically and factually false" was enough for a reasonable jury to support a wire fraud conviction); Henricksen, *supra* note 6, at 561 (discussing that courts should determine whether messages are "verifiably false or misleading" because "an opinion, view, or belief, if genuinely held" would not be verifiably false (emphasis omitted)). Professor Henricksen discusses that "verifiably false or misleading information" is an indispensable element in proving public frauds:

> Disinformation misinforms rather than informs. This is its defining characteristic; it communicates an idea or claim that is untrue or misleading. This has long been incorporated into the definition of the largely analogous terms propaganda and disinformation, as well as the legal definition of common law fraud. A court must be able to determine the message was false or misleading.

Id. at 561–62 (footnote omitted); *see also* United States v. Alvarez, 567 U.S. 709, 739 (2012) (Alito, J., dissenting) (arguing that laws which intend to curb false political speech should "only [extend to] knowingly false statements about hard facts directly within a speaker's personal knowledge"). Justice Alito continued by stating that "[t]hese lies have no value in and of themselves, and proscribing them does not chill any valuable speech." *Id.*

if they promote benefits that cannot be "realistically attainable."[160] If fraudulent schemes apply to situations when someone advertises unrealistic features of a product, this standard could readily apply to a politician soliciting campaign donations while promoting solutions for a problem that simply does not exist.[161] Statements of this kind are not puffery because they misrepresent particular facts running directly against a statement of objective truth.[162]

A campaign can intend to defraud when a campaign violates a donor's expectations, including whether its funds will go towards a stated purpose.[163] This kind of scheme to defraud could also be a promise never intended to be fulfilled.[164] It could also be, according to precedent on "prosperity gospel" televangelism, promotion of a belief proven not sincerely held.[165] Because wire fraud applies to schemes intending to fool more unwary and trusting donors, a prosecutor could take action against someone who solicited campaign donations on the basis of conspiracy theories.[166] A prosecutor may seek wire fraud charges when someone

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160. United States v. Regent Off. Supply Co., 421 F.2d 1174, 1180 (2d Cir. 1970) (discussing that "promotion of an inherently useful item may also be fraud when the scheme of promotion is based on claims of additional benefits to accrue to the customer, if the benefits as represented are not realistically attainable by the customer").

161. *See* David Lazarus, Column, *It's Illegal for Businesses to Lie. Why Not a Similar Rule for Politicians?*, L.A. TIMES (Jan. 5, 2021, 6:00 AM), https://www.latimes.com/business/story/2021-01-05/column-trump-election-fraud-laws [https://perma.cc/683A-UGQQ] (discussing that politicians "selling a phony solution to a made-up problem" is "snake oil"); David Kwok, *Court Narrows Scope of Federal Wire Fraud Statutes*, SCOTUSBLOG (May 12, 2023, 1:46 AM), https://www.scotusblog.com/2023/05/court-narrows-scope-of-federal-wire-fraud-statutes/ [https://perma.cc/JRK9-U44B] ("Some forms of fraud are clear and straightforward—for example, when an individual sells a non-existent product or service, as the buyer has suffered an easily measurable loss.").

162. *See* Vulcan Metals Co. v. Simmons Mfg. Co., 248 F. 853, 856 (2d Cir. 1918) (discussing that political statements are puffery because most individuals would understand that they have no "relation to objective truth").

163. *See Regent Off. Supply Co.*, 421 F.2d at 1182 (discussing that wire fraud could be a "discrepancy between benefits reasonably anticipated because of the misleading representations and the actual benefits which the defendant delivered, or intended to deliver"); United States v. Tomey, 222 F. Supp. 3d 1106, 1111 (N.D. Fla. 2016) (holding that misrepresenting whether all donations will go towards charitable purposes was reasonably calculated to deceive donors), *aff'd*, 783 F. App'x. 832 (11th Cir. 2019); United States v. Henningsen, 387 F.3d 585, 587, 589–90 (7th Cir. 2004) (holding that to misrepresent the destination of campaign funds could constitute wire fraud).

164. *See* O'Donnell v. Countrywide Home Loans, Inc., 822 F. 3d 650, 662 (2d Cir. 2016) (defining a scheme to defraud as making a contract without intending to meet its terms).

165. *See* Bass, *supra* note 134, at 172 ("Demonstrating that prosperity preachers lack sincere belief in their own doctrine is evidence of specific intent to defraud; this is a criminal violation of the law for which televangelist prosperity pastors should be held accountable."); Henricksen, *supra* note 6, at 561 (discussing that subjective opinions made in "bad faith" would not necessarily be fraudulent).

