

# *Marquette Benefits and Social Welfare Law Review*

---

Volume 19  
Issue 1 Fall

Article 4

---

10-2017

## *The Prosecution of Climate Change Dissent*

Follow this and additional works at: <http://scholarship.law.marquette.edu/benefits>

 Part of the [Criminal Law Commons](#), [Disability Law Commons](#), [Elder Law Commons](#), and the [Environmental Law Commons](#)

---

### Recommended Citation

Richard Mandel & Craig P. Ehrlich, *The Prosecution of Climate Change Dissent*, 19 *Marq. Benefits & Soc. Welfare L. Rev.* 43 (2017).

*This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Benefits and Social Welfare Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).*

## THE PROSECUTION OF CLIMATE CHANGE DISSENT

**Richard Mandel\* & Craig P. Ehrlich\*\***

A May 2015 op-ed in the Washington Post by Sen. Sheldon Whitehouse (D. RI) accused the fossil fuel industry of funding a campaign to mislead Americans about the environmental harm caused by carbon pollution. The Attorney Generals of New York and Massachusetts began investigating Exxon Mobil. We look at these two investigations through the lenses of the federal mail and wire fraud statutes (at issue in the racketeering case against big tobacco), and the First Amendment.

We analyze the difficulty of prosecuting someone under the federal mail and wire fraud statutes for expressing an opinion, and discuss why scientific statements are more akin to opinions than statements of fact. We consider a related view, expressed by some courts, that complex scientific or academic matters are unsuited for resolution by a court of law. We conclude that a case can be made against the Exxon chairmen only if the chairmen did not actually believe the opinions they uttered. Holding the chairmen to the standard of an expert, their opinions entail liability only if the opinions lacked a reasonable basis, or if the chairmen knew material facts, unknown to the public, which make it unreasonable to hold such opinions.

Even if the case could be made that the Exxon statements were not true, climate change is a matter of public concern and active public debate, so that even if the statements could be categorized as a form of commercial speech, the First Amendment would allow only counter speech as a remedy. We conclude that Sen. Whitehouse's analogy to the tobacco case was misconceived, that it is highly unlikely that the Exxon statements can lead to RICO liability, or fraud liability of any kind, that there is no probable cause to believe that an offense has been committed, and that the AGs' investigations are misconceived.

---

\* Associate Professor of Law, Babson College.

\*\* Associate Professor of Law, Babson College.

## TABLE OF CONTENTS

I. INTRODUCTION .....	45
A. <i>A Current Orthodoxy</i> .....	45
B. <i>The Heresy</i> .....	45
C. <i>The Investigations</i> .....	46
D. <i>The Subpoenas</i> .....	47
E. <i>The Alleged Misstatements</i> .....	49
II. FACT VERSUS OPINION .....	51
A. <i>The Well Settled Meaning of Fraud</i> ....	51
B. <i>The Opinion of an Expert</i> .....	55
C. <i>The Tobacco Litigation and Mens</i> <i>Rea</i> .....	58
D. <i>Materiality</i> .....	60
III. FACT VERSUS OPINION IN SCIENCE .....	63
A. <i>Scientific Statements</i> .....	63
B. <i>Conclusion</i> .....	68
IV. FREEDOM OF SPEECH .....	68
A. <i>The Remedy for Speech That is False is</i> <i>Speech That is True</i> .....	68
B. <i>The Exxon Chairmen's Statements are</i> <i>Protected under the First Amendment</i> <i>unless they were "Misleading" and</i> <i>made in the Context of Commercial</i> <i>Speech</i> .....	70
C. <i>Distinguishing Commercial from</i> <i>Political Speech</i> .....	71
D. <i>The Exxon Statements are Political</i> <i>Speech</i> .....	77
E. <i>Narrow Tailoring is Still Required</i> <i>Even if the Exxon Statements are</i> <i>Commercial Speech</i> .....	81
V. CONCLUSION .....	84

## I. INTRODUCTION

### A. A Current Orthodoxy

A 2013 paper called *Quantifying The Consensus On Anthropogenic Global Warming in the Scientific Literature* asserted that ninety-seven percent of climate scientists agree that humans are causing global warming.<sup>1</sup> The study was “tweeted” by President Barack Obama.<sup>2</sup> According to the Washington Post, “scientists” say that the debate about this “is over.”<sup>3</sup> John Cook, the author of the 2013 study, believes that doubters use “telltale techniques” to “distort the science.”<sup>4</sup>

### B. The Heresy

The heresy is, as one science writer put it:

[Y]ou can accept all the basic tenets of greenhouse physics and still conclude that the threat of a dangerously large warming is so improbable as to be negligible, while the threat of real harm from climate-mitigation policies is already so high as to be worrying, that the cure is proving far worse than the disease is ever likely to be.<sup>5</sup>

---

1. John Cook et al., *Quantifying the Concensus on Anthropogenic Global Warming in the Scientific Literature*, ENVTL. RESEARCH LETTERS (May 15, 2013), at 1-2, <http://iopscience.iop.org/article/10.1088/1748-9326/8/2/024024/pdf> [<https://perma.cc/C7US-NDSQ>].

2. Barack Obama (@BarackObama), TWITTER (May 16, 2013, 10:48 AM), <https://twitter.com/barackobama/status/335089477296988160> [<https://perma.cc/V5DN-Z8TF>]; In his 2014 State of the Union address, the President said “the debate is settled. Climate change is a fact.” Barack Obama, President of the United States, President Barack Obama’s State of the Union Address (Jan. 28, 2014), <https://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address> [<https://perma.cc/7LQX-HTGM>].

3. Chelsea Harvey, *Research Shows — Yet Again — That There’s No Scientific Debate About Climate Change*, THE WASHINGTON POST (Apr. 15, 2016), <https://www.washingtonpost.com/news/energy-environment/wp/2016/04/15/research-shows-yet-again-that-theres-no-scientific-debate-about-climate-change/> [<https://perma.cc/N24J-SQ62>].

4. John Cook, *The 5 Telltale Techniques of Climate Change Denial*, CNN: OPINION (July 22, 2015, 12:25 PM), <http://www.cnn.com/2015/07/22/opinions/cook-techniques-climate-change-denial/> [<https://perma.cc/QT82-BQFG>].

5. Matt Ridley, Angus Millar Lecture at the RSA in Edinburgh, in *Scientific Heresy*, BISHOP HILL BLOG (Nov. 1, 2011), <http://www.bishop-hill.net/blog/2011/11/1/scientific-heresy.html> [<https://perma.cc/GN5E-2RQF>].

As for the odds of a dangerously large warming, “atmospheric levels of carbon dioxide have been vastly higher through most of Earth’s history. Climates both warmer and colder than the present have coexisted with these higher levels.”<sup>6</sup>

### *C. The Investigations*

A May 2015 op-ed in the Washington Post by Senator Sheldon Whitehouse (D. RI) accused the fossil fuel industry of “funding a massive and sophisticated campaign to mislead the American people about the environmental harm caused by carbon pollution.” The Senator supported his accusation, stating, “their activities are often compared to those of Big Tobacco denying the health dangers of smoking. Big Tobacco’s denial scheme was ultimately found by a federal judge to have amounted to a racketeering enterprise.”<sup>7</sup>

The Senator offered no specific example of any misstatement made by any member of the fossil fuel industry, but the expression of such heresies has become the target of law enforcement. The attorney generals of at least two states, New York and Massachusetts, are investigating Exxon Mobil for possible fraud for expressing opinions, such as “efforts to address climate change should focus on engineering methods to adapt to shifting weather patterns and rising sea levels rather than trying to eliminate use of fossil fuels.”<sup>8</sup> New York is investigating possible violations of the state’s Martin Act<sup>9</sup> and Massachusetts is investigating possible violations of its Consumer Protection Act.<sup>10</sup>

---

6. Richard Lindzen, *The Political Assault on Climate Skeptics*, THE WALL STREET JOURNAL: COMMENTARY (Mar. 4, 2015), <http://www.cato.org/publications/commentary/political-assault-climate-skeptics> [<https://perma.cc/HS4E-PMQV>].

