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EQUITABLE RELIEF FOR PRIVATE RICO PLAINTIFFS: USING *DONZIGER* TO REMEDY COURTHOUSE CORRUPTION

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In Chevron Corp. v. Steven Donziger*, the Southern District of New York granted Chevron an injunction against Donziger under the Racketeer Influenced and Corrupt Organizations (RICO) Act, preventing the enforcement of an Ecuadorean judgment against it in the United States. This Note discusses the circuit court split on whether injunctive relief may be granted in a civil RICO suit, arguing that injunctive relief is an available remedy within the statute's plain meaning, legislative intent, and evolving jurisprudence of civil RICO. The Note applies the Donziger interpretation of RICO to a case of a similarly corrupted judgment,* Caperton v. A.T. Massey Coal Co., Inc.*, to illustrate this argument.*

On August 8, 2016, after a twenty-three year dispute over devastating pollution in Ecuador, the Second Circuit Court of Appeals affirmed the judgment of the District Court for the Southern District of New York in *Chevron Corp. v. Steven Donziger* ("*Donziger*").[1] This decision granted Chevron an equitable remedy under the Racketeer Influenced and Corrupt Organizations ("RICO") Act,[2] and the injunction prevented forty-

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[1] *See* Chevron Corp. v. Donziger, 833 F.3d 74, 137–40 (2d Cir. 2016), *cert. denied sub nom.* Donziger v. Chevron Corp., 137 S. Ct. 2268, 2269 (2017)

[2] *See id.*; s*ee generally* Racketeer Influenced and Corrupt Organizations Act ("RICO Act"), 18 U.S.C. §§ 1961–1968 (2016) (providing, as part of the

eight injured Ecuadorean plaintiffs (the "Lago Agrio plaintiffs," or "LAPs"), represented by Donziger, from enforcing their $8.646 billion judgment granted in Ecuadorean court.[3] In the prior proceeding, the Southern District issued an injunction to prevent enforcement of the judgment in the United States after finding that Donziger had committed numerous RICO predicate acts, including submitting fraudulent expert reports, inflating damages for the LAPs, and bribing the Ecuadorean court with $500,000 for a favorable judgment.[4] The United States Department of Justice has frequently used the RICO Act to fight racketeering since it was enacted,[5] but *Donziger* was the first time that the Second Circuit had decided the issue of whether a private individual or corporation, as opposed to a governmental agency, could receive equitable relief as a plaintiff in a RICO case.[6] This question remains unanswered by the Supreme Court, which denied Donziger certiorari in June 2017.[7]

Due to the broad and ambiguous nature of the RICO statute, circuit courts have been split on whether equitable relief is available for private RICO plaintiffs,[8] and this issue has never been challenged in the Supreme Court.[9] This Note proposes that the

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Organized Crime Control Act of 1970, RICO, a preventative and remedial statute that deals with both criminal and civil prosecution of racketeering).

[3] *Chevron Corp*., 833 F.3d at 80.

[4] *Id.* at 104–14 (summarizing the Southern District's findings); *see also id.* at 140 (affirming the Southern District's issuance of an injunction).

[5] Stephen F. Lopez, *RICO and Equitable Remedies Not Available for Private Litigants*, 21 CAL. W. L. REV. 385, 385 (1984–1985).

[6] *Chevron Corp.*, 833 F.3d at 137.

[7] *Donziger*, 137 S. Ct. at 2269.

[8] *See generally* Nat'l Org. for Women, Inc. v. Scheidler, 267 F.3d 687, 693 (7th Cir. 2001), (affirming the District Court of the Northern District of Illinois' grant of a permanent, nationwide injunction restricting the defendants' protest activities); *see also* Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986) (reversing the United States District Court for the Central District of California's decision, which granted plaintiffs a preliminary injunction that the defendants desist from using or disseminating allegedly stolen scriptural materials). Both of these cases, and the implications of these decisions, will be discussed in full later in this Note.

[9] RJR Nabisco, Inc. v. European Cmty., 136 S.Ct. 2090, 2111 n. 13 (2016) ("[The Supreme Court of the United States] has never decided whether equitable

Donziger holding should be nationally adopted to give private RICO plaintiffs the necessary tools to fight racketeering in court, particularly in instances like *Donziger*, where judicial campaign donations amounting to bribery under the statute resulted in an unlawful judgment[10] and warped the judicial process.[11] This Note will discuss the RICO Act and its evolution, interpreting it through plain meaning analysis and legislative intent, its legal and equitable remedies, and the limitations of monetary legal remedies to fully compensate a plaintiff for harm caused by racketeering.

Part I of this Note lays the framework for interpreting the RICO Act by analyzing its text, legislative intent, and the liberal construction clause,[12] which allows for an open interpretation of the statute. Part II discusses RICO's available civil remedies and how those remedies differ for the government and private plaintiffs.[13] Part III illustrates the circuit courts' divergent treatment and interpretation of equitable relief under RICO.[14] Part IV details *Chevron Corp. v. Donziger* as the tiebreaker in the

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relief is available to private RICO plaintiffs . . . and we express no opinion on the issue today . . . We leave it to the lower courts to determine, if necessary, the status and availability of any such claims.").

[10] *See generally* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (finding that due process requires recusal where a presiding justice received extraordinary campaign contributions from the defendant); *Chevron Corp.*, 833 F.3d at 74 (holding that donations to a judge constituted a bribery racket).

[11] *See Chevron Corp*., 833 F.3d at 80.

[12] Organized Crime Control Act of 1970, Pub. L. 91-452, § 904(a), 84 Stat. 947 (1970) (codified as amended at 18 U.S.C. §§ 1961–1968) (1970)) (stating, under § 1961, that the Racketeer Influenced and Corrupt Organizations Act ("RICO") is meant to be interpreted liberally, as opposed to narrowly, in order to fulfill its legislative intent and remedial purposes).

[13] Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1964 (b)–(c) (1995).

[14] *See RJR Nabisco, Inc.*, 136 S. Ct. 2090, 2111 n. 13 ("[The Supreme Court of the United States] has never decided whether equitable relief is available to private RICO plaintiffs . . . and we express no opinion on the issue today . . . We leave it to the lower courts to determine, if necessary, the status and availability of any such claims."); *see generally* Nat'l Org. For Women, Inc. v. Scheidler, 267 F.3d 687, 698 (7th Cir. 2001) (allowing equitable relief); Religious Tech. Ctr., 796 F.2d 1076, 1087 (9th Cir. 1986) (denying equitable relief).

circuit split and the implications of this decision.[15] Part V argues that the *Donziger* reasoning should be accepted as the interpretation for RICO and uses a case study applying the *Donziger* finding to a case of a similarly corrupted judgment, *Caperton v. A.T. Massey Coal Co., Inc*.[16] Part VI considers arguments against broadening RICO's interpretation and criticisms of private equitable remedies when interpreting RICO through a lens of its antitrust history.[17] *Donziger* shows that RICO is evolving and that it should be used as another avenue towards justice for private plaintiffs—another form of appeal when there is corruption in the courthouse.

I. THE RICO ACT

A. Introduction to RICO

The RICO Act, Title IX of the Organized Crime Control Act of 1970, is a preventative and remedial statute that provides criminal penalties and a civil cause of action for prosecution of racketeering.[18] RICO was created with the intent to eradicate organized crime, and it included new evidentiary tools, consequences for defendants, and remedies for plaintiffs injured by racketeering.[19] Although its individual components are nuanced in their definitions, all RICO violations must have three main elements: "racketeering activity," a "pattern" of that racketeering

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[15] *See Chevron Corp*., 833 F.3d at 137.

[16] *See* Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 880 (2009).

[17] *See generally* Nat'l Org. For Women, Inc. v. Scheidler, 267 F.3d 687 (discussing RICO's antitrust history); *Religious Tech. Ctr.*, 796 F.2d 1076 (discussing RICO's antitrust history).

[18] Though RICO is both criminal and civil, this Note will only focus on the interpretation of civil remedies for private plaintiffs. Donald R. Lee, *Availability of Equitable Relief in Civil Causes of Action in RICO*, 59 NOTRE DAME L. REV. 945, 949 (1984).

[19] Adam M. Snyder, Note, *Equitable Remedies in Civil RICO Actions: In Support of Allowing District Courts to Order Disgorgement*, 74 UNIV. OF CHICAGO L. REV. 1057, 1057 (2007) (citing Organized Crime Control Act of 1970, Statement of Findings and Purpose, Pub. L. No. 91-542, 84 Stat 923 (1970)).

activity, and the connection of that pattern to an "enterprise."[20] Individuals are guilty under RICO if they commit two or more substantive crimes listed in the statute, such as extortion, fraud, or bribery, and if the pattern can be linked back to an enterprise. The necessary connections between the elements have been called "nexus requirements," which may be sufficient to establish a criminal RICO violation.[21] There must be a "horizontal nexus" which connects between two or more predicate acts to form a pattern, and the pattern of predicate acts must connect up in a "vertical nexus" to the racketeering enterprise.[22] Finally, there must be a "causal nexus" which connects the criminal RICO violation to the civil plaintiff's actual injury.[23] While this specific horizontal/vertical "nexus" interpretation is not necessarily the traditional or standard way of interpreting this statute's text, it illustrates the importance of the relationships between the branches of the statute, and it also begins to show both the difficulty of

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[20] RICO Act, U.S.C. § 1962 (1988) provides:

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

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

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

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

[21] Randy D. Gordon, *Crimes That Count Twice: A Reexamination of RICO's Nexus Requirements Under 18 U.S.C. §§ 1962(c) and 1964(c)*, 32 VT. L. REV. 171, 172 (2007).

