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Civil RICO, Protesters, and the First Amendment: A Constitutional Combination

*National Organization for Women v. Scheidler*¹

I. INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act ("RICO") provides for both government causes of action and a private cause of action.² The private cause of action is usually referred to as civil RICO.³ In recent years, abortion clinics and other groups have used civil RICO in suits against violent protesters.⁴ The circuits had disagreed, however, on whether RICO requires the defendant to be economically motivated.⁵ Therefore, abortion clinics and other potential plaintiffs were uncertain whether civil RICO was a viable option in suits against politically or religiously motivated protesters. In addition, many protest organizations have asserted that civil RICO interferes with the First Amendment right to free expression.

In *National Organization for Women v. Scheidler*, the United States Supreme Court held that RICO does not require a defendant to be economically motivated.⁶ Although the Court did not address the potential First Amendment issues facing civil RICO,⁷ this Note suggests that civil RICO does not interfere with First Amendment protected expression.

II. FACTS AND HOLDING

On May 28, 1991, the National Organization for Women, Inc. ("NOW"),⁸ the Delaware Women's Health Organization, Inc. ("DWHO"), and the Summit Women's Health Organization, Inc. ("SWHO")⁹ brought suit in the United States District Court for the Northern District of Illinois against a

1. *National Org. for Women v. Scheidler*, 114 S. Ct. 798 (1994).

2. 18 U.S.C. §§ 1963-1964 (1988).

3. DOUGLAS E. ABRAMS, *THE LAW OF CIVIL RICO* § 1.1 (1991).

4. *See, e.g., Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989).

5. *See infra* notes 56-94 and accompanying text.

6. *National Org. for Women*, 114 S. Ct. at 806.

7. *Id.* at 806 n.6.

8. NOW is a national nonprofit organization that supports women's rights, including the legal availability of abortion. *Id.* at 801.

9. DWHO and SWHO "are health care centers that perform abortions and other medical procedures." *Id.*

coalition of antiabortion groups, including the Pro-Life Action Network ("PLAN"), Joseph Scheidler and other individuals and organizations that oppose legal abortion, and a medical laboratory that formerly provided services to DWHO and SWHO.¹⁰ The plaintiffs alleged violations of the Sherman Act,¹¹ the RICO Title of the Organized Crime Control Act of 1970,¹² and several state laws arising from the conduct of antiabortion

10. *Id.* The other respondents named in the complaint include: John Patrick Ryan, Randall A. Terry, Andrew Scholberg, Conrad Wojnar, Timothy Murphy, Monica Migliorino, Vital-Med Laboratories, Inc., Pro-Life Action League, Inc., Pro-Life Direct Action League, Inc., Operation Rescue, and Project Life. *Id.* at 800 n.1.

11. *Id.*; 15 U.S.C. §§ 1-7. (1988).

12. *National Org. for Women*, 114 S. Ct. at 801; 18 U.S.C. §§ 1961-1968 (1988 and Supp. V 1993). The plaintiffs specifically alleged violations of §§ 1962(a), (c) and (d). *National Org. for Women*, 114 S. Ct. at 801. Section 1962(a) provides in part:

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.

18 U.S.C. § 1962(a) (1988). Section 1962(c) provides:

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.

18 U.S.C. § 1962(c) (1988). Section 1962(d) provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." 18 U.S.C. § 1962(d) (1988).

protesters at the health care centers.¹³ The plaintiffs' civil RICO claims sought injunctive relief, treble damages, costs, and attorneys' fees.¹⁴

The plaintiffs alleged the defendants "were members of a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity¹⁵ including extortion in violation of the Hobbs Act."¹⁶ The plaintiffs claimed the defendants "conspired to use threatened or actual force, violence, or fear to induce clinic employees, doctors, and patients to give up their jobs, their economic right to practice medicine, and . . . their right to obtain medical services at the clinics."¹⁷ The plaintiffs claimed that this conspiracy injured their business and property interests in violation of RICO.¹⁸

13. *National Org. for Women*, 114 S. Ct. at 801. The plaintiffs alleged the defendants

threatened and intimidated clinic personnel and patients, trespassed on clinic property, invaded clinics and damaged clinic equipment, blocked ingress and egress to clinics, destroyed clinic advertising, coordinated telephone campaigns to tie up clinic lines, set up appointments under false pretenses to keep legitimate patients from making appointments, and established competing pregnancy testing and counseling facilities in the vicinities of the clinics.

National Org. for Women v. Scheidler, 765 F. Supp. 937, 938-39 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994).

14. *National Org. for Women*, 114 S. Ct. at 801.

15. *Id.*

16. *Id.* The Hobbs Act imposes fines and imprisonment on anybody who interferes with commerce via threats or acts of violence. 18 U.S.C. § 1951(a) (1988). Violation of the Hobbs Act requires proof "(1) that the defendant took or obtained tangible or intangible property by wrongful use of actual or threatened force, violence, or fear, and (2) that the defendant's conduct obstructed, delayed, or affected commerce." *ABRAMS*, *supra* note 3, § 5.3.5. Violations of the Hobbs Act are predicate acts under RICO. *Id.*

17. *National Org. for Women*, 114 S. Ct. at 801-02. The plaintiffs alleged that the defendants engaged in the following activities in an attempt to shut down abortion clinics:

extortion; physical and verbal intimidation and threats directed at health center personnel and patients; trespass upon and damage to center property; blockades of centers; destruction of center advertising; telephone campaigns designed to tie up center phone lines; false appointments to prevent legitimate patients from making them; and direct interference with centers' business relationships with landlords, patients, personnel, and medical laboratories.