7. Sheldon Whitehouse, *The Fossil-fuel Industry’s Campaign to Mislead the American People*, THE WASHINGTON POST: OPINIONS (May 29, 2015), [https://www.washingtonpost.com/opinions/the-fossil-fuel-industrys-campaign-to-mislead-the-american-people/2015/05/29/04a2c448-0574-11e5-8bda-c7b4e9a8f7ac\\_story.html](https://www.washingtonpost.com/opinions/the-fossil-fuel-industrys-campaign-to-mislead-the-american-people/2015/05/29/04a2c448-0574-11e5-8bda-c7b4e9a8f7ac_story.html) [<https://perma.cc/CTM8-NJ8T>].

8. Civil Investigative Demand from Attorney General Maura Healey to Exxon Mobil Corporation (Apr. 19, 2016), (on file with the author in <http://www.mass.gov/ago/docs/energy-utilities/exxon/ma-exxon-cid-.pdf> [<https://perma.cc/BVZ3-4BEE>]).

9. New York General Business Law article 23-A, sections 352–353, authorizes the state’s attorney general to investigate and prosecute securities fraud. N.Y. Gen. Bus. §§ 352-353 (McKinney 2017).

10. Civil Investigative Demand, *supra* note 8, at 14-15.

Our focus, though, is not on New York or Massachusetts law. Our focus is on the federal mail and wire fraud statutes because those were the statutes at issue in the case cited by Sen. Whitehouse as precedent, the racketeering case against big tobacco. Our thesis is that the federal mail and wire fraud statutes are directed against misstatements of fact, not opinion, and that even if a case against Exxon could be made under these statutes, doing so would run afoul of the First Amendment.

We wrap up this first part with a look at the Massachusetts Civil Investigative Demand served upon Exxon, and its enumeration of the specific statements made by Exxon chairmen over the years which Massachusetts is investigating. Part II is an analysis of whether and how someone can be prosecuted under the federal mail and wire fraud statutes for expressing an opinion. Part III is a discussion of why these scientific statements in question are more akin to opinions than statements of fact. Part IV is an application of the First Amendment to the statements made by the Exxon chairmen, and Part V is our conclusion.

#### ***D. The Subpoenas***

In March 2016, the Attorney General of New York hosted a New York City press conference dubbed “AGs United For Clean Power Coalition.”<sup>11</sup> Former Vice President Al Gore was the event’s featured speaker, and attorneys general or staff members from over a dozen other states, the District of Columbia, and the Virgin Islands were in attendance.<sup>12</sup> The attorneys general called themselves “the Green 20 (a reference to the number of participating attorneys general), and explained that their mission was to ‘com[e] up with creative ways to enforce laws being flouted by the fossil fuel industry.’”<sup>13</sup> As Sen. Whitehouse did in his op-ed, they analogized their efforts to “the long struggle against the fraudulent activities of the tobacco companies.”<sup>14</sup> Exxon Mobil

---

11. *Al Gore and New York Attorney General Eric Schneiderman Launch AGs United For Clean Power Coalition*, The Climate Reality Project (Mar. 30, 2016, 10:00AM), <https://www.climateRealityProject.org/blog/al-gore-and-new-york-attorney-general-eric-schneiderman-launch-ags-united-clean-power-coalition> [<https://perma.cc/NP5N-Z2Z3>].

12. Plaintiff’s Original Petition for Declaratory Relief ¶ 21, *Exxon Mobil v. Walker*, District Court of Tarrant County, Texas, (No. 017-284890-16).

13. *Id.* at ¶ 22.

14. Al Gore, Vice President, United States, Remarks at AGs United For Clean Power Press Conference (Mar. 29, 2016) *in* Plaintiff’s Original Petition for Declaratory Relief p. 6, *Exxon Mobil v. Walker*, District Court of Tarrant County, Texas, (No. 017-

has been served with at least three related subpoenas.<sup>15</sup> The New York Attorney General served Exxon on November 4, 2015.<sup>16</sup> The New York subpoena reportedly sought “information about [Exxon’s] research on and response to climate change over several decades”<sup>17</sup> in order to determine whether “statements made” are inconsistent with the company’s own research in possible violation of the State’s Martin Act.<sup>18</sup> Exxon appears to have voluntarily complied with the New York subpoena. It was reported that Exxon turned over more than 10,000 pages of records in early 2016.<sup>19</sup>

A second subpoena was issued by the Attorney General of the Virgin Islands on March 15, 2016.<sup>20</sup> The Virgin Islands subpoena referred to no specific statement made by ExxonMobil, and sought “[a]ll public statements [the company] made concerning Climate Change.”<sup>21</sup> Exxon Mobil challenged the subpoena in Texas state court.<sup>22</sup> The Virgin Islands’ Attorney General’s subpoena was withdrawn and ExxonMobil’s complaint challenging it voluntarily dismissed on June 29, 2016.<sup>23</sup>

The Massachusetts Attorney General issued a Civil Investigative Demand (CID) on April 19, 2016.<sup>24</sup> The CID

284890-16).

15. Justin Gillis, *Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General*, THE NEW YORK TIMES (Nov. 5, 2015), <http://www.nytimes.com/2015/11/06/science/exxon-mobil-under-investigation-in-new-york-over-climate-statements.html> [<https://perma.cc/MT99-HGRJ>]; David Hasemyer, *Exxon Fights Subpoena in Widening Climate Probe, Citing Violation of Its Constitutional Rights*, INSIDER CLIMATE NEWS (Apr. 14, 2016), <https://insideclimatenews.org/news/13042016/exxon-virgin-islands-subpoena-climate-change-investigation-violates-rights-claude-walker> [<https://perma.cc/PM3E-PDGB>]; Civil Investigative Demand, *supra* note 8 at 14-15.

16. Gillis, *supra* note 15.

17. Lynn Cook, *Exxon Mobil Gets Subpoena From N.Y. Regarding Climate-Change Research; Attorney General Schneiderman Seeks Information About Research and Response to Climate Change*, THE WALL STREET JOURNAL (Nov. 5, 2015), <http://www.wsj.com/articles/exxon-mobil-gets-subpoena-from-n-y-regarding-climate-change-research-1446760684> [<https://perma.cc/C398-NC4V>].

18. Gillis, *supra* note 15.

19. Hasemyer, *supra* note 15.

20. Plaintiff’s Original Petition for Declaratory Relief ¶ 20, *Exxon Mobil v. Walker*, District Court of Tarrant County, Texas, (No. 017-284890-16).

21. *Id.* at p. 3.

22. Hasemyer, *supra* note 15.

23. Terry Wade, *U.S. Virgin Islands to Withdraw Subpoena in Climate Probe into Exxon*, REUTERS (June 26, 2016), <http://www.reuters.com/article/us-exxon-mobil-climatechange-idUSKCN0ZF2ZP> [<https://perma.cc/V9PB-KEJ7>].