166. See Size, *supra* note 20, at 99 (discussing that "[a]ll frauds exploit trust"). Size notes that:

only *may* rely on the misrepresentation to their detriment.[167] To many courts, it is not important whether the lie is outlandish or something that no reasonable person could believe.[168]

B. *Little Looking Out for the Other Fella Too: RICO Liability for Campaigns and Political Action Committees*

Political campaigns can be RICO enterprises for soliciting out of state donations and RICO prosecutions can apply directly to politicians and political action committees that work together.[169] Section IV.B.1 discusses that a campaign accepting donations on the basis of wire fraud can be a pattern of racketeering activity. Section IV.B.2 argues that RICO can effectively and fairly apply to senior operatives in a campaign who solicit donations with the purpose of getting a candidate elected.

1. *Pattern of Racketeering Activity in Soliciting Donations on the Basis of Lies*

Political campaigns can potentially incur liability under RICO when they solicit out-of-state donations.[170] By seeking contributions from donors in multiple states, a political campaign engages in activities that do affect interstate commerce, as it involves the transfer of "goods"—in this case, monetary contributions—across state lines.[171] Campaign staff carry potential liability under RICO when they plan the lie, dissem-

> Many exploit financial vulnerabilities such as desperation, a lack of financial literacy, or a predisposition to believing things that are "too good to be true." Fake news publishers exploit a lack of online literacy as well as other vulnerabilities—rabid political partisanship, skepticism of institutions, stress, and anxiety in times of emergency and sickness. These vulnerabilities are worthy of protection.

Id.

167. *See* Bridge v. Phx. Bond & Indem. Co., 553 U.S. 639, 649 (2008) (discussing that it would not matter whether victims would have likely been deceived by the actions of a RICO enterprise engaged in fraudulent actions); *see also, e.g.*, United States v. Rasheed, 663 F.2d 843, 850 (9th Cir. 1981) (finding "[t]he mail fraud statute does not require proof that anyone has [actually] been defrauded," but evidence that some people had been defrauded may be "relevant to show that a scheme to defraud existed"); United States v. Goodpaster, 769 F.2d 374, 378–79 (6th Cir. 1985) (regarding it "well established" that a defendant need not be successful in the fraud in order to be held accountable under the mail fraud statute).

168. *See* Lauren D. Lunsford, Note, *Fraud, Fools, and Phishing: Mail Fraud and the Person of Ordinary Prudence in the Internet Age*, 99 KY. L.J. 379, 393 (2011) (discussing that several circuit courts adopt a subjective approach as to what may constitute a material scheme to defraud).

169. For further background regarding political campaigns as RICO enterprises, see *supra* Section III.B.

170. *See* Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 257–58 (1994) (holding RICO only considers whether an enterprise *affects* interstate commerce and not whether it is profit seeking).

171. *See* Andrew Frohlich, Note, *Volunteering to Deceive: Criminalizing Citizen-Group Espionage*, 78 GEO. WASH. L. REV. 668, 687 (2010) (discussing that citizen groups are engaged in interstate commerce when they draw charitable contributions from "the Internet, mail or other instrumentalities of interstate commerce").

inate the lie, or take donations premised on the lie because they take some part in directing the enterprise.[172] For example, a court may find staff forming an association-in-fact enterprise because they have a common purpose: to support someone's "political stature."[173] According to the Third Circuit, this could be a situation where associates coordinate together to disseminate false statements and documentation.[174]

Because RICO requires two or more predicate acts of criminal activity, a prosecutor cannot take action against a campaign for making one false statement.[175] In other words, campaigns that repeatedly and indefinitely make false statements are more likely to face liability under RICO.[176] Although campaigns have an intended end date, campaigns may carry the lie (and in some cases, its financial gains) into the next election.[177] RICO's pattern requirement highlights the importance in bringing cases that are clearly within RICO's reach: these prosecutions should not center on a few illicit donations, but instead, on politicians who build a career with deception, telling multiple lies repeatedly and indefinitely to finance their campaigns.[178]

2. *Holding Accountable Politicians, Political Action Committees, Large Donors, and Higher-Level Political Operatives*

RICO charges fit the goals of holding a politician and their closest associates accountable for fraudulent campaign fundraising because seeking conspiracy or multiple wire fraud charges may hold the wrong

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172. *See* sources cited *supra* note 90 and accompanying text (discussing that those who may be liable for RICO are those who may direct or control the enterprise).

173. *See* Fattah v. United States, 914 F.3d 166 (3d Cir. 2019) (discussing that although associations with a politician were informal, the associates could form a RICO enterprise with a purpose in maintaining the politician's "political stature").

174. *See id.* at 163–64 (agreeing with the district court's holding that when associates worked together to create false statements, they were doing so under a RICO conspiracy to support a candidate's political prospects.)

175. *See* Henzler, *supra* note 26, at 454 ("Accepting two or more corporate contributions to be used in furtherance of [a candidate's] campaign within ten years of each other will constitute a violation of the RICO Act, then becoming organized crime.").

176. *See* H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 242 (1989) (discussing that "liability depends on whether the *threat* of continuity is demonstrated" and "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the pattern] requirement").