[22] *See id.*

[23] *See id.*

finding a true RICO violation and the flexibility of the statute's applicability.[24]

"Racketeering activity" does not violate RICO if carried out without a nexus to a predicate act and an enterprise.[25] These elements must be established together in order to charge a defendant with a RICO violation, and not merely one of its underlying prohibited acts.[26] RICO defines "racketeering activity" broadly, and includes conduct related to fraud, extortion, bribery, obstructions of justice, and interstate and foreign commerce.[27] RICO's original intent was to prevent corruption stemming from organized crime,[28] and it seems a natural evolution that, so long as the nexus requirements between RICO's elements are present, RICO can be applied in situations of organized corruption in the U.S. as well as in foreign judicial systems when plaintiffs have proper standing.[29]

The "pattern of racketeering activity" requirement means at least two acts of racketeering must have occurred within a ten-year period.[30] Although seemingly straightforward, circuits were split on what constituted a "pattern"[31] until the Supreme Court clarified

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[24] *See id.* at 172–73.

[25] *See id.* at 171–72 (citing Jackson v. Radcliffe, 795 F. Supp. 197, 207 (S.D. Tex. 1992)) ("'Racketeering activity' alone does not violate RICO. Rather, the activity must have some nexus with the 'enterprise.'").

[26] *Id.* at 172–73. *See* RICO Act, 18 U.S.C. § 1961 (2006) (listing the crimes that are prohibited as "racketeering activities" under RICO).

[27] RICO Act, § 1961 (1) (defining racketeering activity as any act involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, fraud, obstruction of justice, interference with commerce).

[28] *See generally* G. Robert Blakey, *RICO: The Genesis of an Idea. Trends in Organized Crime*, 9 TRENDS IN ORGANIZED CRIME 8, 9–15 (2006) (discussing Anti-Racketeering Act of 1934, 48 Stat. 979).

[29] *See generally* Nat'l Org. For Women, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001) (allowing equitable relief); Chevron Corp. v. Donziger, 833 F.3d 74 (2d Cir. 2016) (allowing equitable relief to rectify a corrupted foreign judicial decision).

[30] RICO Act, § 1961 (5).

[31] *See* Gordon, *supra* note 21, at 175–77 (discussing how in 1980, the court in Sedima S.P.R.L. v. Imrex Co. held that a pattern "requires at least two acts of racketeering activity," and is not defined as two or more acts); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 n. 14 (1985).

the term in 1989 in *HJ Inc. v. Northwestern Bell Telephone Co.,* stating that there must be a relation between the racketeering predicates and that the predicates "amount to or pose a threat of continued criminal activity."[32] To show the relation between racketeering predicates, the plaintiff or prosecutor can bring information that shows that the acts "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics, and are not isolated events."[33]

"Enterprise" has a similarly straightforward definition. RICO provides that the nexus can be between racketeering activity and "any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce."[34] This definition was broadened by the Supreme Court in *United States v. Turkette*, in which the defendant argued that he and his accomplices' business of drug and narcotic distribution was purely illegal and illegitimate, and was therefore not an "enterprise" under the RICO Act.[35] The Supreme Court disagreed, expanding the definition to find that "enterprise" includes both legal *and* illegal enterprises.[36]

In *Northwestern Bell* and *Turkette*, the Supreme Court demonstrated its willingness to advance RICO's applicability by expanding its interpretation, and this inclination, coupled with legislative intent, may allow the Court to broaden the accessibility of RICO's equitable remedy to private plaintiffs.[37] Although courts have continued to redefine and expand RICO's elements,[38] and while many courts have agreed on the importance of legislative intent in their analysis,[39] the heart of the equitable relief circuit split stems from the courts' disagreement on how to weigh the RICO drafters' intent.[40]

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[32] H. J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239 (1989).

[33] *Id.* at 240 (citing *Sedima*, 473 U.S. at 469 n. 14).

[34] RICO Act, § 1962 (a).

[35] *See* United States v. Turkette, 452 U.S. 576, 579–80 (1981).

[36] *Id.* at 580–81.

[37] *See id.*; *H. J. Inc.*, 492 U.S. at 241.

[38] *See* Boyle v. United States, 556 U.S. 938, 948 (2009).

[39] *See infra* note 60 (citing circuits in agreement that legislative intent dictates a liberal interpretation).

[40] *See* sources cited and accompanying text, *supra* note 8.

B. Legislative Intent

The Anti-Racketeering Act of 1934 was the first piece of federal legislation against organized crime; it intended to "control[] 'extortion' by 'professional gangsters,'" but did not define "racketeering,"[41] and focused only on the criminal penalties of either one to ten years imprisonment, a $10,000 fine, or both.[42] The Anti-Racketeering Act was later amended in 1948 by the Hobbs Act,[43] from which RICO adopted its notions of "racketeering" and obstruction of commerce.[44] Consistent with its antitrust structure, the drafters of the RICO Act used the Clayton Act as a model in considering its remedies, particularly in awarding treble damages to civil RICO plaintiffs.[45] As with its predecessors, RICO arose

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[41] Blakey, *supra* note 28, at 9 n. 15 (discussing Anti-Racketeering Act of 1934, 48 Stat. 979).

[42] Anti-Racketeering Act of 1934, 48 Stat. 979, § 2(d) (1934) ("[Anyone found guilty of the defined criminal activity] shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.").

[43] Blakey, *supra* note 28, at 9 n. 15. *See* Hobbs Act, 18 U.S.C. § 1951 (1948).

[44] Hobbs Act, 18 U.S.C. § 1951 (1948). The relevant part of the Hobbs Act is the federal antitrust statute's language as applied to present-day RICO, taken from § 1951(a), which states: "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." Hobbs Act, 18 U.S.C. § 1951 (1948). *See* Blakey, *supra* note 28, at 9 n. 15.

[45] The Clayton Act, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27); Daniel Z. Herbst, *Injunctive Relief and Civil Rico: After Scheidler v. National Organization for Women, Inc., Rico's Scope and Remedies Require Reevaluation*, 53 CATH. U. L. REV. 1125, 1133 (2004). The Clayton Act, as with other antitrust statutes, like the Federal Trade Commission Act and the Sherman Act, serves to ban unfair competition and deceptive business practices. *See* The Clayton Act, 38 Stat. 730 (1914); *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Nov. 16, 2017). The Clayton Act, however, allows private parties to sue for triple damages, as with private RICO plaintiffs, and private parties may seek an injunction on the anticompetitive practice. *See* The Clayton Act, 38 Stat. 730 (1914); *The Antitrust Laws*, *supra* note 45.

from growing concern that it was insufficient to exclusively use criminal prosecution to combat organized crime.[46]

RICO was signed into law in 1970 in response to congressional findings that organized crime in the United States was sophisticated, widespread, and damaging to the country's welfare and economy, concluding that prosecuting organized crime with the criminal laws in existence at the time was "unnecessarily limited in scope and impact."[47] Congress's findings inspired "nation-wide fear that our society's basic institutions were being eroded by this evil force."[48] The legislature hoped that RICO would be the solution, and that, along with the newfound ability to string bosses and underlings together in one enterprise,[49] it would eradicate organized crime by providing stronger evidentiary tools, penal consequences, and "new remedies to deal with the unlawful activities of those engaged in organized crime."[50] In particular, the legislature hoped that the potential to win treble damages would encourage private plaintiffs to aid in the fight against organized crime.[51] This congressional hope that RICO's substantial damages would inspire crime-fighting and award-seeking private plaintiffs was ultimately validated, though it took some time for plaintiffs to begin bringing suits.[52] Although very few RICO suits were brought in the early 1970s (perhaps due to its complexity and uncertainty

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[46] Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970).

[47] *Id.*

[48] Craig M. Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 837 (1980).

[49] Nathan Koppel, *"They Call It RICO, And It Is Sweeping"*, WALL ST. J. (Jan. 20, 2011), http://www.wsj.com/articles/SB10001424052748704881304576094110829882704.

[50] Snyder, *supra* note 19, at 1057 (citing Organized Crime Control Act of 1970, 84 Stat. 923).

[51] Herbst, *supra* note 45, at 1133–34.

[52] *See* Jeff Atkinson, *Racketeer Influenced and Corrupt Organizations, 18 U.S.C. 1961-68: Broadest of the Federal Criminal Statutes*, 69 J. CRIM. L. & CRIMINOLOGY 1, 3 (1978).

among prosecutors as to how it should be applied),[53] private RICO actions increased exponentially in the 1980s.[54]

Although Congress showed a clear intent to control organized crime through its original findings and conclusions before the bill was enacted,[55] it still intended that the Act would apply beyond that scope to be "employed for all,"[56] and this is evident with its inclusion of the Liberal Construction Clause.[57]

C. The Liberal Construction Clause

In line with the legislative intent to create a statute that was broader and more effective than the remedies available at the time, there is a provision in RICO called the Liberal Construction Clause.[58] It states, simply: "The provisions of this title shall be liberally construed to effectuate its remedial purposes."[59] This provision, in conjunction with the legislative intent to eradicate organized crime, is a clear directive that courts "adopt a liberal approach when construing ambiguities within the statute."[60] The

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[53] *Id.*

[54] The second half of the decade saw an eightfold increase in private RICO suits, from only 19 actions in 1981, to 117 suits in 1984, and around 1,000 cases in 1988. Comparatively, the government had filed under 1,000 criminal and civil RICO actions in total from RICO's inception in 1970 until the late 1980s, and had only increased its yearly average to around 100 cases. Stuart Diamond, *Steep Rise Seen in Private Use Of Federal Racketeering Law*, N.Y. TIMES (Aug. 1, 1988), http://www.nytimes.com/1988/08/01/us/steep-rise-seen-in-private-use-of-federal-racketeering-law.html?pagewanted=all&pagewanted=pri
nt.

[55] *See* Organized Crime Control Act of 1970, 84 Stat 922.

[56] Atkinson, *supra* note 52, at 10 (citing Representatives Conyers, Mikva and Ryan, in *opposition* to the House bill (H.R. REP. No. 91-1549, 91st Cong., 2d Sess. 187 (1970)).