National Org. for Women v. Scheidler, 968 F.2d 612, 615 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994).

18. *National Org. for Women*, 114 S. Ct. at 802. RICO requires that the plaintiff show injury to its business or property. 18 U.S.C. § 1964(c) (1988); *Sedima, S.P.R.L.*

The district court dismissed the RICO claim brought under section 1962(a),¹⁹ holding that voluntary donations received by the defendants did not constitute income derived from racketeering activities for purposes of section 1962(a).²⁰ The court also dismissed the RICO claim brought under section 1962(c), holding that RICO requires an economic motive "to the extent that some profit-generating purpose must be alleged in order to state a RICO claim."²¹ The court held that the plaintiffs failed to allege such a profit-generating purpose.²² In addition, since the court dismissed the other RICO claims, the court dismissed the RICO conspiracy claim brought under section 1962(d).²³

The plaintiffs appealed to the United States Court of Appeals for the Seventh Circuit.²⁴ The Seventh Circuit affirmed dismissal of the plaintiffs' claims.²⁵ The court held that RICO requires allegation and proof of either an economically motivated enterprise or economically motivated predicate acts.²⁶

The United States Supreme Court granted certiorari "to resolve a conflict among the courts of appeals on the putative economic motive requirement of [RICO] § 1962(c) and (d)."²⁷ The Supreme Court held that RICO does not contain an economic motive requirement.²⁸ Therefore, the plaintiffs could

v. Imrex Co., 473 U.S. 479, 496 (1985).

19. *National Org. for Women*, 765 F. Supp. at 945. The district court also dismissed the claim brought under the Sherman Act, holding that the Sherman Act did not apply to the defendants' alleged activities. *Id.* at 914. The court held that since the activities alleged "involve[d] political opponents, not commercial competitors, and political objectives, not marketplace goals" the Sherman Act did not apply. *Id.*

20. *Id.* RICO § 1962(a) requires that the defendant acquire assets (income) from specified unlawful activities and then use or invest such assets in an otherwise legitimate enterprise. *ABRAMS, supra* note 3, §§ 4.5.2-.3.

21. *National Org. for Women*, 765 F. Supp. at 943.

22. *Id.* at 944.

23. *Id.*

24. *National Org. for Women*, 968 F.2d at 612.

25. *Id.* at 614.

26. *Id.* The court also held that the Sherman Act did not apply to the defendants' activities. *Id.*

27. *National Org. for Women*, 114 S. Ct. at 802 (comparing *United States v. Ivio*, 700 F.2d 51 (2d Cir. 1983), and *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir.) ("For purposes of RICO, an enterprise must be directed toward an economic goal"), *cert. denied*, 488 U.S. 974 (1988), with *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.) (because the predicate offense does not require economic motive, RICO requires no additional economic motive), *cert. denied*, 493 U.S. 901 (1989)).

28. *National Org. for Women*, 114 S. Ct. at 806. Neither the enterprise nor the

maintain the action if the defendants "conducted the enterprise through a pattern of racketeering activity."²⁹

In a concurring opinion, Justice Souter explained that the First Amendment does not require that RICO contain an economic motive element.³⁰ In addition, Justice Souter stressed that "the Court's opinion does not bar First Amendment challenges to RICO's application in particular cases."³¹

III. LEGAL BACKGROUND

A. *Civil RICO*

Congress enacted RICO as Title IX of the Organized Crime Control Act of 1970.³² The purpose of RICO was to "seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."³³ Instead of defining the term "organized crime," Congress focused on the type of activities engaged in by organized crime³⁴—particularly mail fraud, wire fraud, and securities fraud.³⁵ Therefore, RICO is not limited to the stereotypical mobster or organized crime figure.³⁶ In fact, as the United States Supreme Court held in *Sedima S.P.R.L. v. Imrex Co.*, RICO potentially applies to "any person."³⁷

predicate acts need be economically motivated. *Id.*

29. *Id.* The Court did not decide whether the defendants' alleged activities amounted to a RICO violation. *Id.* The Court held only that the plaintiffs could maintain the action since RICO does not require an economic motive. *Id.*

30. *Id.* (Souter, J., concurring). Justice Kennedy joined in the concurrence. *Id.*

31. *Id.*

32. Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified in scattered sections of 18 U.S.C.).

33. *Id.*

34. John L. Koenig, Comment, *What Have They Done to Civil RICO: The Supreme Court Takes the Racketeering Requirement Out of Racketeering*, 35 AM. U. L. REV. 821, 830-31 (1986).

35. ABRAMS, *supra* note 3, § 1.1.

36. Koenig, *supra* note 34, at 831.

37. *Sedima, S.P.R.L.*, 473 U.S. at 495. The majority of civil RICO claims are against businesses with no ties to organized crime. *Id.* at 526 (Powell, J., dissenting).