177. Megan Lebowitz, *Here's What Happens to Candidates' Leftover Money*, NBC NEWS (Nov. 16, 2022, 2:00PM), https://www.nbcnews.com/meet-the-press/meet-thepressblog/s-happens-candidates-leftover-money-rcna57340 [https://perma.cc/56D4-7ZPY] ("Leftover money can be transferred to other candidates' races, political parties, PACs, charities, even potential recounts. The final destination for this cash can provide insight into a candidate's future political ambitions. If they plan to run for office again, they can use leftover funds for another campaign.").

178. *See H.J. Inc.*, 492 U.S. at 242 ("Congress was concerned in RICO with long-term criminal conduct."); Turley, *supra* note 76, at 488 (discussing that under civil RICO, "Congress viewed the racketeer as something of a monolith, irredeemable and unreformable. . . . [T]he exceptional injurer is a person whose intentional or

people accountable.[179] Prosecuting campaign lies with wire fraud may be underinclusive by holding some associates accountable and not the politicians or high-level donors who benefit from the lies.[180] Additionally, conspiracy charges may also be underinclusive by not holding accountable those who benefitted from the fraud but did not formally agree to the criminal activity.[181] On the other hand, prosecuting multiple actors for conspiracy could be overinclusive by unfairly charging those who only committed a few culpable acts or even no act at all.[182] RICO prosecutions would focus instead on those who "direct or control" the activity of an enterprise: the higher-ups who benefit from the criminal activity, pass on criminal liability to subordinates, and work hard to conceal their involvement.[183]

In this way, RICO prosecutions could define those who solicit donations with false statements, including parties, politicians, large donors, and PACs, and treat them for what they are: associated-in-fact.[184] Political action committees and political campaigns are not supposed to collude, but they often do so through less obvious means.[185] Even so, politicians

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repeated violations of a social standard are such that the threat of normal damages is an insufficient incentive to coax [them] back to the social norm.").

179. For further discussion that RICO charges aim to hold those accountable for at the highest levels, see *infra* notes 180–183 and accompanying text.

180. *See supra* notes 44–53 (describing that dicta in *Kelly v. United States* may take issue with a prosecutor charging a politician with wire fraud without demonstrating whether the politician intended to take physical property).

181. *See* 18 U.S.C. § 371 (2024) (defining that an agreement is an element of federal conspiracy charges). A prosecutor must show that participants to a conspiracy have two intents: an intent to make an agreement to commit criminal acts and the intent to commit the criminal acts subject to the agreement. *See* STRADER, ANDERSON, DIAMANTIS & JORDAN, *supra* note 19, at 75 (discussing that conspiracy charges require prosecutors two prove two intents). A prosecutor could find these two intents difficult to prove with circumstantial evidence for a high-level official in a criminal organization who may not have intended the criminal acts subject to the agreement. *Id.* at 76.

182. *See* Krulewitch v. United States, 336 U.S. 440, 449–50 (1949) (Jackson, J., concurring) ("[T]he conspiracy doctrine will incriminate persons on the fringe of offending who would not be guilty of aiding and abetting or of becoming an accessory, for those charges only lie when an act which is a crime has actually been committed.").

183. *See supra* note 110 (discussing that RICO was designed to hold the leaders of organized crime accountable when those leaders may use their organizations to conceal their involvement in criminal activity); U.S. Dep't of Just., Just. Manual § 9-110.310 (2018) (describing that a prosecutor may bring RICO charges when "[a] RICO prosecution would provide the basis for an appropriate sentence under all the circumstances of the case in a way that prosecution only on the underlying charges would not").

184. For further support regarding whether RICO prosecutions can define these organizations as associated-in-fact, see *infra* notes 185–191.

185. *See* Matt Choi, Note, *An Avenue for Corruption: Super PACS and the Common Vendor Loophole*, 18 NW. J.L. & SOC. POL'Y 99, 101 (2023) ("The only legal damper on Super PAC's ability to raise and spend is that they cannot contribute directly to a political candidate. . . . [T]hey cannot make coordinated expenditures, such as campaign advertisements for a candidate in collaboration with the candidate their ads support." (footnote omitted)); Matea Gold, *It's Bold, but Legal: How Campaigns and*

and PACs are codependent, often working together to create the same messaging and tacitly colluding on goals.[186] Those who contribute large amounts to a campaign spreading lies and conspiracy theories may do so purposefully as a means to increase their own power and influence.[187]

Even if the campaign finance system does not recognize these actors as running the same organization, racketeering law may consider that these groups form an enterprise.[188] To apply the holding in *Boyle*, these groups form an enterprise when they (1) may share the same purpose in getting a candidate elected, (2) share close relationships, and (3) carry those relationships with some longevity.[189] Therefore, these actors should proceed with caution if they intend to endorse campaigns that engage in fraud.[190] If some of these individuals take steps

