

Equitable Remedies in Civil RICO Actions: In Support of Allowing District Courts to Order Disgorgement

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INTRODUCTION

In an effort to fight organized crime and other forms of enterprise criminality, Congress passed the Organized Crime Control Act of 1970¹ (OCCA), Title IX of which is known as the Racketeer Influenced and Corrupt Organizations Act² (RICO). Through RICO, Congress hoped to promote “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.”³

A circuit split exists regarding district courts’ power to order a defendant to disgorge⁴ his profits when the government brings a civil RICO action against him. In the wake of the recent corporate scandals, this issue has become more important because corporate criminals may face RICO charges.⁵ If the government cannot ask for disgorgement, it cannot impose an economic penalty on civil RICO violators that have left the RICO enterprise. This would reduce the government’s power to create disincentives for civil RICO violators. Only three circuits have directly considered this issue. The Second Circuit held that district courts can order disgorgement only where it serves to “prevent and restrain” future misconduct.⁶ Relying on the Second

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¹ Pub L No 91-452, 84 Stat 922 (1970).

² OCCA § 901, 84 Stat at 941, codified as amended at 18 USC §§ 1961–68 (2000).

³ OCCA, Statement of Findings and Purpose, 84 Stat at 923.

⁴ See *Black’s Law Dictionary* 501 (West 8th ed 2004) (defining disgorgement as “[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion”).

⁵ See, for example, DOJ Press Release, *Former Hollinger Chairman Conrad Black Indicted on New Charges, Including Racketeering and Obstruction of Justice* 4–5 (Dec 15, 2005), online at http://www.usdoj.gov/usao/iln/pr/chicago/2005/pr1215_01.pdf (visited June 27, 2007); Carrie Johnson, *Enron Case Shapes Up As Tough Legal Fight*, Wash Post A1 (Feb 18, 2002) (indicating that if prosecutors could prove that former Enron CFO Andrew Fastow and others engaged in mail or wire fraud then, according to American University law professor Ira Robbins, “it’s only a short step to a RICO violation”).

⁶ *United States v Carson*, 52 F3d 1173, 1182 (2d Cir 1995) (remanding for a determination of the extent to which the initial award was intended solely for these purposes).

Circuit's precedent, the Fifth Circuit ruled that the appellant's RICO claim was void because it asked for backward-looking disgorgement.⁷ The D.C. Circuit, on the other hand, found "no justification for considering any order of disgorgement to be forward-looking as required by [the statute]."⁸

This Comment attempts to resolve this circuit split in favor of allowing district courts to order disgorgement in limited circumstances. Part I briefly reviews the text, purpose, and history of RICO. Part II explores the circuit split and discusses the arguments on both sides. Part III describes a proposed resolution. First, it reconciles two Supreme Court cases⁹ that the D.C. Circuit characterized as conflicting, which motivated the D.C. Circuit holding that created the split. The Comment contends that the apparent conflict in the Court's decisions stems from the differing objectives of the statutes at issue in the two cases. Then, this Comment argues that to remain faithful to RICO's objectives, district courts should have the ability to order disgorgement in civil RICO actions brought by the government when the government can demonstrate that disgorgement will thwart the defendant from creating new enterprises. In these cases, disgorgement would serve to "prevent and restrain" future RICO violations. Because courts cannot order dissolution or divestiture before a new enterprise begins operating, disgorgement provides them with another weapon to combat enterprise criminality. Finally, this Comment argues that antitrust precedent supports this conclusion.

I. THE HISTORY, PURPOSE, AND LANGUAGE OF RICO

According to committee reports, Congress designed the RICO statute to eliminate "the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."¹⁰ In an uncodified portion of the act, Congress indicated that RICO

⁷ *Richard v Hoechst Celanese Chemical Group, Inc.*, 355 F3d 345, 355 (5th Cir 2003) ("[Richard] fails to argue that disgorgement would 'prevent and restrain' similar RICO violations in the future.").

⁸ *United States v Philip Morris USA, Inc.*, 396 F3d 1190, 1201 (DC Cir 2005) (rejecting the government's argument that disgorgement of tobacco companies' profits from illegal cigarette sales to youths was permissible under civil RICO).

⁹ *Meghrig v KFC Western, Inc.*, 516 US 479 (1996); *Porter v Warner Holding Co.*, 328 US 395 (1946).

¹⁰ Organized Crime Control Act of 1969, S Rep No 91-617, 91st Cong, 1st Sess 76 (1969) (noting that the RICO statute sought to combine both procedural and substantive reforms in achieving its goal of eliminating racketeering).

“shall be liberally construed to effectuate its remedial purposes.”¹¹ Congress modeled RICO on the Clayton Act,¹² which borrowed language from the Sherman Act.¹³ Both the Clayton Act and RICO grant district courts jurisdiction to “prevent and restrain violations” of the respective statutes.¹⁴ Although Congress designed the statute as part of a larger effort to fight organized crime, RICO is sufficiently broad as to encompass illegal activities relating to any enterprise affecting interstate or foreign commerce. In fact, “Congress consciously crafted the statute to encompass a broader range of ‘enterprise criminality.’”¹⁵ The Supreme Court has held that legitimate businesses¹⁶ and even enterprises operating without a profit motive¹⁷ can violate the provisions of RICO. RICO provides for both criminal penalties¹⁸ and civil reme-

¹¹ OCCA § 904, 84 Stat at 947.

¹² 38 Stat 730 (1914), codified as amended at 15 USC § 12 et seq (2000 & Supp 2004). See also *Holmes v Securities Investor Protection Corp*, 503 US 258, 268 (1992) (“We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act and later in the Clayton Act’s § 4.”); *Agency Holding Corp v Malley-Duff & Associates, Inc*, 483 US 143, 150 (1987) (adopting the Clayton Act’s statutory limitations period for RICO civil enforcement claims, on the reasoning that RICO’s civil action provision is analogous to the Clayton Act’s civil action provision). For a discussion of RICO’s legislative history, see *Sedima, SPRL v Imrex Co*, 741 F2d 482, 488–89 nn 18–20 (2d Cir 1984) (tracing the evolution of RICO’s civil enforcement provision, and noting that the provision was patterned on the Clayton Act), revd, *Sedima, SPRL v Imrex Co*, 473 US 479, 486 (1985).

¹³ 26 Stat 209 (1890), codified as amended at 15 USC §§ 1–7 (2000 & Supp 2004).

¹⁴ See 18 USC § 1964(a); 15 USC § 25 (2000).

¹⁵ Michael Goldsmith, *Resurrecting RICO: Removing Immunity for White-Collar Crime*, 41 Harv J on Legis 281, 284 (2004) (indicating that Congress recognized that corruption of business firms and other enterprises did not involve organized crime efforts alone). See 113 Cong Rec S 17,998 (June 29, 1967) (Sen Hruska) (mentioning the infiltration and corruption of brokerage houses and accounting firms); 113 Cong Rec HR 17,950 (June 29, 1967) (Rep McClory) (observing that “business racketeers” and “criminal cartels employ staffs of attorneys, accountants, and business consultants” to “protect themselves from suit and prosecution”); 116 Cong Rec S 592 (Jan 21, 1970) (Sen McClellan) (detailing corrupted industries including accounting, banking, insurance, and securities firms). See also *United States v Cauble*, 706 F2d 1322, 1330 (5th Cir 1983) (“RICO’s purpose is ‘the imposition of enhanced criminal penalties and new civil sanctions to provide new legal remedies for all types of organized criminal behavior, that is, enterprise criminality—from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors.’”), citing G. Robert Blakey and Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temple L Q 1009, 1013–14 (1980) (summarizing the new legal remedies made available under RICO).

¹⁶ See, for example, *Sedima*, 473 US at 499 (stating that legitimate businesses “enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences”).

¹⁷ See, for example, *National Organization for Women, Inc v Scheidler*, 510 US 249, 258 (1994) (holding that Congress’s use of the word “enterprise” does not lead to “the inference that an economic motive is required”).

¹⁸ See 18 USC § 1963.

dies.¹⁹ Both the government²⁰ and private parties²¹ can seek redress in a civil action for violations of the RICO offenses set forth in § 1962.