RICO provides both criminal penalties³⁸ and civil remedies³⁹ for the commission of four types of prohibited activities.⁴⁰ The prohibited activities are: (1) investing income derived from a pattern of racketeering activity in the acquisition, establishment or operation of any enterprise engaged in interstate commerce;⁴¹ (2) acquiring or maintaining any interest in an interstate enterprise through a pattern of racketeering activity;⁴² (3) participating in the conduct of an interstate enterprise through a pattern of racketeering activity;⁴³ and (4) conspiring to violate any of the above provisions.⁴⁴

The term "enterprise" is defined by RICO as a "legal entity" or an "associat[ion] in fact."⁴⁵ A legal entity may be a private entity or a public entity.⁴⁶ An association in fact may be any combination of individuals or entities.⁴⁷ As the Supreme Court held in *United States v. Turkette*,⁴⁸ the term "enterprise" encompasses both legitimate and illegitimate enterprises.⁴⁹

The definition of "racketeering activity" includes numerous state and federal crimes,⁵⁰ commonly referred to as 'predicate acts' or 'predicate offenses.'⁵¹ A "pattern of racketeering activity" is defined as at least two predicate acts of racketeering activity within a ten year period.⁵² The predicate acts most frequently used to establish a pattern of racketeering activity in civil RICO actions are: "[1] acts or threats chargeable under generically described state criminal laws; [2] acts indictable under the mail

38. 18 U.S.C. § 1963 (1988).

39. *Id.* § 1964.

40. *Id.* § 1962.

41. *Id.* § 1962(a).

42. *Id.* § 1962(b).

43. *Id.* § 1962(c).

44. *Id.* § 1962(d).

45. *Id.* § 1961(4).

46. ABRAMS, *supra* note 3, § 1.3.2.

47. ABRAMS, *supra* note 3, § 1.3.2. An enterprise and a defendant can be the same person, except under § 1962(c). *Id.*

48. 452 U.S. 576 (1981).

49. *Id.* at 580-81. The Court based its decision on the absence of statutory language limiting the term to legitimate enterprises. *Id.* at 580.

50. 18 U.S.C. § 1961(1) (Supp. V 1993). "Racketeering activity" includes such crimes as murder, kidnapping, robbery, extortion, dealing in obscene matter, wire fraud, mail fraud, securities fraud, embezzlement, bribery, obstruction of justice and numerous other state and federal crimes. *Id.*

51. Anne Melley, *The Stretching of Civil RICO: Pro-Life Demonstrators Are Racketeers?*, 56 UMKC L. REV. 287, 289 (1988).

52. 18 U.S.C. § 1961(5) (1988).

fraud or wire fraud statutes; [3] offenses involving fraud in the sale of securities; [4] and acts indictable under the Hobbs Act.⁵³

RICO provides that "[a]ny person injured in his business or property by reason of a violation of [RICO] may sue" under the civil remedies section of the statute.⁵⁴ The most widely invoked civil remedy is in section 1962(c), which provides for the recovery of treble damages, costs, and reasonable attorney's fees.⁵⁵

B. *Economic Motive Requirement*

In recent years, abortion clinics and other groups have begun to use civil RICO as a new line of defense against violent protesters.⁵⁶ The circuits had disagreed, however, on whether RICO requires that either the racketeering enterprise or the predicate acts of racketeering be economically motivated.⁵⁷ Since protesters are usually motivated by religious or political beliefs instead of economic goals, courts finding an economic motive requirement in RICO have not allowed RICO actions against such protesters.

In *United States v. Ivic*,⁵⁸ the Court of Appeals for the Second Circuit held that RICO section 1962(c) requires either the enterprise or the predicate acts to be economically motivated.⁵⁹ In *Ivic*, the defendants were Croatian Nationalists dedicated to liberating Croatia from Yugoslavia.⁶⁰ The defendants had committed several unlawful acts in order to further their political cause, including the predicate acts of arson and attempted murder.⁶¹ In addition to other counts, the district court convicted the Croatians under

53. See ABRAMS, *supra* note 3, § 5.3.

54. 18 U.S.C. § 1964(c) (1988). Injury can be based on intangible property rights as well as tangible property rights. *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989). For example, the right to continue to operate a business is an intangible property right. *Id.*

55. 18 U.S.C. § 1964(c) (1988). Other civil remedies include possible injunctive relief under § 1962(b). 18 U.S.C. §§ 1964(a), (b) (1988). Although a small number of courts have held that injunctive relief is available under civil RICO, the majority of courts that have addressed the issue of injunctive relief have concluded that injunctive relief is not available under civil RICO. See ABRAMS, *supra* note 3, § 3.4.3.

56. Adam D. Gale, Note, *The Use of Civil RICO Against Antiabortion Protesters and the Economic Motive Requirement*, 90 COLUM. L. REV. 1341, 1341 (1990).

57. *National Organization for Women*, 114 S. Ct. at 802.

58. 700 F.2d 51 (2d Cir. 1983).

59. *Id.* at 65.

60. *Id.* at 53.

61. *Id.* at 59.

criminal RICO section 1962(d) for conspiring to violate section 1962(c).⁶² However, the Second Circuit dismissed the RICO count on appeal since the defendants' political motives were not accompanied by a financial motive.⁶³

The Second Circuit based its finding of an economic motive requirement in RICO on the statutory maxim that "[w]hen the same word is used in the same section of an act more than once, and the meaning is clear in one place, it will be assumed to have the same meaning in other places."⁶⁴ The court explained the term enterprise in sections 1962(a) and (b) refers to an entity in which funds can be invested and a property interest acquired.⁶⁵ In other words, an entity that is economically motivated.⁶⁶ Therefore, the court reasoned the term enterprise must have the same meaning in section 1962(c).⁶⁷

The Second Circuit supported its conclusion by citing statements made by Senator McClellan, the principal sponsor of the Organized Crime Control Act of 1970.⁶⁸ The court explained Senator McClellan had clearly stated the Act was to apply only to crimes which are adapted to commercial exploitation.⁶⁹ In addition, the court examined the RICO Guidelines issued by the Justice Department.⁷⁰ The court observed that these guidelines expressly state that the enterprise must be directed "toward an economic goal."⁷¹ Thus, the Second Circuit held that RICO has an economic motive requirement.⁷²

A few months later in *United States v. Bagaric*,⁷³ the Second Circuit once again addressed the issue of RICO and the economic motive requirement.⁷⁴ While upholding its decision in *Ivic*, the court emphasized the economic motive could be part of either the enterprise itself or the predicate acts.⁷⁵ In *Bagaric*, the defendants were Croatian terrorists who had committed predicate acts of extortion to obtain money to further their terrorist

62. *United States v. Cale*, 508 F. Supp. 1038, 1043 (S.D.N.Y. 1981), *rev'd sub nom.* *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983).