Their Super PAC Backers Work Together, WASH. POST (July 6, 2015, 3:19 PM), https://www.washingtonpost.com/politics/here-are-the-secret-ways-super-pacs-and-campaigns-can-work-together/2015/07/06/bda78210-1539-11e5-89f3-61410da94eb1_story.html [https://perma.cc/PSU8-FK48] (discussing that competitive candidates may have personal PACs and that these PACs and campaigns can communicate with each other)

186. *See* Sean Sullivan, *Super PACs and Campaigns Can't Talk to Each Other. Here's How They Get Around It*, WASH. POST (Apr. 24, 2014, 1:26 PM), https://www.washingtonpost.com/news/the-fix/wp/2014/04/24/super-pacs-and-campaigns-cant-talk-to-each-other-heres-how-they-get-around-it/ [https://perma.cc/U2AP-MFZE] ("Democrats and Republicans on both sides have found creative workarounds. Candidates post clip reels on YouTube that can be pulled by anyone who wants to run a positive commercial for them. Campaign committees post opposition research that anyone who wants to make an attack ad would find handy. Outside groups in turn have shown they are not shy about taking cues on timing and subject matter.").

187. *See* Jane Mayer, *The Big Money Behind the Big Lie*, THE NEW YORKER (Aug. 2, 2021), https://www.newyorker.com/magazine/2021/08/09/the-big-money-behind-the-big-lie [https://perma.cc/U3QT-QSHT] ("Dark-money organizations, sustained by undisclosed donors, have relentlessly promoted the myth that American elections are rife with fraud, and, according to leaked records of their internal deliberations, they have drafted, supported, and in some cases taken credit for state laws that make it harder to vote."). Dark money "refers to [the] anonymous outside spending in our political campaigns." Abby K. Wood, *Citizens United Turns 10 Today. Here's What We've Learned About Dark Money*, WASH. POST (Jan. 21, 2020, 7:00 AM), https://www.washingtonpost.com/politics/2020/01/21/citizens-united-turns-10-today-heres-what-weve-learned-about-dark-money/ [https://perma.cc/D6C3-WNNH] (defining dark money and discussing that "some donors may give anonymously to support political positions that they might not choose to take publicly").

188. *See* United States v. Fattah, 914 F.3d 112, 163–65 (3d Cir. 2019) (discussing that concerted activity to support another's "political interests" could be an enterprise under RICO).

189. *See* Boyle v. United States, 556 U.S. 938, 946, 948 (2009) (discussing that a RICO enterprise could "engage in spurts of activity punctuated by periods of quiescence").

190. *See* Mayer, *supra* note 187 (discussing well-financed interests promoting claims of voter fraud); *see also* Ciara Torres-Spelliscy, *The Risks of Corporate Political Spending After the Jan. 6 Insurrection*, TAMPA BAY TIMES (Feb. 26, 2021), https://www.tampabay.com/opinion/2021/02/26/the-risks-of-corporate-political-spending-after-the-jan-6-insurrection-column/ [https://perma.cc/S4ZE-YPH2] (discussing the reputational risks of "corporate financial supporters for members of Congress who backed President Donald Trump's position on Jan. 6"). Professor Torres-Spelliscy

to coordinate with a campaign and direct that campaign's activities towards fraudulent purposes, then those large donors could also be liable under RICO.[191]

C. *Lies Like These: RICO's Purpose as a Close Fit to Curbing Fraudulent Campaign Activity*

Prosecutors who charge those that solicit campaign donations fraudulently with RICO can effectively recover illicit contributions and serve Congress's intent for RICO as both an antitrust and anticorruption statute.[192] Section IV.C.1 explains that RICO prosecutions can demonetize campaigns that solicit donations with false statements. Section IV.C.2 argues that RICO prosecutions of this kind fit the goal to curb political corruption.

1. *Divesting Proceeds from Bad Actors in a Marketplace*

The campaign finance system is essentially a market.[193] Some commentators have described the market in campaign finance as a supply of campaign funding in exchange for politician access.[194] For smaller donors, the campaign finance market is an industry of charitable contributions, in which donors offer funding towards candidates that support their values and concerns.[195] Even using false statements could be

notes that corporations may experience "reputational risks including associating a well-crafted corporate brand with a toxic politician. If a politician that a corporation has supported gets into an embarrassing scandal or legal trouble, the corporation can be harmed through guilt by association." *Id.*

191. *See Fattah*, 914 F.3d at 166 (discussing that RICO liability could attach to associates if a politician "at the center" of a group's activity knows those associates and they acted at the politician's direction).

192. For further discussion regarding political campaigns as RICO enterprises, see *infra* Section IV.C.

193. *See* Justin A. Nelson, *The Supply and Demand of Campaign Finance Reform*, 100 COLUM. L. REV. 524, 528 (2010) ("The amount of money received by the candidate depends on their need. The demand curve, then, is determined by how badly candidates want to take private money. The supply side is composed of the amount of money a donor would give for a particular amount of 'influence,' if influence is used as shorthand to capture all the reasons why somebody might give to the candidate.").