[57] Organized Crime Control Act of 1970, 84 Stat. 947.

[58] *See* William D. Fearnow, *RICO: Are the Courts Construing the Legislative History Rather Than the Statute Itself*, 55 NOTRE DAME L. REV. 777, 793 (1980).

[59] Organized Crime Control Act of 1970, 84 Stat. 847.

[60] Craig W. Palm, Note, *Rico and the Liberal Construction Clause*, 66 CORNELL L. REV. 167, 175 (1980). The Supreme Court and many of the circuit courts have affirmed that RICO must be "liberally construed to achieve its remedial purposes." U.S. DEPT. OF JUSTICE, CRIMINAL RICO: 18 U.S.C. §§

policy considerations behind the Liberal Construction Clause show that it is not merely an all-encompassing attack on organized crime, but one rooted in a legitimate need to mitigate its harmful effects on society and commerce.[61] The Liberal Construction Clause expressly supports Congress's findings and "reflects the 'clear' intention of Congress that *any ambiguity in the statute* be resolved in favor of the victims of the evil Congress sought to eradicate by enacting RICO."[62] Further, liberal construction simply "mak[es] the law appear more rational."[63]

While a majority of federal courts recognize the benefits of this liberal interpretation,[64] there is some critical opinion of the Liberal Construction Clause and RICO that criminal statutes should be strictly construed in "favor of the defendant."[65] Some judges have "questioned the constitutionality" of the Liberal Construction

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1961-1968, (A MANUAL FOR FEDERAL PROSECUTORS) 328 (6th Ed. 2016) (citing Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008) (rejecting civil litigants' argument that civil RICO claims should be narrowly construed); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491–92 n.10, 497–98 (1984); Russello v. United States, 464 U.S. 16, 27 (1983); United States v. Turkette, 452 U.S. 576, 587–88, n.10 (1981); Odom v. Microsoft Corp., 486 F.3d 541, 545–47 (9th Cir. 2007) (en banc); United States v. Cianci, 378 F.3d 71, 88 (1st Cir. 2004); United States v. Corrado, 227 F.3d 543, 551 (6th Cir. 2000); Southway v. Central Bank of Nigeria, 198 F.3d 1210, 1216 (10th Cir. 1999); Tabas v. Tabas, 47 F.3d 1280, 1291, 1293 (3d Cir. 1995); United States v. Floyd, 992 F.2d 498, 501 (5th Cir. 1993); United States v. Perholtz, 842 F.2d 343, 353 (D.C. Cir. 1988); United States v. Neapolitan, 791 F.2d 489, 495 (7th Cir. 1986); United States v. Frumento, 563 F.2d 1083, 1091 (3d Cir. 1977)).

[61] *See* Palm, *supra* note 60, at 183.

[62] Kristi Rae Culver, *Civil RICO: Should Private Plaintiffs Be Granted Equitable Relief?*, 18 PAC. L. J. 1199, 1203 (1986-1987) (citing Rico Act, Pub. L. No. 91-482, 84 Stat. 922, 923 (1970) stating that Congress enacted RICO to combat the "evil" of the infiltration of racketeering activity into legitimate business) (emphasis added).

[63] Palm, *supra* note 60, at 181.

[64] *See* Lee, *supra* note 18*,* at 950; *see also, e.g.*, United States v. Thompson, 685 F.2d 993, 997–98 (7th Cir. 1981) (holding that the Tennessee Governor's office was an "enterprise" under RICO because RICO was "both clear and broad, particularly because Congress provided the Liberal Construction Clause"); United States v. Elliot, 571 F.2d 880 (5th Cir. 1978) (defining "enterprise" to include wholly illicit operations).

[65] Palm, *supra* note 60, at 169.

Clause, believing that "due process requires strict construction of penal statutes."[66] Professionals have criticized it for allowing RICO to be interpreted too broadly.[67]

However, strict construction is inappropriate when there is clear congressional intent to the contrary,[68] and RICO's Liberal Construction Clause, though novel in federal law, is not unique in state law.[69] This shows an evolution in Congress's approach to statutory construction in general, and it shows that criticism to liberal construction is unfounded because this clause only bolsters Congress's intent.[70] While there are clear and understandable constitutional concerns about applying liberal construction to criminal RICO, the same concerns do not apply to civil RICO. The Liberal Construction Clause, coupled with the legislative intent behind it, instructs that courts may interpret RICO in unconventional ways, and courts should grant equitable relief to

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[66] Lee, *supra* note 18*,* at 940 (citing two instances of this minority interpretation of RICO: United States v. Anderson, 626 F.2d 1358, 1369-70 (8th Cir. 1980), where the court chose to apply the rule of lenity, rather than liberal construction, and narrowly interpreted "enterprise," and United States v. Grzwacz, 603 F.2d 682, 692 (7th Cir. 1979), cert. denied, 446 U.S. 935 (1980) (Swygert, J., dissenting) ("[U]nclear whether Congress intended its directive to apply to those sections which establish criminal liability or merely to the 'remedial' provisions of Title IX.")).

[67] David Kurzweil, Note, *Criminal and Civil RICO: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 COLUM. J.L. & SOC. PROBS. 41, 89–90 (1996).

[68] Lee, *supra* note 18*,* at 951, n. 26–29 (citing United States v. Brown, 333 U.S. 18, 25 (1947) ("The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose.").

[69] *See id.* at 950 n. 26 ("A majority of states today has abolished the common law rule of strict construction either by expressly abrogating it or adopting some variation of "fair import" or "liberal construction" . . . The abolition was part of a legislative response to judicial hostility to reform movements in the 19th century. Indeed, judicial hostility to change through legislation was so common at that time "that it became standard practice in drafting statutes to insert a preamble stating broadly the purpose of the act and to close with a provision declaring that the statute should be liberally construed.") (citing David Wigdor, ROSCOE POUND: PHILOSOPHER OF LAW 174 (1974)).

[70] *See id.*

private RICO plaintiffs by refusing to enforce unjust verdicts that resulted as a product of racketeering.

II. CIVIL REMEDIES UNDER RICO

RICO expressly allows for money damages, and if injured parties are successful in their suits, they will recover three-times the damages sustained, the cost of the suit, and reasonable attorney's fees.[71] The original bill did not include the private civil action provision, but it was included at the last moment in the hopes that private parties would be motivated by the large damage awards and lower burden of proof to help the government fight organized crime,[72] modeling RICO's private civil damages from the Clayton Act.[73] RICO grants district courts great equitable power, and they may order individuals to divest themselves of any interest in an enterprise, reasonably restrict future investments or activities related to the racketeering endeavor or that which would affect commerce, and can dissolve or reorganize any enterprise.[74] The remedial section also provides that any defendant found guilty under a criminal RICO proceeding is estopped from denying that outcome in subsequent civil suit.[75]

RICO's provision for equitable relief for the government is equally unambiguous.[76] It provides that the Attorney General may bring a RICO action on behalf of the government and may seek equitable relief in the form of restraining orders and other actions,

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[71] RICO Act, 18 U.S.C., § 1964 (c) (1995).

[72] Herbst, *supra* note 45, at 1133.

[73] *Id.* The Clayton Act is a federal antitrust law which also provides for treble damages. The Clayton Act, 15 U.S.C. §§ 12-27, 38 Stat. 730 (1914). This has led courts to look to the Clayton Act to interpret RICO damages. *See* Herbst, *supra* note 45, at 1133. *See also* Jonathan Turley*, Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation*, 29 WM. & MARY L. REV. 441, 479, n. 178 (1988) (citing Representative Poff when he described RICO's damages provision as "another example of the antitrust remedy being adapted for use against organized criminality." 116 CONG. REC. 35, 295 (1970) (remarks of Rep. Poff)).

[74] RICO Act, 18 U.S.C., § 1964 (a).

[75] *Id.* at § 1964 (d).

[76] *See id.* at § 1964 (b).

including the acceptance of performance bonds.[77] This section's inclusion in the statute forestalls any potential challenges to the government's standing in a RICO action,[78] disposing of the old rule that "only a victim, and not the government, may enjoin a crime,"[79] and that in order to be granted equitable relief, the party must show irreparable injury or inadequacy of remedy at law.[80] If it is accepted that RICO provides this unconventional remedy to the government, not a victim to the crime and therefore not traditionally given the right to enjoin a crime, the same remedy should be available to a private RICO plaintiff, a true victim of racketeering.

While RICO is explicit when it comes to the powers afforded to district courts and the government in civil RICO actions, it is vague when it comes to the equitable relief available to private victims of racketeering.[81] Many district courts have held that injunctive relief is available to private RICO plaintiffs,[82] but, for the most part, circuit courts have only hinted at such a finding.[83]

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[77] *Id.*

[78] Lee, *supra* note 18*,* at 947.

[79] *Id.* at n. 15 (citing In re Debs, 158 U.S. 564, 582–84 (1895)).

[80] *Id.* at n. 16 (citing United States v. Cappetto, 502 F.2d 1351, 1358–59 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975)).

[81] Culver, *supra* note 62, at 1200.

[82] *See* Religious Tech. Center v. Wollersheim, 796 F.2d 1076, 1081–82 (9th Cir. 1986) (citing Chambers Development Co. v. Browning-Ferris Industries, 590 F. Supp.1528, 1540–41 (W.D. Pa. 1984); Aetna Casualty and Surety Co. v. Liebowitz, 570 F. Supp. 908, 910–11 (E.D.N.Y. 1983)**;** USACO Coal Co. v. Carbomin Energy, Inc., 539 F. Supp. 807, 814–16 (W.D. Ky 1982); Marshall Field & Co. v. Icahn, 537 F. Supp. 413, 420 (S.D.N.Y. 1982); Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1014 (S.D.Tex. 1981)); *see also,* McLendon v. Continental Group, Inc., 602 F. Supp. 1492, 1518–19 (D.N.J. 1985) ("The law [in this area] is in great flux."); Kaufman v. Chase Manhattan Bank, N.A., 581 F. Supp. 350, 359 (S.D.N.Y. 1984) (hinting at, but not answering, the question of the availability of injunctive relief). *But see*, Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81, 85–86 (W.D.N.Y. 1982) (denying the availability of injunctive relief for civil RICO plaintiffs).