24. Massachusetts Attorney General to serve a pre suit civil investigative demand if she has “reasonable cause” to believe that any person has violated the

purports to investigate whether Exxon Mobil committed consumer fraud or securities fraud in violation of Massachusetts law.<sup>25</sup>

Our focus is the application of the federal mail and wire fraud statutes to, what some have called, “climate change denial.”<sup>26</sup> The Massachusetts CID is the starting point for our analysis of the federal mail and wire fraud statutes because it identifies eleven specific ExxonMobil statements regarding climate change.<sup>27</sup> This is the only detailed statement we have found which enumerates any alleged misstatement with particularity, beyond the general claim that big oil has engaged in a campaign to mislead the public.<sup>28</sup>

### *E. The Alleged Misstatements*

According to the Massachusetts Attorney General, Exxon is alleged to have known of catastrophic effects of climate change, which could significantly diminish its assets and businesses, but falsely downplayed its “knowledge of the extent of climate-driven risk to its assets.”<sup>29</sup> The Massachusetts CID seeks discovery of documents relating to the following statements made by chairmen of Exxon. The first five were made by Exxon Chairman Lee R. Raymond to the World Petroleum Congress, Beijing, People’s Republic of China on October 31, 1997.<sup>30</sup>

---

Massachusetts Consumer Protection Act. The CID was issued as part of a pending investigation into potential violations of M.G.L. c. 93 A, § 2, which states that “deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” The allegedly wrongful acts arose from the marketing and sale of energy and other fossil fuel derived products to consumers in Massachusetts, and the marketing and sale of securities to investors in Massachusetts.

25. *Id.* at 1.

26. *The Road to a Paris Climate Deal*, THE NEW YORK TIMES: ENVIRONMENT (Dec. 11, 2015 8:53PM), <http://www.nytimes.com/interactive/projects/cp/climate/2015-paris-climate-talks/where-in-the-world-is-climate-denial-most-prevalent> [<https://perma.cc/4HF9-S86Z>].

27. Civil Investigative Demand, *supra* note 8, at 14-15.

28. E.g., William C. Tucker, *Deceitful Tongues: Is Climate Change Denial A Crime?*, 39 ECOLOGY L. QUARTERLY 831 (2012).

29. The Commonwealth’s Consolidated Memorandum Opposing Exxon’s Motion To Set Aside Or Modify The Civil Investigative Demand Or For A Protective Order And Supporting The Commonwealth’s Cross-Motion To Compel Exxon To Comply With The Civil Investigative Demand, In Re Civil Investigative Demand at p. 1-2 (Demand no. 2016-EPD-36) <http://www.mass.gov/ago/docs/energy-utilities/exxon/comm-memo-support.pdf> [<https://perma.cc/9AUU-QQ99>].

30. Civil Investigative Demand, *supra* note 8, at 14.

1. "It is highly unlikely that the temperature in the middle of the next century will be significantly affected whether policies are enacted now or 20 years from now."<sup>31</sup>

2. "Forecasts of future warming come from computer models that try to replicate Earth's past climate and predict the future. They are notoriously inaccurate. None can do it without significant overriding adjustments."<sup>32</sup>

3. "Proponents of the agreements [that could result from the Kyoto Climate Change Conference in December 1997] say they are necessary because burning fossil fuels causes global warming. Many people - politicians and the public alike - believe that global warming is a rock-solid certainty. But it's not."<sup>33</sup>

4. "To achieve this kind of reduction in carbon dioxide emissions most advocates are talking about, governments would have to resort to energy rationing administered by a vast international bureaucracy responsible to no one."<sup>34</sup>

5. "We also have to keep in mind that most of the greenhouse effect comes from natural sources, especially water vapor. Less than a quarter is from carbon dioxide, and, of this, only four percent of the carbon dioxide entering the atmosphere is due to human activities - 96 percent comes from nature."<sup>35</sup>

The next four were made by Exxon Chairman Rex W. Tillerson in his June 27, 2012, address to the Council on Foreign Relations.<sup>36</sup>

6. "Efforts to address climate change should focus on engineering methods to adapt to shifting weather patterns and rising sea levels rather than trying to eliminate use of fossil fuels."<sup>37</sup>

7. "Humans have long adapted to change, and governments should create policies to cope with the Earth's rising temperatures."<sup>38</sup>

8. "Changes to weather patterns that move crop production areas around we'll adapt to that. It's an engineering problem and it has engineering solutions."<sup>39</sup>

---

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 14-15.

37. *Id.* at 14.

38. *Id.*

39. *Id.* at 15.

9. “Issues such as global poverty [are] more pressing than climate change, and billions of people without access to energy would benefit from oil and gas supplies.”<sup>40</sup>

The tenth is from Chairman Tillerson’s statement regarding Climate Change and Global Warming, on or about May 30, 2013, to shareholders at an Exxon shareholder meeting in Dallas, Texas.<sup>41</sup>

10. “What good is it to save the planet if humanity suffers?”<sup>42</sup>

The last is from Chairman Tillerson’s speech *Unleashing Innovation to Meet Our Energy and Environmental Needs*, presented to the 36th Annual Oil and Money Conference in London, England, October 17, 2015.<sup>43</sup>

11. “Exxon’s scientific research on climate change, begun in the 1970s, led to work with the U.N.’s Intergovernmental Panel on Climate Change and collaboration with academic institutions and to reaching out to policymakers and others, who sought to advance scientific understanding and policy dialogue.”<sup>44</sup>

Exxon Mobil has challenged the subpoena in federal district court<sup>45</sup> and Massachusetts state court.<sup>46</sup>

## II. FACT VERSUS OPINION

### A. *The Well Settled Meaning of Fraud*

As Sen. Whitehouse wrote in his op-ed, the federal government brought a civil RICO action in 1999 against cigarette manufacturers.<sup>47</sup> The district court in *United States v Philip Morris* found, and the court of appeals affirmed, that the manufacturers had committed a pattern of predicate acts, consisting of mail and wire fraud about the health effects of

---

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Exxon Mobil v. Healey, No. 4:16-CV-469 (N.D. Tex. Filed June 15, 2016).

46. Civil Investigative Demand from Attorney General Maura Healey to Exxon Mobil, *supra* note 10.

47. Sheldon Whitehouse, *The Fossil-Fuel Industry’s Campaign to Mislead the American People*, THE WASHINGTON POST: OPINIONS (May 29, 2015), [https://www.washingtonpost.com/opinions/the-fossil-fuel-industrys-campaign-to-mislead-the-american-people/2015/05/29/04a2c448-0574-11e5-8bda-c7b4e9a8f7ac\\_story.html?utm\\_term=.dbb51ea3dd60](https://www.washingtonpost.com/opinions/the-fossil-fuel-industrys-campaign-to-mislead-the-american-people/2015/05/29/04a2c448-0574-11e5-8bda-c7b4e9a8f7ac_story.html?utm_term=.dbb51ea3dd60) [https://perma.cc/P6PK-36VG].

smoking.<sup>48</sup> The Racketeer Influenced Corrupt Organizations Act enables the government to use the mail and wire fraud statutes, among a wide array of federal and state criminal statutes, as the basis for a RICO case. RICO criminalizes a pattern of repeated “predicate acts.”<sup>49</sup> The federal mail and wire fraud statutes are among the listed predicate acts.<sup>50</sup> A pattern requires at least two predicate acts within ten years.<sup>51</sup> RICO authorizes criminal prosecution,<sup>52</sup> as well as civil suits by the government and private parties.<sup>53</sup>

In a mail or wire fraud case, the government must prove that:

- (1) the defendant engaged in a scheme to defraud;
- (2) the defendant [knew that its statement was false, and] acted with the specific intent to defraud [the victim of their money or property]; (3) the scheme resulted, or would result upon completion, in the loss of [the victim’s] money [or] property; and (4) the mails or interstate . . . wires were (a) used in furtherance of the scheme, . . . and (b) the defendant . . . caused that use.<sup>54</sup>

“To prove a scheme to defraud, the government must show that [the defendant] made a material false statement, misrepresentation, or promise, or concealed a material fact.”<sup>55</sup> It matters whether a challenged statement is fact or opinion. “[O]pinions are a matter ‘of which many men will be of many minds.’”<sup>56</sup> Since “everyone is entitled to his own opinion, but not his own facts,”<sup>57</sup> federal fraud statutes and rules proscribe untrue statements of fact, and misleading omissions of fact, as does the

---

48. *United States v. Phillip Morris*, 566 F.3d 1095, 1116 (D.C. Cir. 2009).