194. *See* Brett Silverberg, Note, *Turning Cash into Votes: The Law and Economics of Campaign Contributions*, 25 U. MIA. BUS. L. REV. 111, 117 (discussing that "there is an exchange between the politician and the donor"). The article discusses one model for economic exchange in political donations where the "the politician demands either votes or money, and in return offers a monopoly profit as consideration." *Id.*

195. *See* Lisa Ward, *The Surprising Similarity Between Charitable and Political Giving*, WALL ST. J. (Oct. 16, 2020, 9:26 AM), https://www.wsj.com/articles/the-surprising-similarity-between-charitable-and-political-giving-11602854799 [https://perma.cc/86LK-FTEV] (discussing research that suggests "the main motivation for political giving is the same as it is for charitable giving—the donor is driven by his or her desire for the positive feeling that comes from doing something good").

anticompetitive practices interfering with market function.[196] RICO is a statute concerned with corruption in the marketplace as a result of criminal actions.[197] Enterprises that conduct market transactions through wire fraud do not have a place in legitimate commerce much like enterprises that act through extortion.[198] Because RICO is designed to divest proceeds from bad actors in a marketplace, RICO actions are appropriate where there is "a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct."[199]

In this way, RICO prosecutions are an important form of legal recourse against campaigns that spread misinformation because they may deter and demonetize campaigns that raise money with lies and misrepresent material facts.[200] Demonetization, like in other contexts such as social media platform moderation, would mean not banning speech or disqualifying a candidate, but instead removing the fundraising capacity of the lie.[201] Prosecutors could effectuate this demonetization with a RICO post-trial forfeiture of all campaign proceeds derived from the

196. *See* Michael A. Carrier & Rebecca Tushnet, *An Antitrust Framework for False Advertising*, 106 IOWA L. REV. 1841, 1844 ("At the heart of the framework is a presumption that monopolists engaging in false advertising violate antitrust law, with that presumption rebuttable if the defendant can show that the false advertising was ineffective."). *But see* Susannah Gagnon & Hebert Hovenkamp, *Antitrust Liability for False Advertising: A Response to Carrier & Tushnet*, 107 IOWA L. REV. 82, 85–86 (2022) ("Carrier and Tushnet argue that antitrust remedies are appropriate because false advertising laws do not fully address the harms that result from deception. But this is irrelevant unless harm to *competition* can be shown, and the proposed anticompetitive presumption, focusing on monopolists or attempted monopolists, is no substitute. As several courts have observed, false advertising *generally* does not threaten competition." (footnotes omitted)).

197. *See* G. Robert Blakey & Michael Gerardi, *Eliminating Overlap, or Creating a Gap? Judicial Interpretation of The Private Securities Litigation Reform Act of 1995 and RICO*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 435, 458–59 (1995) (discussing that civil "RICO protects against violence and fraud in the market").

198. *See supra* note 86 and accompanying text (describing that RICO clearly forbids using "racketeering activity" to accept shares in legitimate enterprises); Boyle v. United States, 556 U.S. 938, 948 (2009) (discussing that along with groups "whose crimes are sophisticated, diverse, complex, or unique," RICO also covers enterprises "that do[] nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means").

199. U.S. Dep't of Just., Just. Manual § 9-110.310 (2018) (discussing a number of factors a prosecutor should consider before bringing RICO charges and requesting approval from the Department of Justice).

200. *See, e.g.*, Daisuke Wakabayashi & Tiffany Hsu, *Google Bans Ads on Content, Including YouTube Videos, with False Claims About Climate Change*, N.Y. TIMES (Oct. 7, 2021), https://www.nytimes.com/2021/10/07/technology/google-youtube-ads-climate-change-misinformation.html [https://perma.cc/JT5L-BZWM] (describing similar efforts by social media companies, such as YouTube, to demonetize false statements).

201. *See* Peter Kafka, *YouTube 'Demonetization,' Explained for Normals*, VOX (Sept. 4, 2016, 6:29 PM), https://www.vox.com/2016/9/4/12795214/youtube-demonetization-explainer [https://perma.cc/U2ZD-XBN6] (discussing that YouTube's demonetization policy is not "censorship, since YouTube video makers can still post (just about) anything they want").

lie.[202] However, in order to prevent the use of funds raised on the basis of the lie, prosecutors may be able to seek a RICO restraining order pretrial or temporary restraining orders pre-indictment for funds related to the lie (i.e. revenue related to specific solicitations with provably false statements).[203] Conceivably, a candidate could continue their campaign while the case is pending with funding from truthful statements.[204]

2. *RICO and Political Corruption*

Preventing criminals from gaining office with a campaign grounded in lies also meets RICO's broader concerns regarding organized crime and political corruption.[205] Congress enacted RICO out of a dire concern that organized crime would subvert political institutions and the rule of law.[206] Many believe that the current system of campaign finance has the potential to do just that.[207] Because donors may influence elections so easily, candidates may do anything to raise large sums of money and keep their power—including lying to those donors.[208] These donations

202. *See* 18 U.S.C. § 1963(a)(3) (2024) (defining property subject to forfeiture as "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection"). For an example of campaigns refunding specific contributions drawn from the basis of an alleged deception, see Shane Goldmacher, *Trump's Repeating Donation Tactics Led to Millions in Refunds into 2021*, N.Y. TIMES (Aug. 7, 2021), https://www.nytimes.com/2021/08/07/us/politics/trump-recurring-donations.html [https://perma.cc/4DBN-9TZN] (discussing President Trump's campaign refunding "more than $135 million" after fraud complaints that the campaign allegedly opted contributors into making "automatic recurring contributions").