[83] *Religious Tech. Ctr*., 796 F.2d at 1081 (citing Dan River, Inc. v. Icahn, 701 F.2d 278, 290 (4th Cir. 1983) ("While we do not undertake to resolve the question . . . [i]n light of the most recent indications from the Supreme Court, Dan River's action for equitable relief under RICO might well fail to state a

Prior to *Donziger*, only two circuit courts had expressly made a decision on this, and they are split in their decisions.[84] This split might be explained by the similarities between the treble damages provisions of the RICO and Clayton Acts, leading courts to mistakenly rely on the Clayton Act as precedent when interpreting the RICO Act's civil remedies.[85] The Ninth Circuit found that equitable relief was not available to private RICO plaintiffs,[86] but the Seventh Circuit found that equitable relief was available in the form of injunctions (and rejected the notion that the Clayton Act should be relied upon for RICO interpretation).[87] With a vague statute, clear legislative intent, and two competing circuit court decisions, the finding in *Chevron Corp. v. Donziger* becomes even more important to RICO's evolution.

III. THE PRE-*DONZIGER* CIRCUIT SPLIT ON EQUITABLE RELIEF FOR PRIVATE RICO PLAINTIFFS

Prior to *Donziger* in 2016, both the Ninth and Seventh Circuits had decided on the issue of equitable relief for private RICO plaintiffs, and the pre-*Donziger* circuit court cases differ in both their facts and reasoning.[88] In the 1986 Ninth Circuit case, *Religious Technology Center v. Wollersheim*, the Church of

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claim."); Trane Co. v. O'Connor Securities, 718 F.2d 26, 28 (2d Cir. 1983) ("We have the same [serious] doubts [as courts such as the Fourth Circuit in Dan River] as to the propriety of private party injunctive relief . . ."); Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 489 n. 20 (2d Cir. 1984) ("[I]t thus seems altogether likely that [the RICO Act] as it now stands was not intended to provide private parties injunctive relief."); Bennett v. Berg, 685 F.2d 1053, 1064 (8th Cir. 1982) (supporting injunctive relief for private RICO plaintiffs by citing a law review article), *aff'd on rehearing*, 710 F.2d 1361 (8th Cir. 1983) (en banc). *See also* USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 97–98 (6th Cir. 1982) (affirming grant of injunctive relief to private plaintiff on pendent state claims where RICO provided federal jurisdiction base).

[84] *See* Nat'l Org. for Women, Inc. v. Scheidler, 267 F.3d 687, 693 (7th Cir. 2001); *Religious Tech. Ctr.*, 796 F.2d at 1091.

[85] *See* Herbst, *supra* note 45, at 1133.

[86] *See Religious Tech. Ctr.*, 796 F.2d at 1087.

[87] *See Nat'l Org. for Women, Inc.*, 267 F.3d at 695.

[88] *See generally id.* at 697 (allowing equitable relief); *Religious Tech. Ctr.*, 796 F.2d at 1087 (denying equitable relief).

Scientology argued for an injunction to stop the distribution of allegedly stolen scriptural materials, which the court denied using a strictly textual interpretation of the RICO Act.[89] The Ninth Circuit recognized that there had been disagreements in both district and circuit courts regarding interpretations of RICO,[90] and at the time of *Wollersheim*, only the Eighth[91] and Sixth[92] Circuits had loosely supported the idea of injunctive relief for a civil RICO plaintiff, while the Fourth[93] and Second[94] Circuits had loosely opposed its availability. Without guiding precedent, the Ninth Circuit was forced to decide on injunctive relief for civil RICO—and it found the remedy unsupported by any statutory interpretation.[95] The Seventh Circuit rejected this analysis in *National Organization for Women, Inc. v. Scheidler* in 2001,[96] in which the plaintiffs, the National Organization for Women and abortion clinics, sought an injunction to stop violent anti-abortion protesters, which the court granted using an analysis based in both the statute's text and its legislative intent.[97] The Seventh Circuit found that the Ninth Circuit did not fully delve into a statutory language interpretation,[98] and it was not Congress's intent to restrict RICO's

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[89] *See Religious Tech. Ctr.*, 796 F.2d at 1087.

[90] *See id.* at 1081–82; *see also* sources cited, *supra* note 73.

[91] Bennett v. Berg, 685 F.2d 1053, 1063–64 (8th Cir. 1982), *aff'd on rehearing*, 710 F.2d 1361 (8th Cir. 1983) (en banc) (McMillian, J. concurring) (supporting injunctive relief for private RICO plaintiffs by citing a law review article).

[92] USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 97–98 (6th Cir. 1982) (affirming grant of injunctive relief to private plaintiff on pendent state claims where RICO provided federal jurisdiction base).

[93] Dan River, Inc. v. Icahn, 701 F.2d 278, 290 (4th Cir. 1983) (finding that the plaintiff's request for equitable relief under RICO may fail to state a claim, but ultimately refusing to resolve the question).

[94] Trane Co. v. O'Connor Securities, 718 F.2d 26, 28 (2d Cir. 1983) ("We have the same [serious] doubts [as courts such as the Fourth Circuit in Dan River] as to the propriety of private party injunctive relief.").

[95] *Religious Tech. Ctr.*, 796 F.2d at 1088.

[96] Nat'l Org. For Women, Inc. v. Scheidler, 267 F.3d 687, 695 (2001).

[97] *Id.* at 695–700.

[98] *Id.* at 695. For a reference of the language at issue, see 18 U.S. Code § 1964 (c) (1995).

application, since its goal was to eradicate organized crime.[99] The grant of equitable relief for private RICO plaintiffs demonstrates the circuit's increasing willingness to accept novel interpretations of RICO, especially when there is a compelling reason, such as correcting injustices that damages alone will not quell.

A. The Ninth Circuit: Religious Technology Center v. Wollersheim

In *Religious Technology Center v. Wollersheim*, the Ninth Circuit became the first circuit court to decide on equitable relief for a private civil RICO plaintiff: the Church of Scientology.[100] In *Wollersheim*, the Church of Scientology ("Scientology") brought a private RICO action against a splinter group, the Church of the New Civilization ("New Civilization"), seeking damages and an injunction to cease the distribution of confidential scriptural materials.[101]

Scientology alleged that New Civilization had stolen certain materials from Scientology offices, and although they had been returned, Scientology alleged that New Civilization had copied and distributed them.[102] Scientology alleged that it was significantly harmed by this distribution due to the "spiritually harmful effect" that would result from premature exposure to the materials.[103] Scientology also alleged that the stolen materials were trade secrets and were obtained through a pattern of racketeering activity of mail and wire fraud, that New Civilization was an "enterprise," whose members conspired to participate in the racketeering activity, and requested money damages.[104] Scientology brought its civil RICO suit in the District Court for the Central District of California, which granted a temporary restraining order enjoining New Civilization from distributing the materials.[105] The court

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[99] *Nat'l Org. For Women, Inc.*, 267 F.3d at 698.

[100] *Religious Tech. Ctr.*, 796 F.2d at 1081.

[101] *Id.* at 1077.

[102] *Id.*

[103] *Id.*

[104] *Id.* at 1080.

[105] *Id.* at 1079.

made that restraining order final by issuing an injunction against New Civilization that prohibited any release of the materials.[106]

On appeal, the Ninth Circuit reasoned that the plain meaning of the statute, its legislative history, its similarities to the Clayton Act, and the Supreme Court doctrine that limits remedies not expressed in a statute, all denied injunctive relief for private parties.[107] The court used a straightforward textual interpretation that relied on the language of the statute.[108] It rejected Scientology's argument which focused on the statute's use of "and" in RICO's damages clause, Section 1964(c), which states that any person injured by a RICO violation "may sue therefor in any appropriate United States district court *and* shall recover threefold the damages he sustains and the cost of the suit."[109] Scientology argued that the use of "and," rather than "to," preceding the treble damages clause in Section 1964(c) meant the equitable remedies of Section 1964(a) are also available to private plaintiffs because it made no clear limitation between the remedies available to the government and to private plaintiffs.[110] By ignoring the statute's legislative intent and the Liberal Construction Clause, this textual interpretation provides an incomplete analysis.[111]

However, the court's interpretation of RICO's legislative history was more troubling. While the RICO Act was still in the amendment process as a House bill, House Representative William

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[106] *Id.*

[107] *Id.* at 1088.

[108] *See supra* Sections I.A and II of this Note. *See also Religious Tech. Ctr.*, 796 F.2d at 1082–85 (discussing the plain meaning of RICO's text).

[109] *See Religious Tech. Ctr.*, 796 F.2d at 1085 (referencing Kaushal v. State Bank of India, 556 F. Supp. 576, 582 (N.D. Ill. 1983) (rejecting a reading of the statute as "bizarre and wholly unconvincing as a matter of plain English and the normal use of language.")) (emphasis added).

[110] *Id.* at 1083–85. Remedies listed in § 1964(a) include: "ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons." RICO Act, 18 U.S.C. § 1964 (a) (1995).

[111] *See supra* Sections I.A–B of this Note.