49. 18 U.S.C. § 1962(a) (2017); *see also* 18 U.S.C. § 1963(a) (2017).

50. 18 U.S.C. § 1961(1) - (5).

51. 18 U.S.C. § 1961(5).

52. 18 U.S.C. § 1963(a).

53. 18 U.S.C. § 1964 (1970).

54. J. Kelly Strauder & Sandra Jordan, *White Collar Crime: Cases, Materials, and Problems*, (3rd ed. 2015)

55. *U.S. v. Weimert*, 819 F.3d 351, 355 (7th Cir. 2016).

56. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS*, (West Publishing Co.: St. Paul, Minnesota 5th ed., 1984).

57. Attributed variously to Daniel Patrick Moynihan, Alan Greenspan and Bernard Baruch. Garson O’Toole, *Quote: Everyone is Entitled to His Own Opinion, But Not His Own Facts* (Nov. 17, 2010), <http://listserv.linguistlist.org/pipermail/ads-l/2010-November/104693.html> [<https://perma.cc/ZM9S-A96Z>].

common law.<sup>58</sup> The “well-settled meaning. . . of ‘fraud’” in the mail and wire fraud statutes “required a misrepresentation or concealment of material fact.”<sup>59</sup>

How does one tell the difference between a fact and an opinion? “Most important,” according to the Supreme Court in *Omnicare v Laborers District Council*, “a statement of fact (‘the coffee is hot’) expresses certainty about a thing, whereas a statement of opinion (‘I think the coffee is hot’) does not.”<sup>60</sup> In the words of the Restatement Second of Contracts and the Restatement Second of Torts “[a]n assertion is one of opinion if it expresses only a belief, without certainty, as to the existence of a fact or expresses only a judgment as to quality, value, authenticity, or similar matters.”<sup>61</sup> Again, “[t]he difference is that between ‘This is true,’ and ‘I think this is true, but I am not sure.’ The important distinction is between assertions of knowledge and those of opinion, rather than assertions of fact and those of

---

58. *E.g. Neder v. United States*, 527 U.S. 1, 22 (1999) (federal mail fraud, wire fraud, and bank fraud); Section 11 of the Securities Act of 1933 similarly provides a cause of action, “[i]n case any part of the registration statement . . . contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading” 15 U.S.C. § 77k(a) (2017); 17 CFR § 240.10b-5(b) prohibits in connection with the purchase or sale of a security, the making of “any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.” (2017); 17 CFR § 240.14a-9 prohibits a proxy solicitation that is “(a) . . . is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.” (2017).

59. *Neder v. United States*, 527 U.S. 1, 22 (1999); A real estate developer had cheated banks and the IRS, and was convicted of mail fraud, wire fraud and bank fraud, and filing a false federal income tax return. The mail and wire fraud statutes make it illegal for someone “having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. . .” to use the mail or interstate wires. *Id.* at 4 quoting 18 U.S.C. §§ 1341, 1343 (2017); The Court held that materiality is an element of a “scheme or artifice to defraud” under the federal mail fraud, wire fraud, and bank fraud statutes. *Neder*, 527 U.S. at 25. “Fraud” had a well settled meaning at common law, which Congress meant to incorporate. *Id.* at 22-23. Fraud required the misrepresentation or concealment of a material fact. *Id.* at 22. The Court presumed that Congress intended to incorporate materiality, since the language of the statutes does not dictate otherwise. *Id.* at 23. In punishing not the completed crime but rather any person having devised or intending to devise a scheme, Congress meant to punish attempts, and meant only to eliminate justifiable reliance and damages as elements. *Id.* at 24-25.

60. *Omnicare v. Laborers District Council*, 135 S. Ct. 1318, 1325 (2014).

61. Restatement (Second) of Contracts § 168 (Am. Law Inst. 1981); *Accord*, W. PAGE KEETON ET AL., *supra* note 56 at 755.

opinion.”<sup>62</sup>

Of the eleven statements listed in the Massachusetts CID, seven strike us as being opinions because they express beliefs without certainty, or are plainly judgments. We focus on them in this part.

1. “It is highly unlikely that the temperature in the middle of the next century will be significantly affected whether policies are enacted now or 20 years from now.”<sup>63</sup>

4. “To achieve this kind of reduction in carbon dioxide emissions most advocates are talking about, governments would have to resort to energy rationing administered by a vast international bureaucracy responsible to no one.”<sup>64</sup>

6. “Efforts to address climate change should focus on engineering methods to adapt to shifting weather patterns and rising sea levels rather than trying to eliminate use of fossil fuels.”<sup>65</sup>

7. “Humans have long adapted to change, and governments should create policies to cope with the Earth’s rising temperatures.”<sup>66</sup>

8. “Changes to weather patterns that move crop production areas around we’ll adapt to that. It’s an engineering problem and it has engineering solutions.”<sup>67</sup>

9. “Issues such as global poverty [are] more pressing than climate change, and billions of people without access to energy would benefit from oil and gas supplies.”<sup>68</sup>

10. “What good is it to save the planet if humanity suffers?”<sup>69</sup>

Number one is a qualified forecast (“highly unlikely”, “significantly affected”) and a judgment. It does not express a certainty. In general, predictions are considered to be expressions of opinion.<sup>70</sup> Number four is a social prediction. Numbers six and seven use the word “should,” which is to give advice, to suggest. Number eight is a prediction. Number nine is a belief, a point of view. Number ten merely asks a question, and asserts nothing.

When if ever can such statements of opinion constitute mail

62. Restatement (Second) of Contracts § 168 cmt. a (Am. Law Inst. 1981).

63. Civil Investigative Demand, *supra* note 8, at 14.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 15.

68. *Id.*

69. *Id.*

70. *Hoffman v. L & M Arts*, 838 F.3d 568, 579 (5th Cir. 2016).

or wire fraud? As instructed by the Supreme Court, we look to the common law for guidance.<sup>71</sup> An opinion cannot be false, except in one sense. A speaker who does not believe what he claims has misrepresented one fact—his state of mind.<sup>72</sup> Beyond this, “a representation which purports to be one of opinion is not a sufficient foundation for the action of deceit” in the absence of what Prosser called “special circumstances.”<sup>73</sup>

For example, an auditor who states an opinion that the client’s false financial statements are true may hold a belief that is at variance from reality, but if the auditor honestly and sincerely holds that opinion, he commits no fraud. If, on the other hand, the auditor knows the client’s financial statements to be false, then he cannot honestly believe the opinion he expressed and is liable as a fraudster.

Consider again statement number six, “efforts to address climate change should focus on engineering methods to adapt to shifting weather patterns and rising sea levels rather than trying to eliminate use of fossil fuels.”<sup>74</sup> This could be fraudulent only if no engineering solution is possible, and the speaker knew so. If the chairmen of Exxon believed their stated opinions, they committed no fraud.

### ***B. The Opinion of an Expert***

In what may be only a refinement of the sole exception to the general rule that statements of opinion cannot be fraudulent, a speaker who “holds himself out or is understood as having special

---

71. *Neder v. United States*, 527 U.S. 1, 21 (1999).