203. *See* 18 U.S.C. § 1963(d)(1) (2024) (allowing prosecutors to take actions to "preserve the availability of property" likely to be forfeited as a result of the trial). Under § 1963(d)(1)(B), courts may grant a pre-indictment restraining order if "there is substantial probability" of forfeiture and "the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered." *Id.*

204. *See* Richard Fausset, *Indicted and Running for Office: It Didn't Begin with Trump*, N.Y. TIMES (Apr. 1, 2023), https://www.nytimes.com/2023/04/01/us/politicians-indicted-trump-rick-perry.html [https://perma.cc/5MRB-6W5Q] (discussing politicians running for office pending criminal indictment or prosecution).

205. *See* Starnes, *supra* note 84, at 308 (2023) ("Legislators were concerned about the ability of organized crime syndicates to influence the democratic process and destabilize the country's economic system . . . .").

206. For further discussion regarding legislative history on RICO, organized crime, and political corruption, see *supra* notes 82–83 and accompanying text.

207. *See* Henzler, *supra* note 26, at 459 ("The construction of legislation that is motivated by corporate dollars takes the focus of the government away from the citizens and turns it into a competition to please the wealthiest companies. Our political parties will become engaged in a legislative arms race designed to pump out as much favorable corporate legislation as possible.").

208. *See* Mayer, *supra* note 187 (suggesting that some who claimed the 2020 election had been stolen may have done so as a tactic to increase donations); *see also* Henzler, *supra* note 26, at 436 ("Politicians will start constructing campaign platforms to attract the biggest and wealthiest corporations. . . . [C]andidates will be more focused on gaining the most contributions rather than constructing a platform that gains voter approval.").

are a source of political power and important to gaining influence and winning election.[209]

Moreover, candidates may feel emboldened by recent cases that have made bribery prosecutions more challenging and presidential incumbents presumptively immune from criminal actions.[210] If candidates with perpetual funding can game the marketplace of ideas with lies, the goal of fraudsters will not be to evade the law, but to become it.[211] When it is a crime for anyone else to spread lies and acquire financing, it would be a double-standard for a politician to do so with impunity.[212] The reason a politician seeks to defraud is the same reason anyone else might: because they can.[213]

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209. *See* Payne, *supra* note 15, at 333 (discussing that "campaign contributions not only ensure that lawmakers will have funds necessary for their own campaign, but also discourage would-be challengers; pay dues to political party committees; and help build clout within the party by funding contributions to other legislators").

210. *See* Trump v. United States, 144 S. Ct. 2312, 2361 (2024) (Sotomayor, J., dissenting) (discussing that the decision to recognize immunity for Presidential acts "has replaced a presumption of equality before the law with a presumption that the President is above the law for all of [the President's] official acts"); *see also* Leah Litman & Melissa Murray, Opinion, *From Legal Bribery to Trump's Immunity, a Dark Theme Ran Through the Supreme Court's Term*, L.A. TIMES (July 12, 2024, 3:30 AM), https://www.latimes.com/opinion/story/2024-07-12/supreme-court-donald-trump-immunity-corruption-clarence-thomas-samuel-alito [https://perma.cc/42TW-E3XP] (discussing that recent rulings on bribery and presidential immunity could "make the country safe for corruption").

211. *See Trump*, 144 S. Ct. at 2371 (Sotomayor, J., dissenting) (discussing the risks that presidential immunity would allow any incumbent "President that wishes to place [their] own interests, [their] own political survival, or [their] own financial gain . . . above the interests of the Nation"); Henricksen, *supra* note 6, at 577 ("[I]n the marketplace of ideas, the [belief that the] truth will win out is not only quaint but also dangerously naive."). Professor Henricksen discusses empirical research that demonstrates "that falsehoods, lies, and baseless conspiracy theories" spread faster than truthful statements, and that "[t]he speed of lies online increases even more with political news and information." *Id*; *see also* Chemerinsky, *supra* note 54, at 9 (discussing the marketplace of ideas). Chemerinsky asserts that:

> On the one hand, false speech can create harms, even great harms. Speech is protected especially because of its importance for the democratic process, but false speech can distort that process. Speech is safeguarded, too, because of the belief that the marketplace of ideas is the best way for the truth to emerge. But false speech can infect that marketplace and there is no reason to believe that truth will triumph.