Steiger had proposed both treble damages *and* injunctive relief for private plaintiffs during the drafting of the Act, but the House only accepted treble damages in the final draft.[112] This fact heavily influenced the court's interpretation of legislative intent, finding it persuasive that the House had expressly rejected private injunctive relief.[113] Further, the court used precedential guidance from a Supreme Court decision finding that the Clayton Act's treble damages provision precludes private injunctive relief.[114] Finally, the court stated that the Supreme Court "sharply limits the implication of causes of action or remedies not expressly provided by statute,"[115] and that "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."[116]

Though the court denied injunctive relief, it acknowledged the "strong policy arguments" that support a private RICO plaintiff's right to injunctive relief.[117] It recognized the importance for private parties to be able to immediately stop racketeering behavior that threatens to destroy their businesses,[118] and that treble damages may be insufficient to fix the harm if there was no economic injury.[119] Finally, appearing to backtrack on its legislative intent argument, the court even recognized that the U.S. Attorney's resources are limited and precluding private parties from equitable relief constrains RICO's purpose to end racketeering[120] because the private attorney provisions are designed to help prosecute RICO.[121] This court not only acknowledged that the U.S. Attorney's office has limited resources to bring injunctive suits, but that, "[t]he

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[112] *Religious Tech. Ctr.*, 796 F.2d at 1084.

[113] *Id.* at 1089.

[114] *Id.* at 1087 (citing Paine Lumber Co. v. Neal, 244 U.S. 459, 471 (1917)).

[115] *Id.* at 1088.

[116] *Id.* (citing Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979)).

[117] *See id.* at 1088.

[118] *Id.* at 1088–89.

[119] *Id.* at 1089.

[120] *See id.*

[121] *Id.* (citing Sedima v. Imrex Co., 473 U.S. 479 (1985)).

preventative effect of injunctive relief is *often a more just remedy*," significantly weakening RICO by allowing it to be declawed for lack of resources, and not creating a fallback option for private plaintiffs to step in and fill the gaps with equitable relief.[122]

Although the Ninth Circuit denied injunctive relief, despite acknowledging its value, its interpretation of RICO using the Clayton Act's precedent is also unwarranted.[123] Using similar language in two statutes does not mean that both must be interpreted the same way, especially when they exist to serve separate and distinct purposes.[124] This approach would later be rejected in 2001 by the Seventh Circuit in *National Organization for Women, Inc. v. Scheidler* ("*NOW I*"), which laid the foundation for the *Donziger* court to allow equitable relief for private RICO plaintiffs under an analysis of Congress's intent and the statute's text.[125]

B. *The Seventh Circuit:* National Organization for Women, Inc., v. Scheidler

In *National Organization for Women, Inc. v. Scheidler* ("*NOW I*"),[126] defendants, members, and organizers of the Pro-Life Action Network ("PLAN"),[127] participated in anti-abortion protests, physically blocking abortion clinics so neither staff nor patients could enter or exit with the intent to prevent any abortions.[128] These acts, deemed "egregious" by the court,[129] included: protesters crushing clinic staff against the clinic entrance for several hours, and only stopping once the glass wall broke;

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[122] *Id.* (emphasis added).

[123] *Id.* at 1088; *see generally id.* at 1087 (discussing similarities of RICO to the Clayton Act provision).

[124] *See* Nat'l Org. For Women, Inc. v. Scheidler, 968 F.2d 612, 621 (7th Cir. 1992).

[125] *See generally* Nat'l Org. For Women, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001) (allowing equitable relief).

[126] *Nat'l Org. For Women, Inc.*, 968 F.2d at 615.

[127] *Id.* Which satisfied, for RICO purposes, the element of "organization or enterprise." *Nat'l Org. For Women, Inc.*, 267 F.3d at 695.

[128] *Nat'l Org. For Women, Inc.*, 968 F.2d at 615.

[129] *See Nat'l Org. For Women, Inc.*, 267 F.3d at 694.

protesters physically restraining a patient going for a surgery check-up and loosening her stitches, which sent her back to the hospital; protesters destroying medical equipment; and protesters chaining themselves to the clinic (both in and outside).[130] In 1997, plaintiffs, National Organization for Women ("NOW") and two clinics that had been targeted by PLAN, brought a class action against the defendants, alleging violations of the Hobbs Act[131] and RICO, asserting that the protestors' conduct was illegal and amounted to a pattern of extortion.[132] Based on the incidents mentioned above, among others, the jury in the District Court for the Northern District of Illinois found that PLAN had violated both the Hobbs and RICO Acts and awarded damages.[133]

In addition to damages, however, the district court entered a permanent, nationwide injunction, which prohibited the defendants from interfering with the clinics' patients or abortion services, trespassing, damaging clinic property, or threatening violence against patients, volunteers, or staff.[134] In considering this issue on appeal,[135] the Seventh Circuit undercut the Ninth Circuit's reasoning in *Wollersheim*.[136] *Wollersheim* relied heavily upon the legislative history of the statute, and only touched on a statutory interpretation when disregarding Scientology's assertion that equitable remedies were included because of an "and" preceding the damages clause of Section 1964(c).[137] The Seventh Circuit stated that that sort of analysis "no longer conforms to the Court's

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[130] *Id.* at 695.

[131] *See* Nat'l Org. For Women, Inc. v. Scheidler, 172 F.R.D. 351 (N.D. Ill. 1997) (granting class certification); The Hobbs Act, 18 U.S.C. § 1951 (1948).

[132] *See Nat'l Org. For Women, Inc.*, 968 F.2d at 623. Extortion is listed as racketeering activity under RICO. *See* RICO Act, 18 U.S.C. § 1961 (1995) (providing a complete list of acts that qualify as "racketeering activity").

[133] *Nat'l Org. For Women, Inc.*, 267 F.3d at 695.

[134] *Id.*

[135] *Id.* Defendants contested that "RICO does not permit private plaintiffs to seek injunctive relief." *Id.*

[136] *Id.*

[137] *See* Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1083 (9th Cir. 1986); *see also* 18 U.S.C. § 1962(c) ("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 cost of the suit.").

present jurisprudence, assuming for the sake of argument that it was a permissible one at the time," choosing instead to look at RICO as a whole, including legislative intent, and ultimately finding that injunctive relief was proper.[138]

The Seventh Circuit favored the plaintiffs' argument that Section 1964(a)[139] expressly grants district courts jurisdiction to make general remedies for RICO claims, including injunctive relief.[140] The language of the statute supports this.[141] There is no mention of district courts only having the power to grant injunctions in a case where the government is a plaintiff, nor does it expressly mention that private plaintiffs would be precluded from this relief.[142] While defendants pushed back on this, stating that the section was strictly jurisdictional, the court found that the section does "confer[] certain remedial powers" on the district courts.[143]

The Seventh Circuit found that the Ninth Circuit not only failed to perform an in-depth textual analysis of RICO, but that it misread[144] Section 1964(b).[145] It rejected the idea that the Clayton Act should be relied upon for RICO interpretation.[146] The court stated Section 1964(b) only permits the government to seek interim

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[138] *Nat'l Org. For Women, Inc.*, 267 F.3d at 695.

[139] RICO Act, 18 U.S.C. § 1964 (a) (1995) ("The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to . . . imposing reasonable restrictions on the future activities . . . of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in . . . or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.").

[140] *See Nat'l Org. For Women, Inc.*, 267 F.3d at 696.

[141] *Id.* (citing 18 U.S.C. § 1964 (a)).

[142] *See id.*

[143] *Nat'l Org. For Women, Inc.*, 267 F.3d at 697.

[144] *See id.* at 695.

[145] RICO Act, 18 U.S.C. § 1964 (b) (1995) ("The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.").

[146] *See Nat'l Org. For Women, Inc.*, 267 F.3d at 699–700.

remedies, and the ability to seek permanent injunctions comes from the power of the district court granted in Section 1964(a)—not from the individual sections that grant specific remedies to government and private plaintiffs.[147] Since the Attorney General's authority to seek injunctions comes partly from Section 1964(a), the court concluded that the district court's power to give injunctive remedies from Section 1964(a) can also extend to private parties' remedies in Section 1964(c).[148]

Though confident in its textual analysis,[149] the court found additional justifications for its holding in RICO's Liberal Construction Clause[150] and that Congress's intent was not restrictive in RICO's application.[151] Looking to Congress's inclusion of the treble damages clause in order to *encourage* private plaintiffs to bring RICO suits, the court found that a liberal reading of RICO comported with Congress's interests.[152] *NOW I* went up to the Supreme Court on three occasions,[153] but the court never resolved the issue of injunctive relief for private RICO plaintiffs.[154] While the Supreme Court reversed and remanded the case for failure to establish all elements of RICO,[155] the Seventh Circuit's reasoning is based in the language of the statute and legislative intent, and it correctly allows RICO to be used as a tool to correct corruption through injunctive relief.[156]

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[147] *Id.* at 696–97.

[148] *Id.* at 697.

[149] *Id.* at 698.

[150] Organized Crime Control Act of 1970, Pub. L. 91-452 § 904(a), 84 Stat. 947 (codified as amended at 18 U.S.C. §§ 1961-1968) (1970) ("The provisions of this title shall be liberally construed to effectuate its remedial purposes.").

[151] *Nat'l Org. For Women, Inc.*, 267 F.3d at 698.

[152] *Id.*

[153] *See, e.g.*, Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) (reversing the circuit and remanding the case).

[154] *See generally id.* (failing to discuss whether injunctive relief is available for private RICO plaintiffs because the court found there was no legitimate RICO claim before it).

[155] *Id.* at 262 (overturning the injunction *not* because of the Seventh Circuit's ruling on equitable relief, but because the protesting did not meet the pattern of racketeering activity of "extortion" as the Hobbs act defined it).

[156] *Nat'l Org. For Women, Inc.*, 267 F.3d at 695.

Where the Ninth Circuit found that injunctive relief should not be available to private RICO plaintiffs, the Seventh Circuit found that RICO certainly has useful application outside of a strict, mafia-focused, interpretation, and may indeed be valuable for private parties for whom damages are insufficient and there is no other legal recourse.[157] The Seventh Circuit's analysis is particularly relevant when looking at the Second Circuit's reasoning in *Chevron Corp. v. Donziger*, and what this analysis means for future use of RICO by private plaintiffs.