72. *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991) (Proxy solicitation said merger had been approved by board of directors because it gave “shareholders an opportunity to achieve high value for their shares.” Rule 14a-9 prohibits proxy statement that is “false or misleading with respect to any material fact, or which omits” a material fact. As the board knew, the shares were worth 20% more than the price offered, and the directors said what they did to remain on the board. The Court held that statements of opinion or belief are actionable as being with respect to a material fact. Such statements are factual in two senses, as statements that the directors do act for the reasons stated or hold the belief stated, and as statements about the value of the shares. The statement of opinion must be false in both senses to be actionable); *Omnicare v. Laborers District Council*, 135 S. Ct. 1318 (2014); *See Irwin v. United States*, 338 F.2d 770 (9th Cir. 1964); *See also United States v. Wiseman*, 1993 U.S. App. 8787, 17 (unpublished) (art dealer’s conviction for mail/wire fraud affirmed, appraisals could not have been a reasonably based opinion of the artwork’s value).

73. W. PAGE KEETON ET AL., *supra* note 56, § 109 at 755.

74. Civil Investigative Demand, *supra* note 8, at 14.

knowledge of the matter which is not available to the plaintiff”<sup>75</sup> impliedly asserts, along with his opinion, that he “knows no facts which would preclude such an opinion. . . [and] knows facts which justify it.”<sup>76</sup> Presumably no expert could honestly believe the truth of their stated opinion in such circumstances.

Some courts have gone further, holding a projection actionable under the federal securities laws when an expert, in making the projection, “adopts an assumption which the factfinder concludes was objectively unreasonable in the circumstances.”<sup>77</sup> Under this view, an expert with greater access to information impliedly asserts not only that his knowledge comports with his opinion, but that a reasonable expert would also concur.

According to the Restatement Second Torts, if “the facts known to the maker are not incompatible with his [statement]” and if “he knows facts sufficient to justify him in forming” the point of view expressed, then his statement will not subject him to liability - unless the speaker did not actually believe his own statement.<sup>78</sup> Section 539 does not say that all of the facts known by the speaker must justify the statement, or that no facts be incompatible. In the context of a registration statement, the Supreme Court in *Omnicare v. Laborers District Council* noted that “[a]n opinion statement . . . is not necessarily misleading when an issuer knows but fails to disclose some fact cutting the other way . . . A reasonable investor does not expect that *every* fact known to an issuer supports its opinion.”<sup>79</sup> The phrase “the facts”

75. W. PAGE KEETON ET AL., *supra* note 65, § 109 at 760-61.

76. *Id.* at 760.

77. *Herskowitz v. Nutri/System*, 857 F.2d 179, 185 (3d Cir. 1988) (“projections are actionable” under the federal securities laws if “issued without a genuine belief or reasonable basis, thus articulating both a subjective (‘without genuine belief’) and an objective (without ‘reasonable basis’) test”).

78. Restatement (Second) of Torts § 539 (Am. Law Inst. 1977).

79. *Omnicare v. Laborers District Council*, 135 S. Ct. 1318, 1324-30 (2014). The Supreme Court looked to the Restatement of the Law, Second, Torts, 1977, § 539 Representation of Opinion Implying Justifying Facts, for guidance in deciding how Section 11 of the Securities Act of 1933 applies to statements of opinion. If a registration statement filed with the SEC either “contain[s] an untrue statement of a material fact” or “omit[s] to state a material fact . . . necessary to make the statements therein not misleading,” a purchaser of the stock may sue for damages. 15 U. S. C. §77k(a). The registration statement at issue in *Omnicare* said “We believe our contract arrangements . . . are in compliance with applicable laws [and] are legally . . . valid. . .”. The complaint alleged that *Omnicare*’s receipt of payments from suppliers violated anti-kickback laws. The Court addressed two issues. First, was there an untrue statement of material fact? The Plaintiff did not contest that the issuer’s opinion was honestly held, 135 S. Ct. at 1327, so the Court turned to the second issue: Was there a

as used in section 539 means the totality of the facts known to the speaker. A speaker may express a point of view without fear of committing fraud, even if some of the facts known to the speaker conflict with his statement, so long as all of the known facts supply a “reasonable basis” for the belief and the undisclosed facts do not “seriously undermine” the truth of the statement<sup>80</sup> or “undermine [its] foundation.”<sup>81</sup>

“This [implication of justifying facts] is true particularly when the maker is understood to have special knowledge of facts unknown to the recipient. Thus when an auditor who is known to have examined the books of a corporation states that it is in sound financial condition, he may reasonably be understood to say that his examination has been sufficient to permit him to form an honest opinion and that what he has found justifies his conclusion.”<sup>82</sup> For example, suppose that an auditor finds in the course of an audit that the client’s financial statements are not perfect. There is evidence that the client has violated generally accepted accounting principles. An honest auditor may nonetheless sign an unqualified opinion if he judges the violations to be immaterial and believes that the financial statements taken as a whole, present fairly, in all material respects, the client’s financial position.

Even if Exxon were judged according to Restatement Second Torts section 539, there is no fraud so long as the totality of the known facts supplied a “reasonable basis” for the expressed

---

misleading omission? The complaint alleged that signers nonetheless had no reasonable grounds for their opinion. According to the Court, “an investor . . . expects such an assertion to rest on some meaningful legal inquiry. . . Investors do not . . . expect opinions contained in [registration] statements to reflect baseless, off-the-cuff judgments. . . if a registration statement omits material facts about the issuer’s inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself, then section 11’s omissions clause creates liability.”

80. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 854 (D.D.C. 2006), *aff’d*, 566 F.3d 1095 (D.C. Cir. 2009) (quoting *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989) (“In the context of securities fraud litigation, courts have found that a “statement of belief contains at least three implicit factual assertions: (1) that the statement is genuinely believed; (2) that there is [a] reasonable basis for that belief; and (3) that the speaker is not aware of any undisclosed facts tending to seriously undermine the accuracy of the statement. A projection or statement of belief may be actionable to the extent that one of these implied factual assertions is inaccurate.”); *See also Omnicare*, 135 S. Ct. at 1328 (“a statement of opinion is not misleading just because external facts show the opinion to be incorrect. Reasonable investors do not understand such statements as guarantees. . .”).

81. *Arazie v. Mullane*, 2 F.3d 1456, 1467 (7th Cir. 1993).

82. Restatement (Second) of Torts § 539 cmt. (1)b (Am. Law Inst. 1977).

beliefs and the undisclosed facts do not “seriously undermine” the truth of the statements. For example, the statement, “[e]fforts to address climate change should focus on engineering methods to adapt to shifting weather patterns and rising sea levels rather than trying to eliminate use of fossil fuels,”<sup>83</sup> would be actionable only if the known facts provided no reasonable basis for believing that there can be such engineering solutions.

The other four statements made by the Exxon chairmen are arguably factual, and we address them in parts III - IV below.

### *C. The Tobacco Litigation and Mens Rea*

The government in *United States v. Philip Morris* proved 108 predicate acts of mail and wire fraud.<sup>84</sup> The manufacturers had falsely denied that cigarette smoking causes disease and that nicotine is addictive, and falsely claimed that light cigarettes present lower health risks than regular cigarettes and that secondhand smoke is not hazardous to health.<sup>85</sup>

The court of appeals’ discussion of the secondhand smoke issue is pertinent. The manufacturers contended that their statements disputing the health hazards of secondhand smoke were merely good-faith expressions of opinion. The court of appeals focused on the mental state of each defendant, and what each knew.<sup>86</sup>

The district court criticized Defendants’ statements regarding secondhand smoke as contrary to the scientific consensus. Defendants object, emphasizing that the district court found no scientific consensus emerged until the issuance of the Surgeon General’s 1986 report determining secondhand smoke to be hazardous. Moreover, they point to evidence of selected post-1986 scientific opinions casting doubt on the dangers of secondhand smoke, arguing that even then they possessed some basis for disputing the consensus.