63. *Ivic*, 700 F.2d at 63.

64. *Id.*; Gale, *supra* note 56, at 1348.

65. *Ivic*, 700 F.2d at 60.

66. *Id.*

67. *Id.*

68. *Id.* at 63.

69. *Id.*

70. *Id.* at 64.

71. *Id.*

72. *Id.* at 65.

73. 706 F.2d 42 (2d Cir. 1983).

74. *Id.* at 53.

75. *Id.* at 56.

activities.⁷⁶ Since the defendants' predicate acts were economically motivated, the Second Circuit affirmed their RICO convictions.⁷⁷

In an earlier case, *United States v. Anderson*,⁷⁸ the Eighth Circuit also held the enterprise must be economically motivated.⁷⁹ The court stated the term enterprise encompasses only an association "which exists for the purpose of maintaining operations directed toward an economic goal."⁸⁰ Eight years later in *United States v. Flynn*,⁸¹ the Eighth Circuit reaffirmed *Anderson*, holding that "[f]or purposes of RICO, an enterprise must be directed toward an economic goal."⁸² In both decisions, however, the Eighth Circuit failed to give an explanation for its holding.⁸³

In contrast to the Second and Eighth Circuits, the Third Circuit upheld a civil RICO verdict even though the defendants lacked an economic motive.⁸⁴ In *Northeast Women's Center, Inc. v. McMonagle*,⁸⁵ an abortion clinic won a civil RICO suit against a group of antiabortion protesters.⁸⁶ The protesters had committed acts of extortion in an attempt to force the clinic out of business.⁸⁷ Extortion is a crime under the Hobbs Act,⁸⁸ and any violation of the Hobbs Act is a predicate offense under RICO.⁸⁹ On appeal, the protesters argued that extortion must be accompanied by an economic motive, and that their motive was purely political.⁹⁰ In rejecting the argument, the Third Circuit stated "that lack of economic motive does not constitute a defense to Hobbs Act crimes."⁹¹ The court reasoned that since

76. *Id.* at 58.

77. *Id.* at 46.

78. 626 F.2d 1358 (8th Cir. 1980).

79. *Id.* at 1372.

80. *Id.*

81. 852 F.2d 1045 (8th Cir. 1988).

82. *Id.* at 1052.

83. Gale, *supra* note 56, at 1353.

84. *Northeast Women's Ctr., Inc., v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989).

85. *Id.* See generally Jo Anne Pool, *Northeast Women's Center, Inc. v. McMonagle: A Message to Political Activists*, 23 AKRON L. REV. 251 (1989).

86. *Northeast Women's Ctr., Inc.*, 868 F.2d at 1342.

87. *Id.* at 1350.

88. 18 U.S.C. § 1951 (1988).

89. *Id.* § 1961(1)(B); ABRAMS, *supra* note 3, § 5.3.5. See discussion at text accompanying *supra* note 53.

90. *Northeast Women's Ctr., Inc.*, 868 F.2d at 1349.

91. *Id.* at 1350.

the predicate acts of extortion did not require an economic motive, the RICO claim did not require an economic motive.⁹²

With the conflict among the circuits concerning RICO and the economic motive requirement,⁹³ abortion clinics and other potential plaintiffs were uncertain whether civil RICO was a viable claim in lawsuits against politically or religiously motivated protesters who were otherwise lacking an economic motive. In *National Organization for Women v. Scheidler*,⁹⁴ the United States Supreme Court resolved both the conflict and the uncertainty.

C. RICO and the First Amendment

As the frequency of civil RICO suits and criminal prosecutions increased, some defendants began to challenge the RICO statute on First Amendment grounds.⁹⁵ Protest organizations and other defendants involved in RICO actions have asserted that RICO is unconstitutional both on its face and in its application.⁹⁶ However, the few courts addressing the issue have not agreed.⁹⁷

92. *Id.*

93. Other circuits had commented on the economic motive requirement without expressly deciding on it. See *Gale*, *supra* note 56, at 1356-57 (citing *e.g.*, *United States v. Thordarson*, 646 F.2d 1323 (9th Cir.), *cert. denied*, 454 U.S. 1055 (1981); *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *United States v. Webster*, 669 F.2d 185 (4th Cir.), *cert. denied*, 456 U.S. 935 (1982)).

94. 114 S. Ct. 798 (1994).

95. See, *e.g.*, *Alexander v. United States*, 113 S. Ct. 2766 (1993); *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989); *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371 (D. Conn. 1989), *vacated*, 915 F.2d 92 (2d Cir. 1990).