IV. THE SECOND CIRCUIT: *CHEVRON CORPORATION V. DONZIGER*

Considering RICO's judicial history through *Wollersheim* and *NOW I*, the Second Circuit's finding in *Chevron Corp. v. Donziger* shows a distinct trend of the evolution of RICO's use as an equitable tool.[158] The *Donziger* holding leans on, and refines, *NOW I*'s analysis, tightening the equitable relief for private plaintiffs and limiting the damages available for governmental plaintiffs.[159]

A. Facts and Findings

Steven Donziger represented forty-eight residents of Lago Agrio, Ecuador, in a class action lawsuit against Texaco Petroleum, whose stock was acquired by Chevron in 2001.[160] Prior to this acquisition, Texaco was active in Ecuadorean oil fields through its association with the state-run Petroecuador.[161] Texaco exited the country in 1992, leaving contamination in its wake and, although it contributed $40 million dollars to cleanup efforts, it

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[157] *Id.* at 698–99.

[158] *See generally* Chevron Corp. v. Donziger, 833 F.3d 74, 137 (2d Cir. 2016) (agreeing with NOW I's analysis and finding that equitable relief is available for private plaintiffs).

[159] *Id.* at 136.

[160] Mark Hamblett, *Gibson Dunn Clinches Win for Chevron in Donziger Saga,* THE LEGAL INTELLIGENCER (Aug. 8, 2016), http://www.law.com/sites/almstaff/2016/08/08/gibson-dunn-clinches-win-for-chevron-in-donziger-saga/.

[161] Rob Nikolewski, *Chevron and Donziger Take their Battle to Canada*, SAN DIEGO UNION-TRIBUNE (Sept. 11, 2016), http://www.sandiegouniontribune.com/sdut-chevron-donziger-canada-2016sep11-story.html.

took minimal efforts to remediate the pollution.[162] These slow and inadequate measures made it harder to trace the pollution directly back to Texaco.[163]

Although Donziger initially secured a $17.292 billion judgment[164] for his forty-eight clients, this number was reduced to $8.646 billion by the Ecuadorian National Court,[165] and the methods he used to win are the reason the Second Circuit ultimately ruled against this judgment.[166] Chevron alleged that Donziger orchestrated racketeering through bribery, coercion, and fraud of judges, inducing the judgment against them.[167] His racketeering activity included submitting fraudulent evidence, paying an expert witness for damage assessments who would be willing to "play ball" with Donziger's team, coercing the judge to appoint said witness as the court's "global expert," Donziger's team writing the judgment themselves, and promising to pay the presiding judge $500,000 for a judgment in Donziger's favor.[168]

The District Court for the Southern District of New York found that Donziger's "wire fraud, bribery, obstruction of justice, and money laundering were committed as part of an at-least 'five-year effort to extort and defraud 30 Chevron' into paying a huge sum of money," and it was likely that this activity would continue until the plaintiffs succeeded in their claim.[169] Finally, on August 8, 2016, *Chevron Corp. v. Donziger* was resolved in the Second Circuit after twenty-three years of litigation.[170] Despite Donziger's argument on appeal that equitable relief is not available to private RICO plaintiffs, with his huge amount of fraud and racketeering in general, the Second Circuit agreed with the district court, which concluded that "[i]f ever there were a case warranting equitable

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[162] *Id.*

[163] *Id.*

[164] *Chevron Corp.*, 833 F.3d at 84.

[165] *Id.*

[166] Nikolewski, *supra* note 161.

[167] *Chevron Corp*., 833 F.3d at 80.

[168] *Id.* at 92–94, 113.

[169] *Id.* at 134 (citing Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 599 (S.D.N.Y. 2014)).

[170] Nikolewski, *supra* note 161; *see also Chevron Corp.*, 833 F.3d 74 (2016).

relief with respect to a judgment procured by fraud, this is it."[171] The Second Circuit agreed with the Seventh Circuit's *NOW I* holding that Section 1964(a) grants district courts authority to both hear RICO claims and grant equitable relief, and expanding on the holding, that Congress did not intend to limit the court's authority to grant relief by identifying the plaintiffs who may receive that relief.[172] The Second Circuit also referenced the Seventh Circuit's reasoning for its legislative intent analysis, citing again Congress's desire to make prosecutors out of private plaintiffs, and that its goal in enacting RICO was to "eliminate racketeering activity."[173] Further refining the Seventh Circuit's opinion, the Second Circuit found that since Section 1964(b) expressly states that the government may seek interim relief, interim relief is only available to the government, and not a private party.[174] In a similar analysis, the court found that treble damages available to private plaintiffs in Section 1964(c) are not available to the government because they are not expressed in the statute, and the United States cannot be considered a legal person.[175] The interpretations for Sections 1964 (b) and (c) provide the government and private parties with specific relief (interim relief and treble damages, respectively) in addition to the general relief granted under subsection (a)—where the district court has the power to grant permanent injunctive relief.[176]

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[171] *Chevron Corp*., 833 F.3d at 117 (citing *Chevron Corp*., 874 F.Supp. 2d at 384).

[172] *Chevron Corp.*, 833 F.3d at 138.

[173] *Id.* at 139.

[174] *Id.*

[175] *Id.* at 138 ("Subsection (c) allows awards of that type of relief to a 'person,' a term defined as 'any individual or entity capable of holding a legal or beneficial interest in property,' 18 U.S.C. § 1961(3). And while the United States is capable of owning property, the term 'person' in RICO is used in § 1964 to apply both to potential plaintiffs (subsection (c)) and to potential defendants (subsection (a)). As there is no indication that that word was meant to have differing meanings in the same section, and as there is no indication that Congress intended RICO to waive the United States' sovereign immunity—as would be required for the United States to be a defendant—we have concluded that the United States does not come within the RICO definition of 'person.'").

[176] *Id.* at 138–39 (quoting Nat'l Org. for Women v. Scheidler, 267 F.3d 687, 697 (7th Cir. 2001)).

What had begun as an environmental lawsuit against an oil giant had become an extraordinary[177] RICO suit against the plaintiffs' attorney for his shocking practices over the course of litigation.[178] Culminating with the Second Circuit unanimously affirming the district court's decision below, equitable relief was granted to private RICO plaintiffs for the first time in its history.[179] With Donziger and the plaintiffs' representatives enjoined from taking any action to enforce the illicitly won, multi-billion-dollar Ecuadorian judgment in United States courts, the Second Circuit became the third court to weigh in on the split with this reasonable founding—rooted in a just and thorough analysis of RICO's text and legislative intent.[180]

B. Implications of Donziger

In denying injunctive relief for private plaintiffs, Congress and the judiciary fall short in providing a complete remedy for those injured by racketeering. Both the *NOW I* injunction on protests and the injunction on *Donziger's* fraudulent judgment were the only forms of equitable relief that allowed for true remediation for the

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[177] *See* William E. Thomson et. al., *Rule Of Law Trumps Rhetoric In Chevron's 2nd Circ. Win*, LAW 360 (Aug. 19, 2016), http://www.law360.com/articles/830169/rule-of-law-trumps-rhetoric-in-chevron-s-2nd-circ-win (discussing the case and the implications of the finding of equitable relief).

[178] Nikolewski, *supra* note 161.

[179] Gibson, Dunn & Crutcher LLP, *Chevron Earns Decisive Victory In Second Circuit Civil Rico Appeal Concerning Corrupt Scheme To Obtain $9.5 Billion Ecuadorian Judgment Through Bribery And Fraud* (Aug. 9, 2016), https://www.gibsondunn.com/chevron-earns-decisive-victory-in-second-circuit-civil-rico-appeal-concerning-corrupt-scheme-to-obtain-9-5-billion-ecuadorian-judgment-through-bribery-and-fraud/.

[180] *Chevron Corp*., 833 F.3d at 143. For comity reasons, neither the District Court nor the Second Circuit courts attempted to restrain the judgment's enforcement in courts outside of the United States, and it did not limit the actual plaintiffs' conduct, just Donziger's and the plaintiffs' representatives'. *Id.* This injunction does not invalidate the Ecuadorean judgment, but merely prevents its enforcement through United States courts. *Id.* The District Court also imposed a constructive trust, for Chevron's benefit, on any property that Donziger or the plaintiffs' representatives may have received from the judgment so they would not "profit from their fraud." *Id.* at 144.

plaintiffs.[181] The *Donziger* ruling shows that the Second Circuit, like the Seventh Circuit before it, is interpreting RICO under the Liberal Construction Clause.[182] *Donziger* tips the circuit split in favor of allowing federal courts authorization to grant equitable relief to private RICO plaintiffs.[183] This finding is important because it mitigates the "injury requirement" of Section 1964(c) by allowing Section 1964(a) to be accessible to private plaintiffs regardless of whether the exact amount of injury is certain.[184] This makes it possible for private plaintiffs to bring RICO actions for injunctive relief while the ultimate total cost of injury is still pending, where otherwise the action would have to wait until a definite sum of injury is established, which may lead to more injury in the meantime.[185] This finding is also consistent with *NOW I*, which found that "the object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors."[186]

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[181] *Id.* at 140 ("The occurrence of the injury is the focus of statements that the private plaintiff in a RICO action must show injury that is 'clear and definite' . . . But Chevron's injury is in part its liability on an $8.646 billion judgment obtained through a pattern of racketeering activity") (citing Bankers Trust Co. v. Rhoades, 859 F.2d1096, 1106 (2d Cir. 1988) ("Finding § 1964(c) damages claim unripe because 'it is impossible to determine the amount of damages that would be necessary to make plaintiff whole . . . until it suffers the injury'.")).

[182] *Id.* at 139 (citing Nat'l Org. For Women, Inc. v. Scheidler, 267 F.3d 687, 698 (2001) ("Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident.") (internal citations omitted).