The civil portion of the RICO statute permits courts to use their equitable power to devise remedies other than imprisonment and forfeiture. District courts likely have this power only when the government initiates the suit.²² In particular, § 1964(a) provides that “[t]he district courts of the United States shall have jurisdiction *to prevent and restrain* violations . . . by issuing appropriate orders.”²³ The statute specifically enumerates three types of permissible remedies: divestiture, injunctions against a violator’s future involvement in the RICO enterprise, and dissolution of the offending enterprise.²⁴ Although this list is not exclusive,²⁵ the forward-looking nature of these examples has motivated courts deciding civil RICO cases to limit the equitable power available to the district courts to remedies aimed at preventing

¹⁹ See 18 USC § 1964.

²⁰ See 18 USC § 1964(b) (“The Attorney General may institute proceedings under this section.”).

²¹ See 18 USC § 1964(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.”).

²² The only circuit court to address this issue directly held that “injunctive relief is not available to a private party in a civil RICO action.” *Religious Technology Center v Wollersheim*, 796 F2d 1076, 1084 (9th Cir 1986). Other circuits have expressed doubt about whether RICO allows private parties to seek equitable relief. See *In re Fredeman Litigation*, 843 F2d 821, 830 (5th Cir 1988) (holding that the district court was not authorized, in a RICO action for treble damages, to issue a preliminary injunction restricting transfer of defendants’ assets, but not deciding “whether all forms of injunctive or other equitable relief are foreclosed to private plaintiffs under RICO”); *Trane Co v O’Connor Securities*, 718 F2d 26, 28 (2d Cir 1983) (expressing “serious doubt” as to the “propriety of private party injunctive relief” under RICO); *Dan River, Inc v Icahn*, 701 F2d 278, 290 (4th Cir 1983) (noting “substantial doubt whether RICO grants private parties . . . a cause of action for equitable relief”). But see *National Organization for Women v Scheidler*, 267 F3d 687, 698 (7th Cir 2001) (holding that “Congress intended the general remedies explicitly granted in § 1964(a) to be available to *all* plaintiffs”) (emphasis added), *revd on other grounds*, 537 US 393 (2003).

²³ 18 USC § 1964(a) (emphasis added).

²⁴ The statute permits district courts to issue orders requiring:

[A]ny 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.

Id.

²⁵ *Id.* (stating that the district court may order relief “including, but not limited to” divestiture, restrictions on involvement with the enterprise, or dissolution).

future violations.²⁶ Consequently, penalties aimed solely at punishing past conduct are not permitted.²⁷ This limitation has led to a circuit split over whether disgorgement could ever serve to “prevent and restrain” future misconduct rather than punish past conduct.

II. THE CIRCUIT SPLIT: CAN DISTRICT COURTS ORDER DISGORGEMENT AS A REMEDY IN CIVIL RICO ACTIONS?

The D.C. Circuit has split with the Second Circuit and the Fifth Circuit over whether disgorgement is a permissible remedy in civil RICO actions. In *United States v Carson*,²⁸ the Second Circuit found that although “disgorgement is among the equitable powers available to the district court by virtue of 28 USC § 1964,” the statutory language requires that the “jurisdictional powers . . . serve the goal of foreclosing future violations.”²⁹ This ruling allows district courts to order disgorgement in the limited circumstances where it would prevent and restrain future RICO violations. Conversely, the D.C. Circuit held in *United States v Philip Morris USA, Inc*³⁰ that disgorgement could never “prevent and restrain” future RICO violations, which precludes district courts from ordering disgorgement.³¹ It defined disgorgement as “both aimed at and measured by *past* conduct,”³² which means that the district courts lack the statutory authority to order it as a remedy.

A. The Second Circuit Holds That § 1964(a) Permits Disgorgement Only When Designed to “Prevent and Restrain” Future RICO Violations

The Second Circuit relied on the language and structure of 28 USC § 1964(a) to determine that district courts can sometimes require RICO violators to disgorge their profits. Congress expressly ap-

²⁶ See, for example, *United States v Philip Morris USA, Inc*, 396 F3d 1190, 1198 (DC Cir 2005) (noting that the statutory language “indicates that the jurisdiction is limited to forward-looking remedies that are aimed at future violations”); *United States v Carson*, 52 F3d 1173, 1181 (2d Cir 1995) (“The three examples contained in the text of section 1964(a) are forward looking, and calculated to prevent RICO violations in the future.”).

²⁷ See, for example, *Richard v Hoechst Celanese Chemical Group, Inc*, 355 F3d 345, 355 (5th Cir 2003) (affirming the district court’s dismissal for failure to state a claim because “Richard’s disgorgement claim seems to do little more than compensate for the alleged loss”).

²⁸ 52 F3d 1173 (2d Cir 1995).

²⁹ *Id* at 1181–82.

³⁰ 396 F3d 1190 (DC Cir 2005).

³¹ *Id* at 1201 (“[W]e can find no justification for considering any order of disgorgement to be forward-looking as required by § 1964(a).”).

³² *Id* at 1198.

proved three remedies: divestiture of any interest in the offending enterprise, restrictions on future activities of the offender, and dissolution or reorganization of the offending enterprise.³³ These three examples “are forward looking, and calculated to prevent RICO violations in the future.”³⁴ Because Congress conferred power “to prevent and restrain violations of section 1962”³⁵ on the district courts, and because the text of § 1964 only offered forward-looking examples of permissible remedies, the Second Circuit limited disgorgement orders accordingly.³⁶ It indicated that disgorgement could prevent and restrain violations where a district court finds that “the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose.”³⁷ This means that *Carson* would permit disgorgement only where it could plausibly stop that specific violator from committing further violations. The court refused to allow disgorgement to act as a general deterrent to potential RICO violators.³⁸ It concluded that the “prevent and restrain” language coupled with the specified examples restricted the jurisdictional power of district courts to serving “the goal of foreclosing future violations” without affording “broader redress.”³⁹ Thus, the Second Circuit indicated that the text of the statute controlled and precluded an examination of the legislative history.⁴⁰

The legislative history, in contrast with the Second Circuit’s ruling in *Carson*, indicates that Congress intended for courts to have broad powers to craft appropriate equitable relief. The Senate Report explains that RICO meant to extend courts’ jurisdiction to craft “equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity.”⁴¹ Congress also instructed that RICO “shall be liberally construed to effectuate its remedial purposes.”⁴²

³³ 18 USC § 1964(a).

³⁴ *Carson*, 52 F3d at 1181.

³⁵ 18 USC § 1964(a).

³⁶ *Carson*, 52 F3d at 1182 (explaining that § 1964 does not authorize the government to recapture all losses of those wronged by RICO violations).

³⁷ *Id.*

³⁸ *Id.* (“If [general deterrence] were adequate justification, the phrase ‘prevent and restrain’ would read ‘prevent, restrain, and discourage,’ and would allow any remedy that inflicts pain.”).

³⁹ *Id.*

⁴⁰ *Id.* at 1181 (“A plain reading of the statute does not support the broad interpretation adopted by the district court and urged by the government.”).

⁴¹ S Rep No 91-617 at 79 (cited in note 10).

⁴² OCCA § 904, 84 Stat at 947.

In deciding to order disgorgement in the *Carson* case, the district court relied on an earlier opinion by Judge Glasser.⁴³ Reviewing the legislative history of RICO, and analogizing RICO to the securities laws, Glasser concluded that § 1964(a) granted broad equitable power to district courts:

The authority to order disgorgement derives from the broad equitable powers given courts under the securities laws to provide such remedies as are necessary to make effective the congressional purpose. . . . The fashioning of equitable remedies under the securities laws lies within the sound discretion of the court. . . . A court exercising the broad equitable powers of RICO's § 1964 has similar, if not wider, latitude in designing appropriate relief.⁴⁴

This broad equitable power, Glasser ruled, includes the power to order disgorgement.⁴⁵ The district court in *Carson* agreed with Glasser's position and found that it had the power to order Carson to disgorge any ill-gotten profits.⁴⁶ However, the Second Circuit overturned this ruling because it found that a "plain reading of the statute does not support" such a broad interpretation.⁴⁷ It focused on the limiting effect of the "prevent and restrain" language in the Congressional grant of jurisdiction.⁴⁸

Nor was the Second Circuit persuaded by the practical concerns informing the district court's decision that it had the power to order disgorgement. The district court felt "troubled by the consequences" of finding its use of disgorgement barred by statute.⁴⁹ It worried that a RICO violator would merely have to leave his organization to protect

⁴³ *United States v Local 1804-1, International Longshoreman's Association* ("Carson V"), 831 F Supp 177, 184–85 (SDNY 1993) (determining the disgorgement due to the plaintiffs from each defendant), citing *United States v Bonanno Organized Crime Family of La Cosa Nostra*, 683 F Supp 1411 (EDNY 1988).