96. See *infra* text accompanying notes 98-127. In the context of the First Amendment, a litigant may challenge a statute on grounds that it is unconstitutional as applied, or unconstitutional on its face. *Gooding v. Wilson*, 405 U.S. 518, 521 (1972). A statute is unconstitutional as applied if it impermissibly punishes the defendant's freedom of expression. A statute is unconstitutional on its face if it is overbroad or vague. *Id.*; *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). A statute is overbroad if, in addition to punishing unprotected expression, it has potential to punish protected expression. *Gooding*, 405 U.S. at 522. A statute is vague if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally*, 269 U.S. at 391. The reason for striking down a statute for being overbroad or vague is that such a statute may chill the free expression of third parties who are not willing to risk punishment. Russell W. Galloway, *Basic Free Speech Analysis*, 31 SANTA CLARA L. REV. 883, 899 (1991).

97. Galloway, *supra* note 96, at 899.

In *McMonagle*, the Third Circuit rejected a First Amendment challenge to a civil RICO verdict.⁹⁸ The defendants were antiabortion protesters who used force and violence in an effort to force an abortion clinic out of business.⁹⁹ They argued that because they were exercising political expression protected by the First Amendment, it was unconstitutional to apply civil RICO to their activities.¹⁰⁰ The Third Circuit rejected the argument and affirmed the RICO verdict against the defendants.¹⁰¹ The court explained that the defendants had not expressed their political opinion in a "manner protected under the First Amendment."¹⁰² The Third Circuit noted that, while the First Amendment protects the defendants' right to attempt to persuade the clinic to stop performing abortions, the First Amendment does not offer a sanctuary for defendants who violate the law.¹⁰³ The defendants in this case crossed a line separating acts of protected expression from acts of unprotected unlawful conduct.¹⁰⁴

The United States District Court for the District of Connecticut in *Town of West Hartford v. Operation Rescue*¹⁰⁵ also rejected a First Amendment argument in a civil RICO action.¹⁰⁶ The defendants trespassed on the land of the Summit Women's Center while engaging in an antiabortion protest.¹⁰⁷ The defendants also blocked access to exits and entrances, and remained on the premises after being instructed to leave.¹⁰⁸ The plaintiffs requested damages, declaratory relief, and injunctive relief pursuant to RICO.¹⁰⁹ In

98. *Northeast Women's Ctr., Inc.*, 868 F.2d at 1349.

99. *Id.* at 1350. The defendants trespassed on and destroyed the clinic's property, harassed clients and employees, and engaged in blockades. *Id.* at 1347. The defendants were found to have violated the Hobbs Act, a predicate offense under RICO. *Id.* at 1348.

100. *Id.*

101. *Id.* at 1357.

102. *Id.* at 1348.

103. *Id.* at 1349.

104. *Id.*

105. 726 F. Supp. 371 (D. Conn. 1989), *vacated*, 915 F.2d 92 (2d Cir. 1990). The Town of West Hartford filed RICO claims against Operation Rescue, and the Summit Women's Center subsequently intervened, asserting its own RICO claims against Operation Rescue. *Id.* at 105. On review, the appellate court dismissed the town's claims for lack of subject matter jurisdiction, and did not consider the sufficiency of the center's claims. *Id.*

106. *Town of West Hartford*, 726 F. Supp. at 371.

107. *Id.* at 373.

108. *Id.*

109. *Id.* The plaintiffs also filed several pendent state law claims. *Id.* The court concluded that injunctive relief was not available under civil RICO § 1964(c). *Id.* at 378. However, the court issued an injunction pursuant to state law. *Id.* at 383.

response, the defendants argued an injunction would have a chilling effect on First Amendment expression.¹¹⁰

The court ruled that the "defendants have no [F]irst [A]mendment right to carry on even pure speech activities on private property and against the wishes of the Center and its landlord."¹¹¹ The court noted that coercive or offensive expression is protected as long as the speaker refrains from violence and the threat of violence.¹¹² The court emphasized, however, that a "bright line is crossed at the threshold of private property. [W]illful trespass [] is not protected conduct no matter what its purpose."¹¹³

The United States Supreme Court addressed similar constitutional arguments in *Alexander v. United States*.¹¹⁴ In *Alexander*, prosecutors used predicate acts of obscenity¹¹⁵ as a basis for charging the defendant with criminal RICO violations.¹¹⁶ Pursuant to RICO, the defendant was ordered to forfeit his obscene materials.¹¹⁷ The defendant contended that the RICO forfeiture order amounted to an unconstitutional prior restraint on speech because it prohibits future protected expression in retaliation for previous obscenity violations.¹¹⁸

The Court explained, however, that a prior restraint is an order that forbids a person from engaging in expressive activity in the future.¹¹⁹ The Court stated there is a "time-honored distinction between barring speech in the future and penalizing past speech."¹²⁰ In this case, the RICO forfeiture order

110. *Id.* at 382.

111. *Id.* at 383 (citing *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Cologne v. Westfarms Assoc.*, 469 A.2d 1201 (Conn. 1984); *cf. Frisby v. Schultz*, 487 U.S. 474 (1988)).

112. *Id.* (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911, 916 (1982); *Texas v. Johnson*, 491 U.S. 397, 407-08 (1989)).

113. *Id.* (citing *Northeast Women's Ctr., Inc. v. McMonagle*, 670 F. Supp. 1300, 1308 (E.D. Pa. 1987); *Portland Feminist Women's Health Ctr. v. Advocates for Life*, 859 F.2d 681, 686 (9th Cir. 1988); *Claiborne*, 458 U.S. at 920)).

114. 113 S. Ct. 2766 (1993).