[183] *Id.*

[184] *Id.* at 140 (holding that injury does not need to be strictly-defined, finding that "Chevron's injury is in part its liability on an $8.646 billion judgment obtained through a pattern of racketeering activity; that injury, affecting its net worth, is clear and definite"); David J. Stander, *Donziger Ruling—Circuit Split as Second Circuit Holds Equitable Relief Is Available to a Private Plaintiff Under Civil RICO*, STANDER LAW RICO REPORT HIGHLIGHTING RECENT DEVELOPMENTS AND CASES REGARDING RICO LAW AND WHITE COLLAR CRIME (Aug. 15, 2016), https://ricoconsultingattorney.wordpress.com/2016/08/15/donziger-ruling-circuit-split-as-second-circuit-holds-equitable-relief-is-available-to-a-private-plaintiff-under-civil-rico/.

[185] *Chevron Corp.,* 833 F. 3d at 139–40.

[186] Stander, *supra* note 184 (citing *Nat'l Org. For Women, Inc.*, 267 F.3d at 698).

Analyzing *NOW I*, *Wollersheim,* and *Donziger* together shows an evolution in courts' understanding of what constitutes "racketeering activity," and an openness to use RICO as an equitable tool for private plaintiffs.[187] In *NOW I*, the Seventh Circuit held that there need not be economic motivation behind a racketeering activity when they found that protesting an abortion clinic was sufficient, and this is a clear example where treble damages would not have remedied the injury if the violent and invasive protests continued.[188] Money awards are not a panacea, and equitable relief should not only be available to the government when private parties can suffer the same racketeering injury. As seen in *Donziger*, treble damages would have been insufficient to remedy Chevron's harm of having to pay a fraudulently-gotten $8.646 billion judgment against them, where an injunction resolved the action.[189] *Donziger* shows how impactful it is for courts to grant equitable relief for private RICO plaintiffs, and it creates broader implications for civil RICO and legal ethics.[190] Not only does *Donziger* create a narrow use for equitable relief, but it provides an additional check on attorneys and the judiciary to act ethically.[191] Regardless of this new use for RICO, the lingering problem remains that while the Second Circuit ensured that the Ecuadorean plaintiffs were not enjoined from enforcement of the judgment,[192] *more* litigation is an unjust result for those forty-eight injured individuals who were deprived the benefit of a "just, speedy, and inexpensive determination" due to Donziger's fraud.[193] *Donziger* is not the first judgment procured by fraud and,

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[187] *See* discussion *supra* Parts III-IV.

[188] Nat'l Org. For Women, Inc. v. Scheidler, 968 F.2d 612, 629–30 (7th Cir. 1992).

[189] *See Chevron Corp*., 833 F.3d at 103, 119–30 (discussing the difficulty of placing a damages amount on an unclear and indefinite injury).

[190] *See generally What Others Are Saying About the Chevron v. Donziger Appeal Decision*, THE AMAZON POST (Aug. 12, 2016), http://theamazonpost.com/what-others-are-saying-about-the-chevron-v-donziger-appeal-decision/ (describing the unethical and reprehensible actions of Steve Donziger).

[191] *Id.*

[192] *Chevron Corp*., 833 F.3d at 118.

[193] Fed. R. Civ. P. 1.

to illustrate the Seventh and Second Circuits' holdings, this form of equitable relief under RICO would have been useful if applied in *Caperton v. A.T. Massey Coal Co., Inc*.[194]

V. A CASE STUDY: *CAPERTON V. A.T. MASSEY COAL CO., INC.*

Caperton v. A.T. Massey Coal Co., Inc. ("*Caperton*") was not a RICO case, but it is a clear example of RICO's usefulness in rectifying a fraudulent judgment due to a compromised judge.[195] Where *Donziger* dealt with a direct bribe of $500,000, the judge in *Caperton* failed to recuse himself after receiving a $3 million campaign contribution from a party litigating before him.[196] In *Caperton,* respondent A.T. Massey Coal was found liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations, and petitioners were awarded $50 million in damages.[197] Don Blankenship, Massey's chairman and principal officer, decided to contribute $3 million to Brent Benjamin's judicial campaign for the State Supreme Court of Appeals, knowing that there would be an appeal and hoping that the incumbent would be ousted.[198] Of that $3 million, $1,000 (the statutory maximum) went towards Benjamin's campaign committee, $2.5 million went towards a political organization that supported Benjamin, and over $500,000 went towards mailings, letters soliciting donations, and television and newspaper advertisements in support of Benjamin.[199] To put this into perspective, his contributions exceeded the amount spent by Benjamin's campaign committee by 300 percent.[200]

Before Massey could appeal the $50 million judgment, Caperton moved to disqualify the new State Supreme Court Justice, Brent Benjamin.[201] Justice Benjamin denied that motion[202]

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194 *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).

195 *Id.* at 885–88.

196 *Id.* at 873, 875.

197 *Id.*

198 *Id.* at 873, 884.

199 *Id.* at 873.

200 *Id*. at 884.

201 *Id.* at 873–74.

202 *Id.* at 874.

and reversed the $50 million verdict against Massey Coal.[203] While no express deal was made between the defendant and the judge, of note is the fact that Blankenship had "a vested stake in the outcome" at the time the "extraordinary contributions" were made, leading to a serious risk of bias requiring the judge's recusal.[204] Caperton sought a rehearing and filed a motion to disqualify Justice Benjamin again, based on the campaign contributions.[205] Despite his fellow justices insisting he recuse himself, Justice Benjamin again denied Caperton's recusal motion.[206] Justice Benjamin presided as chief justice at the rehearing, and despite Caperton's third attempt at a recusal motion, he once again refused to withdraw.[207]

This case could be a candidate for a RICO violation: the repeated donations for coercive means could constitute racketeering activity,[208] a "pattern"[209] of that racketeering activity, and the connection of that pattern to the "enterprise" of Massey Coal.[210] Not every campaign contribution creates actual bias, but the court noted this was an exceptional case and that they "had a significant and disproportionate influence in placing Justice Benjamin on the case," by all but ensuring that he unseat the

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[203] *Id.*

[204] *Id.* at 886.

[205] *Id.* at 873–74.

[206] *Id.* at 874–75. The parties together also sought to disqualify two more of the five justices that had presided over the appeal that reversed the $50 million judgment against Massey. Though they arguably had fewer conflicts of interest than the massive campaign contributions that Justice Benjamin received from Blankenship, Justice Maynard (who was photographed vacationing with Blankenship in the French Riviera) granted Caperton's recusal motion and Justice Starcher (who had publicly criticized Blankenship's election donations) granted Massey's recusal motion. *Id.*

[207] *Id.* at 875.

[208] RICO Act, 18 U.S.C. § 1961 (1) (1995) (stating that "Racketeering activity" includes bribery).

[209] *Id.* at § 1961 (5) (defining a [p]attern of racketeering activity' [as] requir[ing] at least two acts of racketeering activity" within ten years of each other).

[210] *Id.* at § 1961 (4) (defining "'[e]nterprise' [as] includ[ing] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.").

former justice.[211] The Supreme Court identified that Benjamin's victory in the election was not the issue, but receiving such a large donation would create bias,[212] and reversed the judgment after finding that Benjamin should have recused himself.[213]

Although the Supreme Court reversed and remanded *Caperton*'s judgment because of Justice Benjamin's bias, the State Supreme Court of Appeals on remand still dismissed the case against Massey Coal.[214] Had Caperton brought a civil RICO case against Massey, in light of *Donziger* (and *NOW I*),[215] the court could have found that the judge was compromised due to bias from the campaign contributions and granted an injunction enforcing the State Supreme Court of Appeals' reversal of the $50 million judgment.[216] Regardless of whether the case would have been reversed below, by bringing a civil RICO suit against Massey, Caperton would have been able to have a fair day in court in equity (and in law, if treble damages were also awarded).[217] With this result, alone, Massey wins twice: first with the dismissal of the fraud case, and second, by never answering for their racketeering, bribery, and obstruction of justice.[218] When considering RICO's evolution, this case is a stark example of how useful equitable relief would be in hands of civil plaintiffs.

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[211] *Caperton*, 556 U.S. at 884.

[212] *Id.* at 885.

[213] *Id.* at 886, 890.

[214] Caperton v. A.T. Massey Coal Co., 690 S.E.2d 322, 332, 357 (2009).

[215] *See* Chevron Corp. v. Steven Donziger, 833 F.3d 74 (2d Cir. 2016) (citing the Nat'l Org. For Women, Inc. v. Scheidler, 267 F.3d 687, 698 (7th Cir. 2001)) (holding that found equitable relief is available to private RICO plaintiffs).

[216] *See id.* at 113 (finding that the defendants were able to obtain a verdict in their favor following a $500,000 donation to the campaign of the presiding judge of their case); *see* also *Caperton*, 556 U.S. at 873 (finding that Blankenship had given over $500,000 in mailings, donation solicitation letters, and advertisements in support of the presiding judge's judicial campaign).

[217] *See* FED. R. CIV. P. 1. (stating the process values of a speedy, just, and inexpensive trial).

[218] *See Caperton*, 690 S.E.2d at 358 (Workman, J. dissenting) ("the majority… leaves [plaintiffs] with no legal recourse by which to address Massey's extensive pattern of fraudulent conduct.").