⁴⁴ *Bonanno*, 683 F Supp at 1448 (quotation marks and citations omitted).

⁴⁵ *Id* at 1449 (concluding, on defendant's motion to dismiss, that the government could seek disgorgement if it prevailed, so long as the court could determine which profits stemmed from illegal actions). See also *United States v Private Sanitation Industry Association*, 793 F Supp 1114, 1152 (EDNY 1992) (Glasser) ("[S]ubject to the discretion of the court . . . the remedy of disgorgement (without compensation) of the ill-gotten proceeds of racketeering activity may [] be appropriately ordered as [a] measure [] of relief for the government.").

⁴⁶ *Carson V*, 831 F Supp at 185.

⁴⁷ *Carson*, 52 F3d at 1181.

⁴⁸ See *id* at 1182 (emphasizing that the "prevent and restrain" language limits the disgorgement remedy to cases where ill-gotten gains may be invested in further racketeering activities).

⁴⁹ See *United States v Local 1804-1, International Longshoremen's Association* ("Carson III"), 1993 US Dist LEXIS 3354, *14 (SDNY) (concluding that the government's preliminary showing that it could seek disgorgement under § 1964 was sufficient to justify a temporary order freezing the defendants' assets).

his ill-gotten gains.⁵⁰ Motivated by this concern, the district court concluded that Congress “intended to bestow on the district courts broad equitable powers . . . to prevent such a result.”⁵¹ Nonetheless, the Second Circuit rejected the district court’s reasoning, emphasizing that civil RICO contemplates not only government actions, but also private actions to recover illegal profits.⁵² Section 1964(c) provides that “any person injured in his business or property by reason of a violation of section 1962 may sue therefor . . . and shall recover threefold the damages he sustains.”⁵³ Because this provision protected individuals harmed by RICO violators, the court did not fear the practical consequences of limiting the disgorgement remedy. The Second Circuit decided that the “prevent and restrain” language in § 1964(a) “does not authorize the government to recapture all the losses of those wronged by civil RICO violators.”⁵⁴ The court remanded the case to the district court “for a determination as to which disgorgement amounts, if any, were intended solely to ‘prevent and restrain’ future RICO violations.”⁵⁵

The Fifth Circuit echoed this view in *Richard v Hoechst Celanese Chemical Group, Inc.*⁵⁶ In *Richard*, the court affirmed the district court’s dismissal for failure to state a claim because the plaintiff failed “to argue that disgorgement would ‘prevent and restrain’ similar RICO violations in the future.”⁵⁷ This meant that the disgorgement claim “seem[ed] to do little more than compensate for the alleged loss.”⁵⁸ Because the plaintiff neglected to ask for a proper remedy, the Fifth Circuit held that his RICO claim was void.⁵⁹

⁵⁰ *Id.* (rejecting defendant’s argument that, as a retiree “[not] in a position to engage in labor racketeering,” he was not subject to disgorgement, because accepting this view “would mean that a union racketeer, after raiding the union coffers, need only quit his position in order to retain [his] ill-gotten gains”).

⁵¹ *Id.* at *14–15.

⁵² *Carson*, 52 F3d at 1182 (“If the parties from whom Carson wrongfully took money wished to recover it, they could have pressed their own claims.”).

⁵³ 18 USC § 1964(c).

⁵⁴ *Carson*, 52 F3d at 1182.

⁵⁵ *Id.*

⁵⁶ 355 F3d 345, 355 (5th Cir 2003) (agreeing with the Second Circuit that § 1964(a) “establishes that equitable remedies are available only to prevent ongoing and future conduct”). The Fifth Circuit did not conduct an independent analysis; it relied solely on the Second Circuit’s reasoning.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See *id.*

B. In the D.C. Circuit, District Courts Cannot Order Disgorgement under § 1964(a) in Any Circumstances

The D.C. Circuit created a circuit split when it held that, under civil RICO, district courts have no jurisdiction to order disgorgement. The court's conclusion that § 1964(a) precludes the use of disgorgement as a remedy⁶⁰ went further than the Second Circuit's acknowledgement that the remedy falls within district courts' authority. In addition to the statute's structure and meaning as illuminated by canons of construction, Judge Sentelle relied on the Supreme Court's decision in *Meghrig v KFC Western, Inc.*,⁶¹ which held that the plain language of the Resource Conservation and Recovery Act⁶² (RCRA)—which authorizes district courts to “restrain” persons responsible for hazardous waste disposal⁶³—“did not contemplate[] the award of past cleanup costs.”⁶⁴ To rely on *Meghrig*, he distinguished the facts of *Porter v Warner Holdings Co.*,⁶⁵ where the Court concluded that a statute granting general equitable jurisdiction enables a district court to use “all the inherent equitable powers . . . available for the proper and complete exercise of that jurisdiction.”⁶⁶

The *Porter* Court considered whether a district court could order reimbursement for overcharges under the Emergency Price Control Act of 1942⁶⁷ (EPCA). That statute authorized a district court to grant “a permanent or temporary injunction, restraining order, or other order.”⁶⁸ In *Philip Morris*, the D.C. Circuit observed that Porter brought the action under the section “providing that ‘the Administrator’ could bring action against persons engaged in overcharges for ‘an order enjoining such acts or practices, or for an order enforcing compliance

⁶⁰ *Philip Morris*, 396 F3d at 1201 (concluding that the government's desired relief—disgorgement of defendant tobacco companies' profits from sales of cigarettes to youth—did not fall within the remedial scheme Congress intended to provide through RICO).

⁶¹ 516 US 479 (1996) (reversing the Ninth Circuit's decision ordering that the former owner of a property provide restitution to the current owner for costs incurred in disposing of hazardous waste contaminating the property).

⁶² Pub L No 94-580, 90 Stat 2795 (1975), codified as amended at 42 USC § 6901 et seq (2000) (stating that the objective of RCRA is to “regulate the management of hazardous waste”).

⁶³ See 42 USC § 6972(a) (granting district courts jurisdiction “to restrain any person who has contributed to . . . the disposal of any solid or hazardous waste”).

⁶⁴ *Meghrig*, 516 US at 484 (interpreting RCRA to permit only injunctions that compel proper disposal of hazardous waste, or that restrain future violations of RCRA).

⁶⁵ 328 US 395 (1946) (holding that a district court had equitable jurisdiction to order that a landlord disgorge proceeds in excess of maximum rent regulations issued under the Emergency Price Control Act).

⁶⁶ *Id.* at 398.

⁶⁷ Pub L No 77-421, 56 Stat 23 (1942).

⁶⁸ EPCA § 205(a), 56 Stat at 33.

with such provision.”⁶⁹ The Court explained that “[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.”⁷⁰ Applying this rule, the D.C. Circuit found that “the text and structure of the [RICO] statute provide just such a restriction.”⁷¹

After comparing the statutory language at issue in *Porter* with that in RICO, the D.C. Circuit found that Congress’s goal in enacting the respective statutes restricted the permissible remedies. Congress passed EPCA to “prevent overcharges with inflationary effect.”⁷² The *Philip Morris* court reasoned that the court-ordered restitution in *Porter* directly remedied past inflation, which furthered the statute’s objective.⁷³ However, the D.C. Circuit concluded that the “goal of the RICO section under which the government seeks disgorgement here is to prevent or restrain future violations” and that disgorgement “is a quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo.”⁷⁴ It worried that by allowing disgorgement and interpreting § 1964(a) as a “plenary grant of equitable jurisdiction,” the court would “effectively ignor[e] the words ‘to prevent and restrain.’”⁷⁵

To define the goal of the RICO statute, the D.C. Circuit relied on the Supreme Court’s precedent from *Meghrig*. By analogizing disgorgement under RICO to compensation for past environmental cleanup, the court argued that *Meghrig* limits the broad language from *Porter*. It added that “[i]f ‘restrain’ is only aimed at future actions, ‘prevent’ is even more so.”⁷⁶ The court also equated the enforcement scheme of RCRA coupled with the Comprehensive Environmental Response, Compensation, and Liability Act of 1980⁷⁷ (CERCLA) with the “elaborate” enforcement provisions of RICO.⁷⁸ RCRA grants dis-

⁶⁹ *Philip Morris*, 396 F3d at 1197–98, quoting EPCA § 205(a), 56 Stat at 33.