Defendants’ objections are beside the point. The district court based its finding of fraudulent intent not just on the existence of a consensus but also on

---

83. Civil Investigative Demand, *supra* n. 8.

84. *Phillip Morris*, 566 F.3d at 1116-17.

85. *Id.*

86. *Id.* at 1126-27.

evidence of Defendants' own knowledge. Specifically, the district court found that dating back to the 1970s, Defendants' own research and analysis revealed the hazards of secondhand smoke. For example, the district court found that in 1980 a Philip Morris scientist reviewed a paper concluding that secondhand smoke caused "significant damage to airway function" in exposed nonsmokers, and found "little to criticize," deeming the paper "an excellent piece of work which could be very damaging" to the industry. In 1982, a Philip Morris—sponsored research facility concluded that the "side stream" smoke composing the bulk of secondhand smoke is "more irritating and/or toxic" than the "main stream" smoke inhaled by smokers. And several [Tobacco Institute] advertisements and press releases claimed that an independent 1981 study showing "a significant correlation between lung cancer and secondhand smoke" suffered from a statistical flaw, yet the district court found that industry consultants told TI, Reynolds, and Brown & Williamson that TI knew at the time not only that the statistical error did not exist, but also that the study was in fact correct.

[Defendants] argue that such findings reveal only facts that were known to the public and that had not, at the time, given rise to a scientific consensus. Again, Defendants miss the point. The question is not whether *other* individuals knew that Defendants' claims were false or misleading; the question is whether *Defendants* did. Regardless of whether a scientific consensus existed at any point, Defendants may be liable for fraud if they made statements knowing they were false or misleading. Based on voluminous evidence, including that summarized above, the district court circumstantially inferred that Defendants did in fact possess such fraudulent intent. Given these unchallenged findings, we have no basis for saying that the district court clearly erred in drawing that conclusion.<sup>87</sup>

---

87. *Id.* at 1126-27.

The court correctly focused on the mens rea of the defendants, but its analysis is nonetheless flawed. As the court of appeals acknowledged, the speaker of an opinion and the speaker of a false fact are fraudsters only if they intend to deceive, and do not believe what they say.<sup>88</sup> It is possible for someone in good faith to hold an opinion that is supported by some, but not all the known facts, e.g., a director may reasonably and honestly hold an opinion that the company is worth \$X, even though one of several data points suggests a lower value.<sup>89</sup> The court of appeals in *United States v. Philip Morris* did not analyze the total mix of information that was available to the defendants.<sup>90</sup> It did not determine whether all of the facts known to the defendants supplied a reasonable basis for the beliefs expressed, or whether the undisclosed facts seriously undermined the truth of the statements made.<sup>91</sup> We express no view as to what such an examination of all the evidence might have shown in that case.

Even if the Exxon chairmen knew of contradictory facts when they spoke, that alone would not lead to liability. Those facts would have to deny any reasonable basis for the opinions expressed. Those facts would have to be material.

#### ***D. Materiality***

A fact known only to the speaker and, which conflicts with the speaker's opinion, can be problematic only if that fact is material. In *Neder v. United States*, the Court held that materiality is an element of a "scheme or artifice to defraud" under the mail, wire and bank fraud statutes.<sup>92</sup> The Court cited the Restatement Second Torts definition of materiality. The Restatement instructs:

---

88. W. PAGE KEETON ET AL., *supra* note 56, § 107 at 742; Eleventh Circuit Pattern Jury Instructions, 50.1 (Criminal Cases) 2010 at 308, <http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstruction.pdf> [<https://perma.cc/E65U-J7DB>].

89. *Allied Chem. & Dye Corp. v. Steel & Tube Co.*, 120 A. 486, 494 (Del. Ch. 1923). "When the question is asked whether in a given case the price is adequate, it is readily seen that room is afforded for honest differences of opinion. While the parties to the controversy may be guilty of an intolerance of view towards each other, yet a court, when called upon to decide the question, must endeavor, as best it may, to arrive at the correct answer, making all due allowance for the range over which honestly inclined minds may wander."

90. *Philip Morris*, 566 F.3d at 1127.

91. *Id.* at 1127.

92. *Neder v. United States*, 527 U.S. 1, 25 (1999).

[a] matter is material if: (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.<sup>93</sup>

Since there is no specific gullible victim in the climate change controversy, the “reasonable man” objective standard applies. That standard asks two things, first, would a reasonable consumer consider the information important, and secondly, in connection with the challenged transaction?<sup>94</sup>

Rephrased in the language of the controversy we are discussing, the question becomes—is there a substantial likelihood that a reasonable consumer would consider it important in deciding whether to purchase gasoline that ninety-seven percent of climate scientists agree that humans are causing global warming? That seems unlikely if we apply the same standard of materiality that was applied in the tobacco litigation, a direct and significant connection between the use of the product and significant personal harm.

From the opinion of the court of appeals in *United States v. Philip Morris*,

The false statements identified by the district court would be important to a reasonable person purchasing cigarettes. For example, statements about the adverse health effects of smoking would be a matter of importance to a reasonable person deciding to purchase cigarettes. The fact that Defendants continually denied any link between smoking and cancer suggests they themselves considered the matter material. So, too, regarding Defendants’ false statements on other topics, including statements concerning: whether smoking is addictive, whether Defendants manipulated their cigarettes to control nicotine delivery, whether “light” cigarettes were less harmful than other

---

93. Restatement (Second) of Torts § 538 (Am. Law Inst. 1977).

94. *Id.*

cigarettes, whether secondhand smoke is hazardous to non-smokers, and whether Defendants concealed scientific research and destroyed documents.

Each of these topics is an important consideration for a reasonable person because each concerns **direct and significant consequences of smoking**. When deciding whether to smoke cigarettes, tobacco consumers must resolve initial reservations (or lingering qualms) about the potential for cancer, the risk of addiction, or the hazardous effects of secondhand smoke for friends, family, and others who may be exposed. Defendants' prevarications about each of these issues suggests full awareness of this obvious fact; reasonable purchasers of cigarettes would consider these statements important.

Defendants further argue that, because the scientific community had reached a consensus regarding the severely adverse health consequences of smoking, their statements to the contrary would not be believed. . . . The question, however, is not whether a reasonable person would have believed Defendants' false statements, but only whether a reasonable person would have considered the issue "of importance," and the issues considered by the district court clearly met the materiality threshold.<sup>95</sup>

Unlike the connection between cigarettes and cancer, it is not clear that the use of fossil fuel leads to direct and significant personal harm to the motorist. The climate effects of fossil fuels might not be of importance to a reasonable person in deciding whether to purchase a gallon of gasoline, since it is far from clear that the use of fossil fuels is directly harmful to the purchaser directly or indirectly, or that the costs of using fossil fuel outweigh the benefits. The calculus of the risk is subtle. The use of coal, oil and gas has powered the economic development of the world.

The American consumer may not really care about the effect of fossil fuels on the climate. While sixty-nine percent of Americans surveyed by Pew said that they support the United

---

95. *Philip Morris*, 566 F. 3d at 1122-23 (emphasis added) (citations omitted).

States government limiting greenhouse gas emissions,<sup>96</sup> suggesting that they understand the issue, an April 2015 analysis by Edmunds.com showed that American “car buyers are trading in hybrid and electric cars for SUVs at a higher rate than ever before,”<sup>97</sup> suggesting that despite knowing about the problems of greenhouse gas emissions, they just don’t care. Current low gas prices are drawing hybrid and EV owners toward gas-guzzling vehicles at a much more accelerated pace than in recent years.<sup>98</sup>

To sum up so far, the chairmen and their employer Exxon could face liability for mail or wire fraud only if the chairmen did not actually believe the opinions they uttered. Holding the chairmen to the standard of an expert, their opinions entail liability only if the opinions lack a reasonable basis, or if the chairmen knew material facts, unknown to the public, which conflicted with their opinions.