Id.

212. *See* Lazarus, *supra* note 161 (discussing that businesses are not able to make false or misleading claims in the same way a politician could).

213. *See* Elizabeth Spiers, Opinion, *The Very Good Reason People Like George Santos Lie About Nonsense*, N.Y. TIMES (Nov. 24, 2023), https://www.nytimes.com/2023/11/24/opinion/george-santos-lies-trump-adams.html?searchResultPosition=1 [https://perma.cc/3HYH-VNX8] (noting the danger that the public will become desensitized to politicians lying habitually to avoid public scrutiny for their wrongdoing, and thus avoid accountability).

V. EVERYBODY KNOWS WHERE THE BOOZE IS: RESPECTING FIRST AMENDMENT RIGHTS AND CHARGING RICO FAIRLY[214]

Using RICO to prosecute politicians that raise contributions with false statements requires deliberation, restraint, and an understanding of the potential legal consequences to political campaigns.[215] The government cannot prosecute a candidate for telling lies in general because the goal is to divest the proceeds from those lies—in this case, illicit contributions.[216] It is the contention of this Article that other than raising money with false statements, the First Amendment allows candidates to raise money on the basis of opinions, good-faith beliefs, and any other statement that can be interpreted true.[217] Thus, the goal of a RICO prosecution for false campaign solicitations is not—and cannot be—censorship, but demonetization and only to the illicit gains from particular solicitations.[218] Therefore, civil suits could present more of a risk to candidate speech than criminal prosecution because of the risk that campaigns will begin to sue each other with weaker claims, such as alleging a loss of donation receipts.[219] Well-resourced candidates could claim RICO's treble damages and coerce political rivals into settling.[220] Because RICO suits regarding campaign lies to raise donations could

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214. This title is inspired by THE UNTOUCHABLES (Paramount Pictures 1987). The full line reveals how it was only a question of courage to hold Al Capone accountable: "Mr. Ness, everybody knows where the booze is. The problem isn't finding it, the problem is who wants to cross Capone." *Id.*

215. *See* Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 264 (1994) (Souter, J., concurring) ("Accordingly, it is important to stress that nothing in the Court's opinion precludes a RICO defendant from raising the First Amendment in its defense in a particular case. Conduct alleged to amount to [any of the] somewhat elastic RICO predicate acts may turn out to be fully protected First Amendment activity, entitling the defendant to dismissal on that basis.").

216. *See* Kelly v. United States, 140 S. Ct. 1565, 1574 (2020) ("Because the scheme here did not aim to obtain money or property, [defendants] could not have violated the federal-program fraud or wire fraud laws.").

217. *See* Henricksen, *supra* note 6, at 579 ("There are valid reasons to protect some falsehoods, . . . but dangerous falsehoods that mislead the public and cause widespread harm cannot be part of the marketplace of ideas because their purpose is to manipulate in bad faith rather than to extoll a sincerely held idea, opinion, or belief.").

218. For further discussion on demonetizing campaigns that intend to defraud, see *supra* Section IV.C.1.

219. *See* Wayne Johnson for Congress, Inc. v. Hunt, No. 22-CV-118, 2023 WL 1767774, at *1, *3 (M.D. Ga. Feb. 3, 2023) (granting a motion to dismiss claims of lost campaign donations when they may not have made a difference in securing election).

220. *See* Bussey-Garza, *supra* note 86, at 626 (discussing that civil RICO treble damages may encourage defendants to settle claims); Perry Cooper, *State Farm, BofA, Great Lakes Cases Show RICO on the Rise*, BLOOMBERG L. NEWS (Sept. 25, 2018, 7:07 AM), https://www.bloomberglaw.com/bloomberglawnews/class-action/X7UR5I5C000000?bna_news_filter=class-action [https://perma.cc/DV6T-GBHH ("Class certification is significant because it can pressure defendants into settling, and that's especially true when coupled with the stick of treble damages, and attorneys' fees for plaintiffs, which are also allowed under RICO.").

have the effect of a strategic lawsuit against public participation, courts should continue to scrutinize their plausibility, especially if there is a tenuous relationship between the harm to a plaintiff's campaign and a defendant's practices to fundraise with false representations.[221]

Raising money from small-dollar donors primarily harms the public rather than other campaigns and warrants the seriousness of a criminal prosecution.[222] RICO criminal restraining orders could take early action to divest campaign receipts solicited through lies, and these prosecutions would have the greater protections of a review process within the Department of Justice.[223] There are serious concerns that RICO prosecutions are politicized already, as RICO prosecutions may be brought against those who are "politically unpopular enough to get caught."[224] The Department of Justice could consider appointing a special counsel for these kinds of prosecutions, which could demonstrate the government's commitment to resources countering political corruption at the highest levels and its duty to impartiality and restraint.[225]

One goal of civic education is to prepare citizens to scrutinize candidates for elected office: to discern candidates who misrepresent the source of social problems or candidates who claim to solve problems that they cannot.[226] Voters cannot fairly determine which political campaigns

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221. *See Hunt*, 2023 WL 1767774, at *3 (discussing this relationship as "speculation").