⁷⁰ *Porter*, 328 US at 398.

⁷¹ *Philip Morris*, 396 F3d at 1197.

⁷² *Id.* at 1198.

⁷³ See *id.* (“Restitution of overcharge works a direct remedy of past inflation, directly effecting the goal of the statute.”).

⁷⁴ *Id.*

⁷⁵ *Id.* (arguing that if the court interpreted § 1964(a) as a plenary grant of equitable jurisdiction, it would “nullif[y] the plain meaning of the terms and violate [] our canon of statutory construction that we should strive to give meaning to every word”).

⁷⁶ *Philip Morris*, 396 F3d at 1199.

⁷⁷ 42 USC § 9601 et seq (2000).

⁷⁸ See *Philip Morris*, 396 F3d at 1199–1200 (emphasizing the thoroughness of the statutory scheme).

strict courts jurisdiction “to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . . or to order such person to take such other action as may be necessary.”⁷⁹ This language resembles the clause in the RICO statute, which provides for orders that “prevent and restrain violations.”⁸⁰ Because of this similarity, the court ruled that *Meghrig* as opposed to *Porter* controlled.⁸¹

The D.C. Circuit focused on the structure of the RICO statute and determined that Congress created an elaborate enforcement scheme, which allowed the court to escape the broad equitable authority applied in *Porter*.⁸² Congress provided backward-looking remedies in criminal RICO actions.⁸³ In addition to fines and imprisonment,⁸⁴ a RICO violator convicted of criminal racketeering “must forfeit his interest in the RICO enterprise and unlawfully acquired proceeds.”⁸⁵ The D.C. Circuit claimed that forfeiture under § 1963(a) resembles the disgorgement remedy requested by the government in *Philip Morris*. Because of this similarity, the court refused to allow disgorgement “without requiring the inconvenience of meeting the additional procedural safeguards that attend criminal charges.”⁸⁶ Additionally, the court recognized that disgorgement would parallel the remedy available to private parties under § 1964(c).⁸⁷ Allowing district courts to

⁷⁹ 42 USC § 6972(a).

⁸⁰ 18 USC § 1964(a). See also *Philip Morris*, 396 F3d at 1200.

⁸¹ See *Philip Morris*, 396 F3d at 1199 (noting that the Supreme Court, rejecting a similar argument in *Meghrig*, declined to allow a backward-looking remedy under RCRA). See also *Meghrig*, 516 US at 487–88 (“[W]here Congress has provided elaborate enforcement provisions for remedying the violation of a federal statute, as Congress has done with RCRA and CERCLA, it cannot be assumed that Congress intended to authorize by implication additional judicial remedies.”) (internal quotation marks and citation omitted).

⁸² See *Philip Morris*, 396 F3d at 1200 (maintaining that RICO’s complex enforcement scheme “limits courts’ ability to fashion equitable remedies”). See also *Porter*, 328 US at 403 (finding that EPCA does not limit a district court’s inherent equity jurisdiction).

⁸³ 18 USC § 1963(a)(3) (providing that violators must forfeit to the United States “any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962”).

⁸⁴ 18 USC § 1963(a) (providing that violators may be sentenced up to twenty years, or to life imprisonment, “if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment”).

⁸⁵ *Philip Morris*, 396 F3d at 1200. See 18 USC § 1963(a) (providing that violators found criminally liable “shall forfeit . . . any interest in; security of; claim against; or property or contractual right of any kind affording a source of influence over [the] enterprise”).

⁸⁶ *Philip Morris*, 396 F3d at 1200–01. These safeguards include “a five year statute of limitations, notice requirements, and general criminal procedural protections including proof beyond a reasonable doubt.” *Id.* at 1201.

⁸⁷ See *id.* at 1201; 18 USC § 1964(c) (providing that a private party who prevails under this section “shall recover threefold the damages he sustains”). See also text accompanying notes 52–53.

order disgorgement, it argued, would present the problem of duplicative recovery and “allow the Government to escape a statute of limitations that would restrict private parties seeking essentially identical remedies.”⁸⁸ The court concluded that “[t]his ‘comprehensive and reticulated’ scheme, along with the plain meaning of the words themselves, serves to raise a ‘necessary and inescapable inference,’ sufficient under *Porter*, that Congress intended to limit relief under section 1964(a) to forward-looking orders, ruling out disgorgement.”⁸⁹ The court thought it would thwart Congress’s intent to allow disgorgement under § 1964(a) because of the similarity to the remedies provided by other sections of the RICO statute.

The court also applied canons of statutory construction to strengthen its position. It utilized the canons of *noscitur a sociis* and *eiusdem generis*.⁹⁰ *Noscitur a sociis* means that “a word is known by the company it keeps.”⁹¹ It limits a broad term to the characteristics it shares with the terms with which it is grouped. Similarly, under *eiusdem generis*, “where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”⁹² The D.C. Circuit used these canons when it determined that disgorgement did not resemble the remedies specifically approved by Congress,⁹³ which include divestiture, prohibitions on criminal activity, and dissolution of the enterprise.⁹⁴ The court argued that “the remedies explicitly granted in § 1964(a) are all directed toward future conduct and separating from the RICO enterprise to prevent future violations.”⁹⁵ Because it determined that disgorgement aimed to separate “the criminal from his prior ill-gotten gains” rather than prevent future violations,⁹⁶ the D.C. Circuit concluded that the canons of *noscitur a sociis* and *eiusdem generis* bolstered its position that district

⁸⁸ *Philip Morris*, 396 F3d at 1201 (“[I]t raises issues of duplicative recovery of exactly the sort that the Supreme Court said in *Holmes v Securities Investor Protection Corp*, 503 US 258, 269 (1992), constituted a basis for refusing to infer a cause of action not specified by statute.”).

⁸⁹ *Philip Morris*, 396 F3d at 1200, quoting *Porter*, 328 US at 398.

⁹⁰ See *Philip Morris*, 396 F3d at 1200.

⁹¹ *Jarecki v G.D. Searle & Co*, 367 US 303, 307 (1961).

⁹² *Circuit City Stores v Adams*, 532 US 105, 114–15 (2001).

⁹³ See *Philip Morris*, 396 F3d at 1200 (“Applying the canons of *noscitur a sociis* and *eiusdem generis*, we will expand on the remedies explicitly included in the statute only with remedies similar in nature to those enumerated.”).

⁹⁴ See 18 USC § 1964(a).

⁹⁵ *Philip Morris*, 396 F2d at 1200.

⁹⁶ *Id.*

courts have no power to order disgorgement in a civil RICO suit brought by the government.

C. The *Philip Morris* Dissent Argues That *Porter*'s Broad Grant of Equitable Power Should Control

After claiming that the *Philip Morris* court erred in reaching the merits of the case, Judge Tatel argued in dissent that Supreme Court precedent pointed toward permitting disgorgement as an available equitable remedy.⁹⁷ He would have held that *Porter*'s broad grant of equitable power controls as opposed to the restrictions on the facts of *Meghrig*.⁹⁸ He also relied on *Mitchell v Robert De Mario Jewelry, Inc.*,⁹⁹ which held that "in an action by the Secretary to restrain violations of [the Fair Labor Standards Act (FLSA)], a District Court has jurisdiction to order an employer to reimburse employees, unlawfully discharged or otherwise discriminated against, for wages lost because of that discharge or discrimination."¹⁰⁰ The FLSA provided that "the district courts are given jurisdiction . . . for cause shown, to restrain violations" of the statute.¹⁰¹ The *Mitchell* Court reasoned that this jurisdictional hook grants district courts broad authority to use their equitable powers.¹⁰² Judge Tatel argued that "if [FLSA's] language opens the door to all equitable relief, then RICO's language . . . certainly does the same."¹⁰³ The majority countered by arguing that with RICO, "Congress provided a statute granting jurisdiction defined with the sort of limitations not present in the FLSA or the EPCA."¹⁰⁴ Nonetheless, RICO grants jurisdiction to "prevent and restrain" violations and the FLSA grants jurisdiction to "restrain" violations; thus the jurisdictional limitations look very similar.

However, as Judge Tatel noted, "reconciling *Meghrig* with *Porter* and *Mitchell* is difficult."¹⁰⁵ The statutes at issue in both *Meghrig* and *Mitchell* granted district courts the power "to restrain" violations, but

⁹⁷ See *Philip Morris*, 396 F3d at 1229–30 (Tatel dissenting).