### III. FACT VERSUS OPINION IN SCIENCE

#### A. *Scientific Statements*

Another way of approaching the eleven statements is to ask whether any is a scientific inference, conclusion or forecast. These have been judicially recognized as being more akin to a statement of opinion than fact because all scientific conclusions are inherently tentative. Four of the Exxon statements are scientific statements. Statements one, two, three are forecasts (or critiques of forecasts) of temperature. Number five is a discussion of the sources of Carbon Dioxide in the atmosphere.

1. It is highly unlikely that the temperature in the middle of the next century will be significantly affected whether policies are enacted now or 20 years from now.
2. Forecasts of future warming come from

---

96. Bruce Stokes et al., Global Concern about Climate Change, Broad Support for Limiting Emissions: U.S., China Less Worried; Partisan Divides in Key Countries, PEW RESEARCH CENTER 24 (2015), <http://www.pewglobal.org/2015/11/05/global-concern-about-climate-change-broad-support-for-limiting-emissions/> [<https://perma.cc/5BVJ-VPK7>].

97. *Hybrid and Electric Vehicles Struggle to Maintain Owner Loyalty*, EDMUNDS (Apr. 21, 2015) <http://www.edmunds.com/about/press/hybrid-and-electric-vehicles-struggle-to-maintain-owner-loyalty-reports-edmundscom.html> [<https://perma.cc/RS84-ZNVD>].

98. *Id.*

computer models that try to replicate Earth's past climate and predict the future. They are notoriously inaccurate. None can do it without significant overriding adjustments.

3. Proponents of the agreements [that could result from the Kyoto Climate Change Conference in December 1997] say they are necessary because burning fossil fuels causes global warming. Many people - politicians and the public alike - believe that global warming is a rock-solid certainty. But it's not.

5. We also have to keep in mind that most of the greenhouse effect comes from natural sources, especially water vapor. Less than a quarter is from carbon dioxide, and, of this, only four percent of the carbon dioxide entering the atmosphere is due to human activities - 96 percent comes from nature.<sup>99</sup>

Unlike a seller's statement about the quality of their offered product, scientific hypotheses have been judicially recognized as being akin to opinions, at least when published in a peer reviewed journal whose readers understand that all scientific models and hypotheses are inferences, tentative and subject to revision. In *ONY, Inc., v. Cornerstone Therapeutics, Inc.*,<sup>100</sup> a false advertising case alleging violations of the Lanham Act, the Second Circuit held that "statements of scientific conclusions about unsettled matters of scientific debate cannot give rise to liability for damages."<sup>101</sup> Even though such statements "constitute assertions about the world that are in principle matters of verifiable 'fact,' for purposes of the First Amendment and the laws relating to fair competition and defamation, they are more closely akin to matters of opinion."<sup>102</sup> If applied in a mail or wire fraud case, this principle would not necessarily preclude liability for the Exxon statements immediately above. All were made in public speeches, not in peer reviewed scientific journals.<sup>103</sup> The core point deserves emphasis nonetheless. All scientific statements about the nature

---

99. Civil Investigative Demand, *supra* note 8.

100. *ONY, Inc. v. Cornerstone Therapeutics, Inc.* 720 F.3d 490, 492 (2d Cir. 2013).

101. *Id.*

102. *Id.* at 497.

103. See *Eastman Chem. Co. v. Pastipure Inc.*, 775 F.3d 230 (5th Cir. 2014) (publication was a three-page sales brochure; *ONY* distinguished).

of the world are tentative. J. Bronowski called science “a very human form of knowledge. We are always at the brink of the known . . . Every judgment in science stands on the edge of error.”<sup>104</sup> A web site created by the University of California at Berkeley for science teachers explains that:

[t]he knowledge that is built by science is always open to question and revision. No scientific idea is ever once-and-for-all “proved.” [S]cience is constantly seeking new evidence, which could reveal problems with our current understandings. Ideas that we fully accept today may be rejected or modified in light of new evidence discovered tomorrow.<sup>105</sup>

The revision of our understanding in light of new evidence is at the heart of the scientific method, defined by Oxforddictionaries.com as being, “[a] method of procedure that has characterized natural science since the 17th century, consisting in systematic observation, measurement, and experiment, and the formulation, testing, and modification of hypotheses.”<sup>106</sup>

The scientific method is not arcane. It is taught in high school.<sup>107</sup>

One might classify scientific statements about the world as factual assertions because they can be proven false. However, being inherently tentative and always subject to revision, such statements are really opinions. This was the issue in *ONY*.<sup>108</sup>

The parties were competing producers of surfactants,

---

104. J. BRONOWSKI, *THE ASCENT OF MAN* 374 (1973).

105. *Science Aims to Explain and Understand*, UNDERSTANDING SCIENCE [http://undsci.berkeley.edu/article/0\\_0\\_0/whatisscience\\_04](http://undsci.berkeley.edu/article/0_0_0/whatisscience_04) [<https://perma.cc/GQP8-XYR9>] (last visited Nov. 15, 2017).

106. SCIENTIFIC METHOD, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/scientific-method](http://www.oxforddictionaries.com/us/definition/american_english/scientific-method) [<https://perma.cc/JV4T-VXLD>] (last visited Nov. 15, 2017).

107. *See Labs and Activities*, CORNELL INSTITUTE FOR BIOLOGY TEACHERS, (CORNELL UNIVERSITY, 2014) <https://blogs.cornell.edu/cibt/labs/inquiryscientific-method/> [<https://perma.cc/F376-Z5VS>]. For example, the Cornell Institute for Biology Teachers provides support to high school biology teachers on a variety of topics, specifically including the scientific method.

108. *ONY, Inc. v. Cornerstone Therapeutics, Inc.* 720 F.3d 490, 496-97 (2d Cir. 2013).

substances that line the surface of human lungs.<sup>109</sup> “Prematurely born infants often produce inadequate surfactant levels.”<sup>110</sup> The surfactants produced and sold by the parties were the primary treatment for such infants.<sup>111</sup> In an effort to promote and sell its product, the defendant hired a third party to build a database and conduct a study of the relative effectiveness of the different surfactants.<sup>112</sup> The defendant next hired several medical doctors, to present findings based on the database at various medical conferences.<sup>113</sup> Among the findings were that defendant’s product was associated with a twenty percent lower mortality rate and a fifteen percent shorter length of stay than plaintiff’s product.<sup>114</sup> Later, the physicians published some of the findings from the same data set in a peer-reviewed journal. The Plaintiff alleged that the article contained five incorrect statements of fact about the relative effectiveness of the two products, and one misleading omission.<sup>115</sup> Plaintiff did not allege that the data presented in the article were fabricated or fraudulently created. Rather, plaintiff alleged that the inferences drawn from those data were incorrect.<sup>116</sup>

The Lanham Act provides a civil cause of action against any person who, in interstate commerce, uses any false or misleading description of fact, or false or misleading representation of fact.<sup>117</sup> “Because the Act proscribes conduct that, but for its false or misleading character, would be protected by the First Amendment, free speech principles inform our interpretation of the Act.”<sup>118</sup> “Generally, statements of pure opinion—that is, statements incapable of being proven false—are protected under the First Amendment.”<sup>119</sup>

“Plaintiff’s theory [was] that scientific claims made in print [are] statements of fact that are falsifiable, and such statements can be defamatory or represent false advertising if known to be false when made.”<sup>120</sup> The Second Circuit explained why

---

109. *Id.* at 492.