222. *See* Size, *supra* note 20, at 98–99 ("Criminal fraud is concerned with the prevention and punishment of deceptive economic exploitation as well as harm."). Size argues that "[i]t does not matter if the victim does not suffer a loss because the defendant has obtained a dishonest gain." *Id.* at 99.

223. *See* Jaylen Minefield, Note, *The Line Between Justice and Abuse: A Critical Review of State RICO Statutes in Drug Prosecutions*, 57 UIC L. REV. 829, 857 (2024) (discussing the benefits of formal review processes similar to federal RICO prosecutions and underscoring goals to "use . . . RICO when appropriate, encourage[] public trust in prosecutors, and shield[] defendants from punishments that are disproportionate to their alleged offense conduct"); *see also* Goldmacher, *supra* note 202 (remarking that without divesting donations early, this could "amount[] to an unwitting interest-free loan").

224. Levin, *supra* note 82, at 160 (discussing the possibility that RICO prosecutions can be motivated by political and cultural biases). Professor Levin argues: "By invoking state violence and the attendant social stigma of criminality, criminal law generally and RICO specifically act not only to separate legitimate from illegitimate but to create both categories—to legitimate and to delegitimate." *Id.* at 163. In this way, prosecutors using RICO share a "role in creating and structuring American society" and shape "a particular conception of state and market." *Id.*

225. *See* Julian A. Cook, *Prosecuting Executive Branch Wrongdoing*, 54 U. MICH. J.L. REFORM 401, 430 (2021) (arguing for increased protections for independent prosecutors such as special counsels who investigate "executive branch wrongdoing" because "an investigative and prosecutorial structure must be implemented that grants a prosecutor sufficient latitude to pursue independent investigations, while reigning in the exercise of runaway discretion"). Professor Cook further discusses that: "What is imperative in a criminal justice system is the administration of impartial justice. To obtain the public's trust, the administration of justice must be fair in appearance and in fact." *Id.* at 439.

226. *See* Manzi, *supra* note 55, at 2626 ("[T]he free trade of ideas promotes a democratic system of governance by allowing people to discover the ultimate truth

will make good faith efforts to serve issues of a constituency if candidates are allowed to defraud it.[227] Much like the concerns surrounding organized crime, if those who seek to defraud may be able to hide in a cloak of legitimacy, whether with a legitimate business or a political fundraiser where representing truth is not required, there is increased risk that candidates will have power to act above the law and obtain the resources to do so.[228]

Certainly, candidates can lie; it is, regrettably, their right.[229] Nonetheless, voters deserve the legal protections against the self-serving.[230] This protection does not require new law, but instead requires the application of existing law to a very powerful industry with a very powerful membership.[231] Perhaps in a similar way to those waiting for a national response to organized crime, could the most "extraordinary thing" about fraudulent political campaign solicitations be that constituents have lived with them "for so long"?[232]

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of what policies best serve society."). Manzi continues by stating false information "interferes with [citizens] ability to form reasoned opinions and make rational decisions." *Id.* at 2651; *see also* Warner, *supra* note 1 (discussing an interview with Justice Souter who voiced concerns that politicians can take advantage of civic ignorance).

227. *See* Sencer, *supra* note 59, at 444 (finding "that shareholders and voters face common problems caused by the process of delegating decision-making authority to elected representatives"). Sencer discusses that:

> Congress has determined that the free market does not provide sufficient protection for the shareholder, and therefore the courts should be employed to safeguard the corporate election process. In the same way, courts have a potential role in policing the effective and accurate dissemination of information to voters in the political context.

Id.; Manzi, *supra* note 55, at 2651 ("Fake news threatens democracy by making citizens vulnerable to manipulation could cause them to vote against their interests, adopt unfounded beliefs, or distrust legitimate media.").

228. *See* 116 CONG. REC. 601 (1970) (discussing organized crime's power to use legitimate businesses to commit crimes and avoid accountability through political influence).

229. *See supra* note 17 and accompanying text (discussing that candidates for political office can lie under the First Amendment).

230. *See* Henricksen, *supra* note 6, at 578 (arguing that "the need for protection against deception is no less true for fraud on the public than it is for personal fraud"). Professor Henricksen goes on to state: "This is why we have civil and criminal fraud laws in the first place. Those who deceive to benefit themselves at the expense of others too often succeed at it, if they are allowed to." *Id.*

231. *See* Mayer, *supra* note 187 (discussing that powerful donors may be incentivized to spread false information).

232. CRIME COMMISSION REPORT, *supra* note 82, at 209 (discussing that "[t]he extraordinary thing about organized crime is that America has tolerated it for so long").