⁹⁸ See *id.* at 1220 ("In my view, *Porter* and *Mitchell*, not *Meghrig*, 'directly control' this case.").

⁹⁹ 361 US 288 (1960).

¹⁰⁰ *Id.* at 296.

¹⁰¹ See *id.* at 289, quoting 29 USC § 217 (2000).

¹⁰² See *id.* at 291–92.

¹⁰³ *Philip Morris*, 396 F3d at 1219 (Tatel dissenting).

¹⁰⁴ *Id.* at 1199 (majority).

¹⁰⁵ *Id.* at 1220 (Tatel dissenting).

the Court ruled differently in each case.¹⁰⁶ Judge Tatel observes that *Meghrig* did not overrule *Porter* and *Mitchell*;¹⁰⁷ indeed, the Court indicated in *Meghrig* itself that the “limited remedies” provided by RCRA and the “stark differences” between RCRA and CERCLA explain the different results.¹⁰⁸ The Court refused to read into the statute a remedy not explicitly provided because of the “elaborate enforcement provisions” in the statute.¹⁰⁹ The *Philip Morris* majority argued that RICO’s enforcement scheme also compelled this conclusion.¹¹⁰ Because the jurisdictional language in *Mitchell* resembles *Meghrig* so closely, this text alone cannot reconcile the conflicting outcomes.

Judge Tatel distinguished *Meghrig* from *Mitchell* and *Porter* in three ways. First, he claimed that since RICO and EPCA “stand alone,” unlike RCRA which “had a closely related statute” that motivated the *Meghrig* decision, “RICO’s statutory scheme resembles EPCA more than RCRA.”¹¹¹ Second, he called attention to the fact that the government brought suit in both *Mitchell* and *Porter*, unlike in *Meghrig*, where a private party brought the action.¹¹² The *Porter* Court indicated that a district court has increased equitable power in a case that implicates the public interest as opposed to just private parties.¹¹³

¹⁰⁶ See *id.* (“*Meghrig* suggests that ‘to restrain’ only authorizes prohibitory injunctions. By contrast, *Mitchell* holds that this language imposes no limit on the district court’s full equitable powers.”).

¹⁰⁷ *Id.* (“*Meghrig* . . . left both cases intact.”). For opinions relying on *Porter*, see *United States v Oakland Cannabis Buyers’ Cooperative*, 532 US 483, 496 (2001) (applying *Porter* to find that “[respondent] is correct that, when district courts are properly acting as courts of equity, they have discretion unless a statute clearly provides otherwise”); *Miller v French*, 530 US 327, 340 (2000) (citing *Porter* for the proposition that “we should not construe a statute to displace courts’ traditional equitable authority absent . . . an ‘inescapable inference’ to the contrary.”). For opinions relying on *Mitchell*, see *Great-West Life & Annuity Insurance Co v Knudson*, 534 US 204, 228 (2002) (Ginsburg dissenting) (citing *Mitchell* for the proposition that courts have equitable jurisdiction to carry out the legislature’s purposes); *Bailey v Gulf Coast Transportation, Inc.*, 280 F3d 1333, 1336–37 (11th Cir 2002) (referring to *Mitchell*’s interpretation of FLSA’s antiretaliation provision); *United States v Universal Management Services, Inc.*, 191 F3d 750, 761 (6th Cir 1999) (citing *Mitchell* for the proposition that “a district court’s equitable powers are even broader and more flexible when the public interest is involved”).

¹⁰⁸ See *Philip Morris*, 396 F3d at 1220 (Tatel dissenting). See also *Meghrig*, 516 US at 487.

¹⁰⁹ See *Meghrig*, 516 US at 487–88 (emphasizing that “additional judicial remedies for private citizens” should not be read into a statute where Congress has provided elaborate enforcement provisions).

¹¹⁰ See text accompanying notes 87–89. See also *Philip Morris*, 396 F3d at 1201 (“The text and structure of RICO indicate that [its] remedial purposes do not extend to disgorgement in civil cases.”).

¹¹¹ *Philip Morris*, 396 F3d at 1220 (Tatel dissenting).

¹¹² See *id.* at 1221.

¹¹³ See *Porter*, 328 US at 398 (finding a “broader and more flexible” power of equity when the public interest is involved).

Since the government brought suit in *Philip Morris*, Tatel would have granted district courts as much equitable power as possible.¹¹⁴ He noted that this point has “particular traction if the government is the only party that may seek equitable relief under RICO.”¹¹⁵ Finally, Tatel argued that “*Meghrig*’s suggestion that ‘restrain’ in RCRA refers only to prohibitory injunctions cannot apply to *section 1964(a)*, since that section explicitly authorizes other remedies . . . to ‘prevent and restrain’ RICO violations.”¹¹⁶ Based on these three reasons, Judge Tatel claimed that *Porter* and *Mitchell*, rather than *Meghrig*, illuminate the limits on a district court’s equitable powers provided by the phrase “prevent and restrain” in the RICO statute. After making this determination, he asserted that “no ‘necessary and inescapable inference’ limits the district court’s jurisdiction in equity.”¹¹⁷ For this reason, he would have permitted the district court to order Philip Morris to disgorge ill-gotten profits.¹¹⁸

III. RESOLVING THE SPLIT IN FAVOR OF GRANTING DISTRICT COURTS THE POWER TO ORDER DISGORGEMENT IN CIVIL RICO ACTIONS

Congress drafted RICO to eliminate corruption in legitimate organizations.¹¹⁹ By permitting district courts to order disgorgement in situations where such an order would “prevent and restrain” future corrupt activity, appellate courts could implement the congressional purpose while staying true to the text of RICO. Although the Second Circuit reached this result in *Carson*, it based its conclusion solely on a “plain reading of the statute.”¹²⁰ However, this interpretation is flawed as the statutory language is ambiguous. Because the Second Circuit

¹¹⁴ See *Philip Morris*, 396 F3d at 1227 (Tatel dissenting) (“[W]ere this case properly before us, I would hold, in accordance with *Porter* and *Mitchell*, that district courts have authority to order any remedy, including disgorgement, necessary to ensure complete relief.”).

¹¹⁵ *Id.* at 1221.

¹¹⁶ *Id.* (emphasis added) (pointing to the inclusion of divestment and other remedies in § 1964(a) to indicate that civil RICO’s remedial scheme extends beyond injunctions alone). See also *Meghrig*, 516 US at 484 (“Under a plain reading of this remedial scheme, a private citizen suing under [RCRA] could seek . . . a prohibitory injunction, *i.e.*, one that ‘restrains’ a responsible party . . . from further violating RCRA.”).

¹¹⁷ See *Philip Morris*, 396 F3d at 1222 (Tatel dissenting).

¹¹⁸ See *id.* (“If the district court concludes that the government has shown that the tobacco companies have committed RICO violations by advertising to youth despite assertions to the contrary and by falsely disputing smoking’s addictive, unhealthy effects, then it may order whatever equitable relief it deems appropriate.”).

¹¹⁹ See S Rep No 91-617 at 76 (cited in note 10).

¹²⁰ *Carson*, 52 F3d at 1181.

determined that the statutory text ended its analysis, the court did not discuss either the Supreme Court precedent concerning legislative grants of equitable power or the extensive body of case law interpreting the analogous antitrust laws. This Comment lends support to the outcome reached in *Carson* by examining RICO's legislative history and the Court's equitable jurisdiction precedent. Then it looks to the relevant precedent in antitrust law to further support the use of disgorgement in civil RICO actions.¹²¹

A. The "Prevent and Restrain" Language Is Ambiguous

Despite the Second Circuit's holding to the contrary, other courts have found that where Congress confers equitable jurisdiction to "restrain" violations, the statutory language does not require solely forward-looking remedies. As discussed above, the *Mitchell* Court determined that the text of FLSA granted district courts general equity jurisdiction to enforce the prohibitions of the statute.¹²² After finding that Congress conferred broad equitable powers upon the courts,¹²³ it looked to the purpose of FLSA to "give effect to the policy of the legislature." In *Mitchell*, the Supreme Court applied *Porter* because it found that Congress did not issue a "clear and valid legislative command" when it granted district courts jurisdiction to restrain statutory violations.¹²⁴ Even though the Court seemingly reached a contrary holding in *Meghrig*, it justified its decision by referring to the legislative intent.¹²⁵ Because the Supreme Court itself found the "restrain"

¹²¹ Unlike the dissent in *Philip Morris*, this Comment considers the statutory objectives at issue in *Meghrig* and *Mitchell* to reconcile the seemingly conflicting holdings. Judge Tatel primarily relied on the resemblance of the text of the jurisdictional grant in the RICO statute to that of the statute at issue in *Porter* as opposed to the statute at issue in *Meghrig*, see *Philip Morris*, 396 F3d at 1220, and the fact that the government brought suit in *Mitchell*, which provided a public interest justification for granting the most expansive remedial power possible, see *Philip Morris*, 396 F3d at 1221. This Comment argues that the Court merely implemented the congressional intent underlying the statutes at issue in *Meghrig* and *Mitchell*; this view provides a broader basis for reconciling the apparent conflict than that suggested by Judge Tatel. In implementing the congressional goal of preventing and restraining enterprise criminality, the appellate courts should allow district courts to order disgorgement when it would "prevent and restrain" enterprise criminality.