115. The defendant was in the "adult entertainment" business in which he sold pornographic magazines, videotapes, and sexual paraphernalia. *Id.* at 2769. At trial, the jury found that four magazines and three videotapes distributed by the defendant were obscene. *Id.* He was subsequently convicted of seventeen obscenity offenses and three RICO offenses. *Id.* The RICO offenses were predicated on the obscenity convictions. *Id.* at 2769-70.

116. *Id.* at 2769. Although this Note is limited to the discussion of civil RICO, the First Amendment arguments in *Alexander* are analogous.

117. *Id.* at 2770.

118. *Id.* at 2770-71.

119. *Id.* at 2771.

120. *Id.*

served as a penalty for past criminal conduct,¹²¹ and did not bar the defendant from engaging in future protected speech.¹²²

The defendant in *Alexander* also argued that the forfeiture penalties imposed under RICO "have an improper 'chilling' effect on free expression by deterring others from engaging in protected speech. . . ." ¹²³ The Court acknowledged that some self-censorship might occur.¹²⁴ Even so, the Court explained that deterrence of the predicate act of obscenity is a legitimate end,¹²⁵ and that the imposed penalty is clearly constitutional.¹²⁶

In *National Organization for Women*, the United States Supreme Court did not address the potential First Amendment issues facing civil RICO.¹²⁷ Justice Souter suggested, however, that First Amendment issues will undoubtedly arise in future civil RICO actions.¹²⁸

IV. INSTANT DECISION

A. *Majority Opinion*

Chief Justice Rehnquist, writing for the majority, began by considering the issue of RICO section 1962(c) and the economic motive requirement.¹²⁹ After examining the RICO statute, the majority explained that neither section 1962(c) nor the definitions in section 1961 refer to an economic motive.¹³⁰ In addition, the majority rejected the Seventh Circuit's reasoning that the term enterprise, as used in sections 1962(a) and (b), restricts the scope of the term enterprise in section 1962(c).¹³¹ The majority explained that an enterprise

121. *Id.*

122. *Id.* In addition, the defendant asserted that the RICO statute is overbroad. *Id.* at 2774. The Court dismissed the argument explaining that the "RICO statute does not criminalize constitutionally protected speech . . ." *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* See also *Fort Wayne Books v. Indiana*, 489 U.S. 46 (1989).

127. *National Org. for Women*, 114 S. Ct. at 798.

128. *Id.* at 807.

129. *Id.* at 802. The majority first considered the issue of standing, explaining that, in order to have standing, the plaintiff must allege injury resulting from the defendant's conduct. *Id.* at 803. In the instant case, DWHO and SWHO alleged the defendants' activities injured their business and property interests. *Id.* Therefore, the majority held that DWHO and SWHO had standing to bring the RICO claim. *Id.*

130. *Id.* at 804.

131. *Id.*

in subsections (a) and (b) is not required to be a profit-seeking entity.¹³² The subsections merely require that the enterprise be an entity acquired either through illegal activity or through money obtained from illegal activity.¹³³ Even so, the enterprise in subsection (c) is "the vehicle through which the unlawful pattern of racketeering activity is committed," rather than an entity that is being acquired.¹³⁴ Therefore, since an entity is not being acquired, the majority concluded that the enterprise in subsection (c) is not required to have an economic motive for engaging in illegal activity.¹³⁵

The majority next examined the reasoning of the Second Circuit in *United States v. Bagaric*.¹³⁶ In *Bagaric*, the Second Circuit based its analysis in part on a statement found in RICO's congressional findings.¹³⁷ The statement suggests that RICO was enacted to eradicate activities that "drain[] billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption."¹³⁸ The Second Circuit decided that, in order to "drain[] billions of dollars," such activities must be economically motivated.¹³⁹

Justice Rehnquist rejected the Second Circuit's reasoning.¹⁴⁰ He explained that some activities, such as extortion, may not be economically motivated, yet still may drain money from the economy.¹⁴¹ Extortion, for example, may force an otherwise successful business to close down. Justice Rehnquist explained that the congressional statement was a rather "thin reed" upon which to base an economic motive requirement, particularly because the statute does not expressly or impliedly require one.¹⁴²

Referring to the Court's decision in *United States v. Turkette*,¹⁴³ the majority next examined the definition of enterprise in RICO section 1961(4).¹⁴⁴ Noting the absence of statutory language limiting the term to

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* In addition, the enterprise in § 1962(c), does not need to have an acquirable property interest. *Id.*

136. *Id.* at 805. *See supra* notes 73-77.

137. *Id.*

138. *United States v. Bagaric*, 706 F.2d 42, 57 n.13 (2d Cir. 1983) (quoting Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 922 (1970)).

139. *National Org. for Women*, 114 S. Ct. at 805.

140. *Id.*

141. *Id.*

142. *Id.*

143. 452 U.S. 576 (1981).