VI. ARGUMENTS AGAINST EQUITABLE RELIEF FOR PRIVATE RICO PLAINTIFFS

A. Courts Are Hesitant to Expand RICO's Plain Meaning in General Due To Concerns About Over Broadening its Scope

While the judiciary has been mostly open to RICO's broad scope, general criticism with more expansive interpretation of RICO is that it is already overbroad[219] and that it was a reactionary statute to the nationwide fear of organized crime.[220] Judicial resistance to RICO's expansion is conveyed in courts' interpretations of what constitutes "racketeering" and "enterprise," for fear of "render[ing] the statute unconstitutionally vague"[221]—though "RICO can only be found to be unconstitutionally vague if a statute defining an underlying predicate offense is impermissibly vague."[222] Courts have also expressed concern that a broader interpretation of RICO could replace "whole bodies of state statutory and common law,"[223] including common law fraud, and, combined with the low threshold for a "pattern" only being two or

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[219] *See* Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1102–03 (1982) (discussing the changing use of RICO and its ability to displace "certain statutory and common law rights of action" and the potential for misuse by private plaintiffs).

[220] Curtis Roggow, Note, *Of Rum, Rights, And Rico: Are Plaintiffs Intoxicated With The Power Of Civil Rico? What Is Falling Victim To The Statute?*, 40 DRAKE L. REV. 577, 601 (1991).

[221] *See* Bradley, *supra* note 48 at 864–65, n. 150 (discussing United States v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973)).

[222] Palm, *supra* note 60, at 178–79.

[223] Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, *supra* note 219 at 1103. The Note goes into detail with an example wherein RICO "federalizes common law fraud" in regards to mail and wire fraud. *Id.* at 1104. Mail and wire fraud can be proven only with a "scheme to defraud" and "use of the mails or wires for the purpose of executing the scheme," and federal courts have refused to allow private cause of action arising under those statutes and the plaintiff would have to bring a common law case in state court. *Id.* However, the concern is that a private plaintiff would then use the multiple acts of fraud as a separate "predicate" offense so as to create a "pattern" under RICO, which would allow them to bring a suit. *Id.*

more acts of racketeering within ten years, could lead to misuse by private plaintiffs.[224] There have also been concerns among professionals that injunctive relief for private plaintiffs in protest cases has led to the chilling of free speech in the past.[225]

Those concerns have merit, and the proposal here does not seek to broaden the interpretation of what constitutes "racketeering," but rather proposes that a pattern of massive, well-timed campaign donations resulting in an unlawful judgment certainly falls within the plain meaning of "bribery"[226] within the statute.[227] Civil RICO was written to be broad because it is preventative and remedial, not punitive like criminal RICO.[228] Just short of exploring legislative intent, another way to interpret RICO's language is to consider, "did Congress clearly *provide* for equity relief?",[229] or, "did Congress clearly *exclude* it?"[230] The "long-standing and well-

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[224] *See id.* at 1102–03.

[225] *See* Roggow, *supra* note 220, at 594–602 (discussing Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342 (3rd Cir. 1989), *aff'd in part and remanded*, 665 F. Supp. 1147 (E.D.P.A. 1987), a case very similar to *NOW I* that dealt with a RICO claim against abortion clinic protesters, "When such [RICO] claims occur in the context of civil disobedience . . . they implicate the first amendment . . . . The central question presented in cases such as McMonagle is not whether one favors or opposes abortion. The central question is whether one favors free speech."); Carole Golinski, *Recent Decisions*, *In Protest of Now v. Scheidler*, 46 ALA. L. REV. 163, 164 (1994) (discussing Madsen v. Women's Health Ctr., 512 U.S. 753 (1994), a case involving a free speech challenge to a judicial injunction against abortion protesters).

[226] *See generally* Chevron Corp. v. Donziger, 833 F.3d 74 (2d Cir. 2016) (holding that donations to a judge constituted a bribery racket).

[227] RICO Act, 18 U.S.C. § 1961 (1) (2016) (defining "racketeering activity" as "(A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year.").

[228] Robert G. Blakey, *Foreword: Debunking RICO's Myriad Myths*, 64 ST. JOHN'S L. REV. 701, 704–05 (1990).

[229] Robert G. Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflection on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, 547 (1986-87) (emphasis in original).

[230] *Id.* (emphasis in original).

settled" rule is that federal courts always retain their equitable power and may issue injunctions unless there is an *express* instruction from the legislature in a certain statute.[231] RICO expressly preserves this power,[232] and this debate is merely on whether that relief is available to non-government parties. The *NOW I*[233] and *Donziger*[234] courts agree that RICO's language is clear. Congress clearly provided for equitable relief for private plaintiffs in the text of the statute, and courts should retain their power to grant injunctions in the cases that fall within RICO when legal remedies are simply insufficient, as with the judicial misconduct in *Donziger* and *Caperton*.[235]

B. Antitrust Interpretation

The *Wollersheim* court argued that since the "treble damages" clause was modeled after the Clayton Act and the Supreme Court had held that equitable relief was not available under antitrust

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[231] *Id.* at 547 (quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) ("Unless otherwise provided by statute, all the inherent equitable powers [of the court] are . . . available.").

[232] RICO Act, 18 U.S.C. § 1964 (a) ("The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: *ordering any person to divest himself of any interest . . . imposing reasonable restrictions on the future activities* or investments of any person, including, but not limited to, *prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in*, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.") (emphasis added).

[233] *See* Nat'l Org. For Women, Inc. v. Scheidler, 267 F.3d 687, 696–97 (7th Cir. 2001) ("As an initial matter, we note that the *Wollersheim* decision apparently misreads § 1964(b) when it states that § 1964(b) explicitly 'permits the government to bring actions for equitable relief.'").

[234] Chevron Corp. v. Donziger, 833 F.3d 74, 137 (2d Cir. 2016) ("We conclude that a federal court is authorized to grant equitable relief to a private plaintiff who has proven injury to its business or property by reason of a defendant's violation of § 1962.").

[235] *See id.*; *see generally* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (finding that due process requires recusal where a presiding justice received extraordinary campaign contributions from the defendant).

law,[236] Legislature did not intend for an equitable remedy in RICO.[237] The Second Circuit's holding in *Donziger* agreed with the Seventh Circuit's ultimate holding in *NOW I* that district courts were allowed to grant equitable relief, and it "largely" agreed with *NOW I*'s reasoning. [238] However, where *NOW I* loudly rejected the *Wollersheim* court's interpretation of RICO based on the Clayton Act,[239] the *Donziger* court did not expressly dismiss this interpretation.[240]

Drawing a comparison between the two statutes is a "lawyers' fallacy, which mistakenly believes that the same words have the same meaning without regard to context of time and place."[241] Further, antitrust statutes passed before law and equity merged in 1938, and RICO passed afterward, in 1970—the different legal climates of each statute's enactment would naturally lead to different language, intent, and interpretation, effectively invalidating this comparison.[242] Additionally, the Supreme Court has already found that private plaintiffs may receive injunctive relief under the Clayton Act.[243] The *Wollersheim* court's antitrust analysis simply does not hold water. Congress intended that the

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[236] In *Paine Lumber Co. v. Neal* and *Minnesota v. NorthernSec. Co*., the Supreme Court found that section 7 of the Sherman Act, which was also very similar to § 1964(c) of RICO, did not grant private litigants equitable relief. Lopez, *supra* note 5, at 405 (citing Paine Lumber Co. v. Neal, 244 U.S. 459 (1917); Minnesota v. NorthernSec. Co., 194 U.S. 48 (1904)).

[237] Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076,1086 (9th Cir. 1986); *see* Frederic W. Parnon, *RICO Damages: Look to the Clayton Act, Not the Predicate Act,* 21 CAL. W. L. REV. 348 (1984-1985) (arguing that a RICO plaintiff can receive treble damages but not disgorgement).

[238] *Chevron*, 833 F.3d at 137.

[239] *See* Nat'l Org. For Women, Inc., 267 F.3d 687, 700 (7th Cir. 2001) (describing defendants' attempt to make an argument comparing the Clayton Act and RICO's remedy interpretation). The court rejected the argument and took the time to also mention that *Wollersheim* used the same "methodology" that the *Scheidler* court had just rejected.

[240] *Chevron*, 833 F.3d 74 (making no mention of the Clayton Act in the opinion).

[241] Blakey & Cessar, *supra* note 229, at 555.

[242] *Id.*

[243] *See Nat'l Org. For Women, Inc.*, 267 F.3d at 700 (citing California v. American Stores Co., 495 U.S. 271 (1990)).

RICO Act eradicate organized crime,[244] and as long as a defendant's activity meets the statutory standards of a pattern of racketeering activity connected to an enterprise, courts should be able to grant equitable relief to private RICO plaintiffs who seek injunctions to protect themselves from further harm.

CONCLUSION

The injuries in *NOW I* and *Donziger* could not have been remedied by money alone. In both cases, injunctions were the only way to truly make the injured parties whole and, after the *Donziger* holding, indicate a gradual trend towards allowing equitable relief for private plaintiffs.[245] The concern of an overbroad statute is mitigated with *Donziger*'s narrow application of equitable relief, and although courts are split on how to interpret the language of RICO, its legislative intent is clear.[246] Allowing equitable relief for private RICO plaintiffs in the cases that require an injunction to remedy a corrupt judicial decision is well within Congress's intent to empower private plaintiffs to take action to eradicate organized crime.[247] As shown in the *Caperton* example, its new application may be used in ways to remedy injuries where damages would be insufficient.[248] In considering RICO's evolution, it is fitting to reflect on words from former Chief Justice of the Second Circuit—the *Donziger* court—Billings Learned Hand: "[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[249] RICO is no longer merely a tool to take down the mafia, but a tool for an injured plaintiff to finally have a fair day in court.

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[244] Snyder, *supra* note 19, at 1057 (citing the Organized Crime Control Act of 1970, Statement of Findings and Purpose, Pub. L. No 91-542, 84 Stat at 923).

[245] *See supra* Parts III and IV.

[246] Herbst, *supra* note 45, at 1133 (hoping to encourage plaintiff to bring cases with the draw of treble damages in the fight against organized crime).

[247] *Id.* at 1332.

[248] *See supra* Part V.

[249] Cabell v. Markham, 148 F.2d 737, 739 (1945).