¹²² *Mitchell*, 361 US at 292, quoting *Clark v Smith*, 38 US 195, 203 (1839).

¹²³ See *Mitchell*, 361 US at 291-92 ("When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes.").

¹²⁴ *Id.* at 292, quoting *Porter*, 328 US at 398.

¹²⁵ See *Meghrig*, 516 US at 485 ("That RCRA's citizen suit provision was not intended to provide a remedy for past cleanup costs is further apparent from the harm at which it is directed.").

language ambiguous enough¹²⁶ to resort to the “historic power of equity to provide complete relief in light of the statutory purposes,”¹²⁷ the Second and D.C. Circuits should have followed the Supreme Court’s lead in looking to the objectives behind RICO.

As Judge Tatel discussed, the contrary holdings in *Mitchell* and *Meghrig* seem to preclude lower courts from relying solely on the “prevent and restrain” language in RICO’s grant of equity jurisdiction.¹²⁸ Indeed, the First Circuit has held that *Mitchell* explicitly precluded a ruling that restricted the permissible remedies as the Second Circuit did, because the statute at issue in *Mitchell* granted district courts jurisdiction to restrain violations of the statute.¹²⁹ Similarly, the Tenth Circuit stated that it did “not think the presence of the term ‘restrain’ in a statutory grant of general equity jurisdiction is dispositive evidence of Congress’s intent to limit remedies to those that are forward-looking.”¹³⁰ It went even further and found that *Meghrig* “did not explicitly overrule *Mitchell*’s holding that backward-looking remedies are permitted under a grant of authority to restrain violations.”¹³¹

B. *Meghrig* and *Mitchell* Can Be Reconciled by Looking at the Reasons Congress Enacted the Respective Statutes at Issue

Congress designed FLSA “to achieve, in those industries within its scope, certain minimum labor standards.”¹³² The statute prohibited discharges and other forms of retaliation against workers who complained that their employer violated FLSA; however, it did not explicitly provide for reimbursement of lost wages caused by an unlawful discharge or other discrimination.¹³³ The *Mitchell* Court worried that if it did not allow reimbursement, injured employees might decide not to sue because they could be laid off without pay while attempting to

¹²⁶ Judge Tatel, consulting several dictionaries, points out that “prevent” and “restrain” carry multiple meanings. See *Philip Morris*, 396 F3d at 1222 (Tatel dissenting).

¹²⁷ *Mitchell*, 361 US at 292.

¹²⁸ See *Philip Morris*, 396 F3d at 1221 (Tatel dissenting).

¹²⁹ See *Interstate Commerce Commission v B & T Transport Co*, 613 F2d 1182, 1185 (1st Cir 1980) (finding equitable jurisdiction to order “restitution of overcharges” where the statutory provision resembled that in *Mitchell*).

¹³⁰ *United States v Rx Depot, Inc*, 438 F3d 1052, 1058 (10th Cir 2006) (holding that disgorgement of defendant’s profits from illegal importation of prescription drugs was an available remedy under the Federal Food, Drug and Cosmetic Act, 21 USC § 301 et seq).

¹³¹ See *id.*

¹³² *Mitchell*, 361 US at 292. See FLSA § 2, 52 Stat at 1060 (finding that “labor conditions detrimental to the maintenance of the minimum standard of living” exist in industries Congress may regulate, and setting a policy to regulate commerce to eliminate said labor conditions).

¹³³ FLSA § 15(a)(3), 52 Stat at 1068.

vindicate their rights in the judicial system.¹³⁴ This concern motivated the Court to refuse to “read the Act as presenting those it sought to protect with what is little more than a Hobson’s choice.”¹³⁵ To fully achieve the statute’s objective, the Court had to allow the broad equitable jurisdiction of the district courts to prevail, as in *Porter*.

The situation differed in *Meghrig* because of the existence of CERCLA, which complemented RCRA. In *Meghrig*, the Court concluded that RCRA does not “authorize[] a private cause of action to recover the prior cost of cleaning up toxic waste that does not, at the time of suit, continue to pose an endangerment to health or the environment.”¹³⁶ The Court considered the statute’s objective in reaching this decision.¹³⁷ Congress passed RCRA primarily “to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, ‘so as to minimize the present and future threat to human health and the environment.’”¹³⁸ The Court distinguished RCRA’s preventative objective from CERCLA’s objective, the promotion of ex post environmental cleanup.¹³⁹ Because the Court concluded that “RCRA is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards,” it limited the remedies available under the statute to forward-looking ones that promote the statute’s objectives.¹⁴⁰ These permissible remedies must “ameliorate[] present or obviate[] the risk of future ‘imminent’ harms.”¹⁴¹

The Court did not decide either *Meghrig* or *Mitchell* based on the text of the jurisdictional hooks in the relevant statutes. Even though both of the statutes grant district courts the same jurisdiction “to restrain” violations, the outcomes of the cases differed. The Court looked beyond the text to effectuate the legislation’s objectives. With *Porter*’s broad grant of equitable power as the backdrop, the Court

¹³⁴ See *Mitchell*, 361 US at 293 (“Resort to statutory remedies might thus often take on the character of a calculated risk, with restitution of partial deficiencies in wages due for past work perhaps obtainable only at the cost of irremediable entire loss of pay for an unpredictable period.”).

¹³⁵ *Id.*

¹³⁶ *Meghrig*, 516 US at 481.

¹³⁷ See *id.* at 483.

¹³⁸ *Id.*, quoting 42 USC § 6972.

¹³⁹ See *Meghrig*, 516 US at 483 (contrasting CERCLA’s main objectives—“prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party”—with RCRA’s primary objective, which is “to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated”).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 486.

permitted district courts to exercise only as much equitable jurisdiction as would further the respective statutory objectives in *Meghrig* and *Mitchell*. Similarly, by looking to the broad objective of RICO rather than the text of Congress's jurisdictional grant, courts could resolve the split over whether district courts can ever order disgorgement in a civil RICO action brought by the government.

C. The Objectives of RICO Point toward Allowing Disgorgement, at Least in Limited Circumstances

1. Disgorgement could reduce enterprise criminality.

In some cases, disgorgement would effectively further the goals of the RICO statute. Congress intended RICO to combat criminal enterprises conducting interstate commercial activity.¹⁴² A disgorgement order could prevent a violator from employing his illegally obtained profits to finance other criminal organizations, thus fighting enterprise criminality. In this situation, disgorgement achieves the same result as a divestiture. When a district court orders a RICO violator to divest himself of the assets of the RICO enterprise, it restricts the financing of a RICO enterprise. Similarly, if a district court ordered a defendant to disgorge past profits that he would invest in another RICO enterprise, it would reduce the funding available to a RICO enterprise. In these circumstances, disgorgement would be "calculated to prevent" future RICO violations. This power to order disgorgement furthers RICO's objectives by providing courts with a civil penalty that differs from both the other remedies enumerated by the civil RICO statute¹⁴³ and from criminal forfeiture. It specifically addresses the situation where a RICO violator engages in multiple criminal enterprises, where the prosecutor can demonstrate that the criminal can and will use his ill-gotten proceeds to fund other enterprises, but lacks enough information about each enterprise to obtain criminal convictions.

For example, a criminal might use profits acquired from a gambling website to create a child pornography website. Perhaps the prosecutor can prove only that the criminal has a reasonably successful gambling site and a propensity to engage in child pornography. In this situation, prosecutors could not obtain a criminal conviction for the child pornography enterprise. Even the enumerated civil RICO penalties would not provide much muscle to prevent child pornography. If restricted to only the stated remedies, a court could order the defen-

¹⁴² See note 15 and accompanying text.