144. *National Org. for Women*, 114 S. Ct. at 804.

legitimate enterprises,¹⁴⁵ *Turkette* concluded that the definition of enterprise in section 1961(4) encompasses both legitimate and illegitimate enterprises.¹⁴⁶ The Court explained that Congress could easily have limited the scope of the term, but chose not to.¹⁴⁷ Comparing *Turkette* with *National Organization for Women*, the majority noted that nothing in the statutory language requires an enterprise under section 1962(c) to have an economic motive.¹⁴⁸ As in section 1961(4), Congress could easily have limited the scope of the term enterprise, but choose not to.¹⁴⁹

Next the majority reviewed the 1981 RICO Guidelines issued by the Justice Department, which the Seventh Circuit found persuasive in reaching its holding.¹⁵⁰ The 1981 Guidelines provided that an association-in-fact enterprise must be "directed toward an economic goal."¹⁵¹ Justice Rehnquist noted, however, that the Justice Department amended the Guidelines in 1984.¹⁵² The new Guidelines provide that an association-in-fact enterprise may be directed toward "other identifiable goal[s]."¹⁵³

Finally, the majority disposed of the defendants' arguments concerning RICO's legislative history.¹⁵⁴ The majority explained that the statutory language is unambiguous,¹⁵⁵ and that nothing in the legislative history warrants a different construction.¹⁵⁶

Therefore, the majority held that RICO does not contain an economic motive requirement.¹⁵⁷ As a result, the plaintiffs could maintain the action by demonstrating that the defendants "conducted the enterprise through a pattern of racketeering activity."¹⁵⁸

145. *Id.* (citing *Turkette*, 452 U.S. at 580).

146. *National Org. for Women*, 114 S. Ct. at 805 (citing *Turkette*, 452 U.S. at 580-81).

147. *Id.* (citing *Turkette*, 452 U.S. at 581).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 806.

155. *Id.*

156. *Id.* The majority also rejected the defendants' argument that the rule of lenity should apply. *Id.* The rule of lenity is a maxim of statutory construction that construes an ambiguous criminal statute in favor of the accused. *Staples v. United States*, 114 S. Ct. 1793, 1804 n.17 (1994). The rule only applies if a statute contains an ambiguity. *National Org. for Women*, 114 S. Ct. at 806.

157. *National Org. for Women*, 114 S. Ct. at 806.

158. *Id.*

B. Concurring Opinion

Justice Souter, joined by Justice Kennedy, concurred with the majority's opinion, but wrote separately to "explain why the First Amendment does not require reading an economic-motive requirement into" RICO.¹⁵⁹ In addition, Justice Souter stressed that "the Court's opinion does not bar First Amendment challenges to RICO's application in particular cases."¹⁶⁰

Justice Souter directly addressed the defendants' argument that the First Amendment issues which could arise from applying RICO to protest organizations should be avoided by construing an economic motive requirement into the statute.¹⁶¹ On occasion, when a statute is ambiguous, the Court narrowly construes the statute to avoid constitutional problems.¹⁶² Justice Souter explained, however, that RICO is unambiguous, and therefore that this principle of statutory construction does not apply.¹⁶³

Even assuming the principle of construction does apply, Justice Souter noted that an economic motive requirement would correspond poorly to First Amendment concerns.¹⁶⁴ Such a requirement would be both overprotective and underprotective.¹⁶⁵ Ideological entities that engaged in acts of violence would escape the grasp of the RICO statute.¹⁶⁶ At the same time, economically motivated entities that engaged in acts of protected expression could be exposed to harassing RICO suits.¹⁶⁷

Finally, Justice Souter explained that an economic motive requirement is unnecessary because legitimate free speech claims may be raised by defendants in future RICO cases.¹⁶⁸ For example, conduct alleged to be a RICO predicate act may actually be activity protected by the First Amendment.¹⁶⁹ Furthermore, even if a RICO violation is established, "the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression."¹⁷⁰

159. *Id.* (Souter, J., concurring).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 806-07 (Souter, J., concurring).

164. *Id.* at 807 (Souter, J., concurring).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* Justice Souter noted the following cases where the First Amendment limited the available relief: *NAACP v. Claiborne Hardware, Co.*, 458 U.S. 886, 917 (1982); *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449 (1958); *Oregon Natural*

In conclusion, Justice Souter noted RICO's potential to deter free speech, and he cautioned courts to keep First Amendment interests in mind when applying RICO.¹⁷¹

V. COMMENT

In light of the Court's decision in *National Organization for Women*, antiabortion advocates and other protest organizations may no longer escape the net of civil RICO merely by claiming a non-economic agenda. Civil RICO now applies to groups that are politically or religiously motivated, as well as those that are economically motivated.¹⁷² For purposes of RICO, the question is whether the group violated the law, not whether they violated the law for financial reward.¹⁷³

Many protest organizations and commentators agree with Justice Souter that the use of RICO against protesters raises significant First Amendment issues.¹⁷⁴ Some have argued that civil RICO punishes acts of free expression protected by the Constitution.¹⁷⁵ However, this author believes that civil RICO does not punish acts of free expression and does not otherwise interfere with First Amendment rights.

Civil RICO is likely to be constitutional when applied to protest organizations because it does not punish protected acts of expression. Peaceful picketing, protesting, and other non-violent acts of expression protected under the First Amendment are not predicate acts under RICO, and will not subject individuals to RICO liability.¹⁷⁶ RICO punishes only unlawful conduct such as murder, arson, robbery, extortion, and fraud.¹⁷⁷ As the court in *Town of West Hartford* explained, such violent and unlawful conduct has never received First Amendment protection.¹⁷⁸

Furthermore, civil RICO imposes liability only on conduct already a crime under state or federal law.¹⁷⁹ Therefore, if the conduct is beyond First Amendment protection when charged as a crime under state or federal law, it is likewise beyond First Amendment protection when it is the subject of a

Resources Council v. Mohla, 944 F.2d 531 (9th Cir. 1991).

171. National Org. for Women, 114 S. Ct. at 807 (Souter, J., concurring).

172. Criminal RICO also applies, but is beyond the scope of this Note.

173. *National Org. for Women*, 114 S. Ct. at 806.