¹⁴³ See note 24 and accompanying text.

dant to divest himself of the gambling website; but, significantly, the defendant would keep the proceeds he obtains in the divestiture.

The D.C. Circuit's claim in *Philip Morris* that a broad reading of the remedies provided by § 1964(a) would circumvent congressional intent relies too heavily on the similarity in relief between the criminal forfeiture provision, § 1963(a), and disgorgement under § 1964(a).¹⁴⁴ In a criminal RICO action, a guilty defendant must forfeit his interest in the RICO enterprise along with any unlawfully acquired proceeds, and he faces penal fines, imprisonment or both.¹⁴⁵ These penalties go much farther than mere disgorgement. The criminal RICO statute does not require, as the Second Circuit did in *Carson*, that the remedy "serve the goal of foreclosing future violations."¹⁴⁶ Additionally, the defendant will likely lose more than his unlawfully acquired profits. He will almost certainly have to pay fines over and above his profits and he very well may be imprisoned. These additional penalties coupled with the stigma associated with a criminal conviction¹⁴⁷ distinguish the relief mandated under § 1963(a) from disgorgement. Therefore, the D.C. Circuit was unnecessarily concerned about allowing district courts to grant similar relief without "requiring the inconvenience of meeting the additional procedural safeguards that attend criminal charges."¹⁴⁸ The greater severity of the § 1963(a) criminal penalties justifies the increased procedural safeguards.

Furthermore, the *Philip Morris* majority incorrectly determined that it would thwart Congress's intent to allow the government to collect ill-gotten proceeds from a RICO violator because this remedy resembles the damages available to private parties under § 1964(c).¹⁴⁹ Again the court worried about the government avoiding a procedural safeguard, a statute of limitations that would "restrict private parties seeking essentially identical remedies."¹⁵⁰ RICO provides that a private party "shall recover threefold the damages he sustains and the cost of the suit."¹⁵¹ Conceptually, this remedy differs significantly from dis-

¹⁴⁴ See *Philip Morris*, 396 F3d at 1200–01. See also text accompanying notes 86–89.

¹⁴⁵ 18 USC § 1963(a) (providing that a RICO violator may be "fined" or "imprisoned," and "shall forfeit . . . any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity").

¹⁴⁶ *Carson*, 52 F3d at 1182.

¹⁴⁷ See *Rutledge v United States*, 517 US 292, 302 (1996) (discussing "the societal stigma accompanying any criminal conviction"), citing *Ball v United States*, 470 US 856, 865 (1985).

¹⁴⁸ See *Philip Morris*, 396 F3d at 1200–01.

¹⁴⁹ See *id.*

¹⁵⁰ See *id.* at 1201. See also 18 USC § 3282 (2000), which provides for a five-year statute of limitations for any federal offense other than a capital crime.

¹⁵¹ 18 USC § 1964(c).

gorgement. Section 1964(c) requires that the RICO violator have injured the private-party plaintiff “in his business or property.”¹⁵² By awarding damages under § 1964(c), a court aims to compensate the victim for his injury. As the dissent in *Richard* noted, “the [disgorgement] remedy is not analogous to compensatory damages.”¹⁵³ Disgorgement entails “surrender of all profits earned as a result of an unfair business practice regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice.”¹⁵⁴ This remedy differs from the damage remedy provided by § 1964(c) because it does not attempt to make the injured party whole, and the government need not demonstrate third-party injury to prevail. The disgorgement remedy increases the government’s chances of a successful prosecution of a civil RICO case by reducing the burden of proving injury; thus, it furthers RICO’s objective of fighting corruption in commercial organizations.

2. A comparison with antitrust law supports this conclusion.

Because Congress modeled RICO on antitrust law,¹⁵⁵ antitrust precedent can shed some light on the disgorgement dispute. Congress passed the antitrust laws to promote competition and prevent monopolies.¹⁵⁶ Similar to RICO, antitrust law empowers “the Attorney General to institute proceedings in equity to prevent and restrain . . . violations.”¹⁵⁷ Although “the Court once ignored, though did not explicitly reject, an invitation by Justice Douglas to apply *Porter* to antitrust actions,”¹⁵⁸ other cases have indicated that courts can use their

¹⁵² *Id.*

¹⁵³ *Richard*, 355 F3d at 355 (Wiener dissenting in part).

¹⁵⁴ *Kraus v Trinity Management Services, Inc*, 23 Cal 4th 116, 999 P2d 718, 725 (2000).

¹⁵⁵ See *Holmes v Securities Investor Protection Corp*, 503 US 258, 267 (1992) (noting that “Congress modeled § 1964(c) on the civil action provision of the federal antitrust laws”).

¹⁵⁶ See, for example, *Verizon Communications, Inc v Law Offices of Curtis V. Trinko, LLP*, 540 US 398, 407–08 (2004) (“Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.”); *Great Atlantic & Pacific Tea Co v FTC*, 440 US 69, 83 n 16 (1979) (describing the “general purposes of the antitrust laws [as] encouraging competition between sellers”). See also Aryeh S. Friedman, *Law and the Innovative Process*, 1986 Colum Bus L Rev 1, 17 (“The primary purpose of the antitrust laws is to ensure that economic markets are competitive.”).

¹⁵⁷ 15 USC §§ 4, 25 (2000).

¹⁵⁸ *Philip Morris*, 396 F3d at 1221 (Tatel dissenting). See also *United States v National Lead Co*, 332 US 319, 366 (1947) (Douglas concurring in part and dissenting in part) (noting that under the statute at issue in *Porter*, which provided “more detailed remedies than do the antitrust laws, [the Court] held that an equity court may mould additional ones”).

traditional broad powers of equity to remedy antitrust violations.¹⁵⁹ When specifically addressing the power of the lower courts to grant equitable relief, the Court stated that “[t]he relief which can be afforded under these statutes is not limited to the restoration of the *status quo ante*.”¹⁶⁰ The Court further indicated that “the relief must be directed to that which is necessary and appropriate in the public interest to *eliminate the effects* of the acquisition offensive to the statute, or which will *cure the ill effects* of the illegal conduct, and *assure the public freedom from its continuance*.”¹⁶¹ By granting district courts power to craft equitable relief to assure the public’s freedom from illegal anticompetitive conduct, the Court promoted the objectives of the antitrust laws. Using similar logic, courts could promote RICO’s objectives by allowing disgorgement where it is the most effective remedy to promote the public’s freedom from enterprise criminality.

Also, the Supreme Court has previously relied on antitrust precedent to inform its interpretation of RICO. It explained that both RICO and the Clayton Act “bring to bear the pressure of ‘private attorneys general’ on a serious national problem for which public prosecutorial resources are deemed inadequate.”¹⁶² Then, it adopted a four-year statute of limitations in RICO actions based on Clayton Act precedent.¹⁶³ After a circuit split developed over when the four-year period accrues, the Court revisited the issue in *Rotella v Wood*.¹⁶⁴ There

¹⁵⁹ See, for example, *California v American Stores Co*, 495 US 271, 281 (1990) (“[T]he simple grant of authority in § 16 to ‘have injunctive relief’ would seem to encompass divestiture just as plainly as the comparable language in § 15. . . . [T]he statutory language indicates Congress’ intention that traditional principles of equity govern the grant of injunctive relief.”); *United States v United States Steel Corp*, 251 US 417, 452 (1920) (remarking that the Sherman Act directs “that the courts of the nation shall prevent and restrain [monopolies] . . . but [that] command is necessarily submissive to the conditions which may exist and the usual powers of a court of equity to adapt its remedies to those conditions”).

¹⁶⁰ See *Ford Motor Co v United States*, 405 US 562, 573 n 8 (1972) (according the district court broad jurisdiction to fashion appropriate relief to restore competition after Ford’s acquisition of a sparkplug manufacturer diminished competition in the sparkplug market).

¹⁶¹ See *id* (internal citations omitted).

¹⁶² See *Agency Holding Corp v Malley-Duff & Associates, Inc*, 483 US 143, 151 (1987) (analogizing the Clayton Act and RICO as to the statutes’ remedies, and as to the type of harm each seeks to remedy, to support the conclusion that civil RICO should follow the Clayton Act’s limitations period).

¹⁶³ See *id* at 156 (adopting the Clayton Act’s limitations period for civil RICO because “the Clayton Act clearly provides a far closer analogy than any available state statute,” and because the four-year limitations period was of appropriate length to address “the federal policies that lie behind RICO and the practicalities of RICO litigation”).