174. See *infra* notes 183-93 and accompanying text.

175. See *infra* notes 183-93 and accompanying text.

176. *National Org. for Women*, 968 F.2d at 616.

177. 18 U.S.C. § 1961(1) (Supp. V 1993).

178. *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371, 383 (D. Conn. 1989), *vacated*, 915 F.2d 92 (2d Cir. 1990).

179. Gale, *supra* note 56, at 1371-72.

civil RICO suit.¹⁸⁰ The unlawful conduct does not acquire First Amendment protection solely because the action is filed under RICO.¹⁸¹

One commentator has described civil RICO as an unreasonable limitation on protest activity.¹⁸² That description, however, is inaccurate. Civil RICO meets all the requirements of a reasonable time, place, and manner restriction.¹⁸³ Since RICO is directed at restricting the manner in which protest activities are conducted, rather than the communicative message of the activities, it is a content-neutral restriction.¹⁸⁴ In addition, civil RICO satisfies mid-level judicial review since it is narrowly tailored to "serve a significant government interest," and since it "leave[s] open ample alternative channels" for the communication of the protesters' message.¹⁸⁵ For example, the government has a significant interest in restricting unlawful conduct such as murder, robbery, extortion, and other RICO predicate acts.¹⁸⁶ Additionally, RICO is narrowly tailored to restrict unlawful conduct since, by its own terms, it is limited in application to specific crimes. Furthermore, peaceful demonstrating, picketing, leafletting, and other non-violent acts of expression provide "ample alternative channels" for the communication of the protesters' message.¹⁸⁷

The ACLU has expressed concern that civil RICO has enormous potential for chilling First Amendment rights of free expression.¹⁸⁸ For example, the threat of a civil RICO suit may deter peaceful protesters from engaging in acts of protected expression.¹⁸⁹ Although the ACLU's concern is legitimate, it exaggerates the threat of a civil RICO suit. Since civil RICO applies only when protesters commit specific unlawful acts, it is doubtful that protesters

180. See generally Gale, *supra* note 56, at 1371-72. The same would hold true for criminal RICO.

181. Gale, *supra* note 56, at 1371-72.

182. John P. Barry, *When Protesters Become "Racketeers," RICO Runs Afoul of the First Amendment*, 64 ST. JOHN'S L. REV. 899, 914 (1990).

183. Content-neutral time, place, and manner restrictions will satisfy mid-level judicial review if they are narrowly tailored to "serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976).

184. A restriction is content-neutral if it is "unrelated to the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

185. See generally *Virginia State Bd. of Pharmacy*, 425 U.S. at 771 (discussing mid-level judicial review).

186. 18 U.S.C. § 1961(1) (Supp. V 1993).

187. See generally *Northeast Women's Ctr., Inc.*, 868 F.2d at 1353 (discussing injunctive relief).

188. Rorie Sherman, *Courts Deal Blockaders Big Setbacks*, NAT'L L.J., Nov. 13, 1989, at 30. (quoting Antonio Califa, ACLU counsel).

189. *Alexander*, 113 S. Ct. at 2774.

will unknowingly or accidentally engage in a pattern of racketeering activity, particularly if they make an effort to learn RICO's predicate acts prior to engaging in expressive activity. Under these circumstances, protesters may engage in acts of protected expression with little threat of civil liability.

The ACLU's concern also exaggerates the scope of civil RICO. Civil RICO does not limit First Amendment expression. Protesters have the same constitutional rights under civil RICO as they would if RICO did not exist. Protesters may engage in peaceful protesting, picketing, leafletting, demonstrating, and other similar acts of expression.¹⁹⁰ Protesters may not, however, destroy property, murder, steal, extort property, kidnap individuals, or commit certain other unlawful acts. It is important to note that if civil RICO was repealed, all of the acts that represent RICO predicate acts would remain beyond First Amendment protection.¹⁹¹

In addition, one commentator has noted that, because of the threat of penalties, RICO represents a potential prior restraint on free expression.¹⁹² A prior restraint is something that forbids a person from engaging in expressive activity in the future.¹⁹³ There is a "time-honored distinction," however, between preventing future expression and penalizing past expression.¹⁹⁴ As the Court in *Alexander* explained, RICO penalizes past unlawful expression, but does not prevent protesters from engaging in future expressive activity.¹⁹⁵ The claim that penalties for past unlawful conduct act as a prior restraint on future lawful conduct erodes this "time-honored distinction," and results in a circular theory.

VI. CONCLUSION

By rejecting the economic motive requirement in *National Organization for Women*, the United States Supreme Court has approved the use of civil RICO against protesters and protest organizations. In light of the decision, many protesters argue that civil RICO interferes with their First Amendment

190. See generally *Northeast Women's Ctr., Inc.*, 868 F.2d at 1353 (discussing injunctive relief).

191. Future civil RICO defendants may attempt to convince the courts that RICO is overbroad and therefore unconstitutional on its face. However, as the Supreme Court explained in *Alexander*, RICO is not overbroad since it does not punish constitutionally protected speech. *Alexander*, 113 S. Ct. at 2774. Furthermore, even if RICO was found to be overbroad, it could not be struck down unless its overbreadth was substantial. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

192. Barry, *supra* note 182, at 915.

193. *Alexander*, 113 S. Ct. at 2771.

194. *Id.* at 2773.

195. *Id.* at 2772.

right to free expression. However, as this Note suggests, civil RICO imposes liability only on unprotected acts of unlawful conduct and does not interfere with, or limit, acts of protected expression.

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