¹⁶⁴ 528 US 549 (2000).

the Court rejected the minority “injury and pattern discovery” rule¹⁶⁵ because it required less of RICO plaintiffs than the traditional federal accrual rule of injury discovery, which “clash[ed] with the limitations imposed on Clayton Act suits.”¹⁶⁶ By applying the same rule in civil RICO cases as in antitrust suits, the Court “honor[ed] an analogy that Congress itself accepted and relied upon.”¹⁶⁷ Also, in determining whether RICO requires plaintiffs to demonstrate proximate cause, the Court assumed that Congress intended the words in the RICO statute to have the same meaning as the same words used in the antitrust statutes.¹⁶⁸ Additionally, Justice Scalia has noted that the “purpose, structure, and aims of the two schemes [are] quite similar.”¹⁶⁹ With the analogy between RICO and the antitrust statutes firmly entrenched in the Court’s jurisprudence, the Court’s antitrust decisions point toward the conclusion that district courts should have the power to order disgorgement when it serves to forestall future RICO violations.

The Supreme Court’s antitrust precedent favors a reading of the “prevent and restrain” language similar to the Second Circuit’s, but some decisions suggest that general deterrence of antitrust violations serves to “prevent and restrain” future violations. The Court appeared to limit district courts’ equitable power to fashion forward-looking remedies when it authorized remedies that “eliminate the effects” of the violation and “assure the public freedom from” the illegal conduct.¹⁷⁰ Additionally, it has also stressed that “[t]he sole function of an action for injunction is to forestall future violations.”¹⁷¹

On the other hand, some decisions seem to conclude that courts have broader power in enforcing the antitrust laws. Justice Stevens explained that “[t]he Sherman Act was enacted virtually unanimously in 1890 to protect the national economy from the pernicious effects of

¹⁶⁵ Under the “injury and pattern discovery” rule, the statute of limitations begins to run only after the plaintiff discovers or should have discovered both the injury and the requisite pattern of racketeering. *Id.* at 553.

¹⁶⁶ *Id.* at 557.

¹⁶⁷ *Id.*

¹⁶⁸ See *Holmes*, 503 US at 268 (1992) (noting that in RICO, Congress “used the same words [as in the antitrust statutes], and we can only assume it intended them to have the same meaning that courts had already given them”).

¹⁶⁹ *Klehr v A.O. Smith Corp.*, 521 US 179, 198 (1997) (Scalia concurring in part and concurring in the judgment). The majority reiterated that “the Clayton Act analogy [to RICO] is helpful.” *Id.* at 188 (majority).

¹⁷⁰ See *Ford Motor Co.*, 405 US at 573 n 8 (emphasis altered and internal citations omitted).

¹⁷¹ *United States v Oregon State Medical Society*, 343 US 326, 333 (1952). The Court went on to say that the purpose of the injunctive relief “is so unrelated to punishment or reparations for those past that its pendency or decision does not prevent concurrent or later remedy for past violations by indictment or action for damages by those injured.” *Id.*

regulation by private cartel and to vest the federal courts with jurisdiction adequate to exert such remedies as would fully accomplish the purposes intended.”¹⁷² The Court has also echoed this sentiment in some older decisions.¹⁷³ In these opinions, the Court indicated that courts have the power to issue injunctions as a general deterrent.¹⁷⁴ This comparison with antitrust precedent supports this Comment’s conclusion that district courts should have the equitable power to order disgorgement in civil RICO actions brought by the government where the order would directly serve to forestall future violations; indeed, antitrust precedent may even direct an interpretation of RICO which allows disgorgement as a general deterrent.

Antitrust precedent also supports Judge Tatel’s distinction between *Mitchell* and *Meghrig* based on the fact that the government brought suit in *Mitchell*¹⁷⁵ and a private party brought the action in *Meghrig*.¹⁷⁶ In the antitrust context, the Court indicated that “[a] Government plaintiff, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm . . . [a]nd a Government plaintiff has legal authority broad enough to allow it to carry out this mission.”¹⁷⁷ Courts’ broad power to grant the government’s requested relief contrasts with their more narrow power in addressing private parties’ requests for relief.¹⁷⁸ The Court underscored this divergence when asserting that “it is well settled that once the Government has

¹⁷² See *Vendo Co v Lektro-Vend Corp*, 433 US 623, 648–49 (1977) (Stevens dissenting) (internal quotations omitted) (emphasizing the Sherman Act’s broad grant of jurisdiction to support the conclusion that the federal courts have jurisdiction to enjoin a litigant’s use of state court proceedings to undermine market competition).

¹⁷³ See, for example, *United States v Crescent Amusement Co*, 323 US 173, 189 (1944) (noting that in Sherman Act cases the Court has consistently recognized “that the government should not be confined to an injunction against further violations”); *United States Steel Corp*, 251 US at 452 (observing that the Sherman Act is “clear in its direction that the courts of the Nation shall prevent and restrain [monopolies]” but that “the command is submissive to the conditions which may exist and the usual powers of a court of equity to adapt its remedies to those conditions”).

¹⁷⁴ *Crescent Amusement*, 323 US at 189 (“Those who violate the [Sherman] Act may not reap the benefits of their violations.”).

¹⁷⁵ See *Mitchell*, 361 US at 334.

¹⁷⁶ See *Meghrig*, 516 US at 481.

¹⁷⁷ *F. Hoffmann-La Roche Ltd v Empagran SA*, 542 US 155, 170 (2004) (maintaining that precedent where the government brought antitrust charges against foreign defendants did not indicate that private plaintiffs may bring claims for foreign antitrust harms under the Sherman Act).

¹⁷⁸ *Id.* at 171 (“Private plaintiffs, by way of contrast, are far less likely to be able to secure broad relief.”). See also *American Stores*, 495 US at 295 (“Our conclusion that a district court has the power to order divestiture in appropriate cases brought [by private plaintiffs under the Clayton Act] does not, of course, mean that such power should be exercised in every situation in which the Government would be entitled to such relief.”).

successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.”¹⁷⁹ This reinforces the conclusion that district courts should have greater equitable power when granting relief requested by the government in the RICO context. It also bolsters the claim that *Mitchell*, and not *Meghrig*, should control this situation.

CONCLUSION

Congress enacted RICO to combat a wide range of enterprise criminality, and granted the courts jurisdiction to order remedies for RICO violations. The civil portion of RICO authorizes district courts to “prevent and restrain” RICO violations. The circuit courts that have considered whether this grant of equitable power includes the authority to order disgorgement issue have reached different conclusions. In the Second Circuit and the Fifth Circuit, courts can order disgorgement when it would serve to prevent future violations. The Second Circuit and Fifth Circuit Courts of Appeals relied on ambiguous statutory language to justify the outcome they reached. The D.C. Circuit, however, concluded that disgorgement could never be a forward-looking remedy as required by its reading of the statute.

In making this determination, the D.C. Circuit misapplied Supreme Court precedent. In its attempt to reconcile *Meghrig* and *Mitchell*, it ignored the fact that the statutes at issue in those cases shared identical jurisdictional language. *Meghrig* and *Mitchell* can be reconciled by looking at the objectives of the respective statutes. By applying this same objective-focused reading to RICO, this Comment concludes that district courts should have the power to order disgorgement in a civil RICO suit brought by the government. Disgorgement could serve to “prevent and restrain” violations of RICO both by operating as a general deterrent and by reducing the funds available to chronic RICO violators to set up other offending enterprises.

Additionally, the Supreme Court’s antitrust jurisprudence fortifies the conclusion that disgorgement should be available as a remedy when the government requests it in a civil RICO action. The Court has repeatedly recognized the usefulness of using antitrust law to inform interpretations of RICO. At the very least, antitrust precedent indicates that district courts should have the power to order disgorgement

¹⁷⁹ *United States v E.I. du Pont de Nemours & Co*, 366 US 316, 334 (1961) (directing complete divestiture of the du Pont company’s stock in General Motors, as a remedy for du Pont’s violation of the Clayton Act).

where it would specifically forestall future violations. It also lends support to the permissibility of using disgorgement as a general deterrent. Because both the analogy to antitrust law and the purposive reading of the jurisdictional language based on the reconciliation of *Meghrig* and *Mitchell* support allowing disgorgement, district courts should have the power to order disgorgement in civil RICO actions brought by the government.