110. *Id.* at 493.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 493-94.

115. *Id.* at 494.

116. *Id.* at 494-95.

117. 15 U.S.C. § 1125(a)(1) (2012).

118. *ONY Inc.*, 720 F.3d at 496.

119. *Id.*

120. *Id.*

“[s]cientific academic discourse poses several problems for the fact-opinion paradigm of First Amendment jurisprudence.”<sup>121</sup>

Most conclusions contained in a scientific journal article are, in principle, ‘capable of verification or refutation by means of objective proof,’ . . . Indeed, it is the very premise of the scientific enterprise that it engages with empirically verifiable facts about the universe. At the same time, however, it is the essence of the scientific method that the conclusions of empirical research are tentative and subject to revision, because they represent inferences about the nature of reality based on the results of experimentation and observation. Importantly, those conclusions are presented in publications directed to the relevant scientific community, ideally in peer-reviewed academic journals that warrant that research approved for publication demonstrates at least some degree of basic scientific competence.

These conclusions are then available to other scientists who may respond by attempting to replicate the described experiments, conducting their own experiments, or analyzing or refuting the soundness of the experimental design or the validity of the inferences drawn from the results. In a sufficiently novel area of research, propositions of empirical “fact” advanced in the literature may be highly controversial and subject to rigorous debate by qualified experts. Needless to say, courts are ill-equipped to undertake to referee such controversies. Instead, the trial of ideas plays out in the pages of peer-reviewed journals, and the scientific public sits as the jury.<sup>122</sup>

[T]o the extent a speaker or author draws conclusions from non-fraudulent data, based on accurate descriptions of the data and methodology underlying those conclusions, on subjects about which there is legitimate ongoing scientific disagreement, those statements are not grounds for

---

121. *Id.*

122. *Id.* at 496-97 (citing *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 728 n.7 (1st Cir. 1992)).

a claim of false advertising under the Lanham Act.<sup>123</sup>

The Second Circuit thus dismissed a Lanham Act claim based upon an article in a peer reviewed journal which drew scientific conclusions from non-fraudulent data.<sup>124</sup> The court considered scientific statements to be opinions because they do not express certainty.<sup>125</sup> As opinions, the six Exxon scientific statements would be actionable only if the speakers did not believe them.

### ***B. Conclusion***

Analyzed according to the traditional fact-or-opinion rules, statements one, four and six through ten are opinions. Statements one, two, three and five are scientific statements, and should be treated as opinions. Only statement eleven asserts a fact, and it appears to us to be an accurate statement.<sup>126</sup> There could be liability under the federal mail and wire fraud statutes and RICO for statements one through ten, only if the chairmen did not believe their opinions, or if their opinions had no reasonable basis and the chairmen knew that.

## **IV. FREEDOM OF SPEECH**

### ***A. The Remedy for Speech That is False is Speech That is True***

For the sake of argument, let us assume for a moment that

---

123. *Id.* at 498.

124. *Id.*

125. *Id.*

126. Intergovernmental Panel on Climate Change, *The IPCC: Who Are They and Why Do Their Climate Reports Matter?*, Union of Concerned Scientists, [http://www.ucsusa.org/global\\_warming/science\\_and\\_impacts/science/ipcc-backgrounder.html#.WE3OVrIrLX4](http://www.ucsusa.org/global_warming/science_and_impacts/science/ipcc-backgrounder.html#.WE3OVrIrLX4) [<https://perma.cc/94UG-AFSY>] (last visited Nov. 15, 2017). The Intergovernmental Panel on Climate Change (IPCC) was established in 1988 by the World Meteorological Organization and the United Nations Environment Program. Climate experts from around the world synthesize the most recent climate science findings every five to seven years and present their report to the world's political leaders. The IPCC is now working on its Sixth Assessment Report. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, <https://www.ipcc.ch/index.htm> [<https://perma.cc/G35V-TZAP>] (last visited Nov. 15, 2017). Climate change experts from industry participate in the assessment process. "Industry examples have included representatives from the Electric Power Research Institute and ExxonMobil."

one or more of the eleven statements fail the truth test. The First Amendment's guarantee of free speech would still protect their speaker. The United States Supreme Court in its recent *Alvarez* decision<sup>127</sup> confronted the point directly. *Alvarez* was convicted under a federal statute criminalizing false claims to have been awarded "any decoration or medal authorized by Congress for the Armed Forces of the United States."<sup>128</sup> *Alvarez* had falsely claimed to have been awarded the Congressional Medal of Honor.<sup>129</sup> In reversing his conviction, the Court noted,

Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.<sup>130</sup>

What forms of speech are subject to content-based regulation, and would Exxon's allegedly false statements be included among them? Fortunately, the *Alvarez* Court helpfully sets forth that list.

[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories [of expression] long familiar to the bar. Among these categories are advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called fighting words, child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent, although a restriction under the last category is most difficult to sustain.<sup>131</sup>

---

127. *U.S. v. Alvarez*, 132 S. Ct. 2537 (2012).

128. 18 U.S.C. § 704(b).

129. *Alvarez*, 132 S. Ct. at 2550.

130. *Id.* at 2544.

131. *Id.* (internal citations and quotation marks omitted).

The only plausible category into which the any of the eleven statements fall is fraud as an avenue to prosecution or suppression of the Exxon statements regarding climate change.

***B. The Exxon Chairmen's Statements are Protected under the First Amendment unless they were "Misleading" and made in the Context of Commercial Speech***

The likely allegation would be that the statements were made with the intent that policy makers and consumers would reasonably rely upon them in order to induce policies and consumer choices, which would preserve the commercial viability of fossil fuels. Fraud in this context is thus virtually indistinguishable from the concept of false or misleading commercial speech, the other remaining category of potentially suppressible speech.<sup>132</sup>

The Supreme Court long ago dismissed the suggestion that commercial speech, as a category, is not entitled to First Amendment protection,

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.<sup>133</sup>

But the protection afforded commercial speech by the First Amendment is not as extensive as that provided to other forms of speech.<sup>134</sup> Specifically, the Court has approved regulation aimed

---

132. Note that the Court in *Alvarez* cites *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) a commercial speech case, as its example of a fraud case.

133. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

134. *Id.* at 750-51.

at ensuring truthfulness in advertising.<sup>135</sup> The constitutionally acceptable limits on commercial speech were spelled out by the Supreme Court in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*<sup>136</sup> in which a state agency had issued regulations prohibiting a public utility from promoting its product.<sup>137</sup>

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.<sup>138</sup>

Since none of the other categories of unprotected speech seemingly apply, the Exxon chairmen's statements are protected under the First Amendment unless they were "misleading" and made in the context of commercial speech.<sup>139</sup> The statements are not otherwise punishable.<sup>140</sup> This is especially true if the speech is seen as commentary on a political issue.<sup>141</sup>

### ***C. Distinguishing Commercial from Political Speech***

How then do we distinguish commercial from political speech? *Central Hudson* proposes a common-sense distinction "between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."<sup>142</sup>

But speech proposing a commercial transaction is not always set apart from other forms of speech. Can commercial speech claim more First Amendment protection if it is combined with, for example, political speech?

---

135. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 358 (1977).

136. 447 U.S. 557 (1980).

137. *Id.* at 585-86.

138. *Id.* at 566.

139. *Id.* at 557.

140. *Id.*

141. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 889 (2010).

142. *Cent. Hudson Gas & Electric Corp., v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980).

In *Bigelow v. Virginia*,<sup>143</sup> “[a]n advertisement carried in the appellant’s newspaper led to his conviction for a violation of a Virginia statute that made it a misdemeanor, by the sale or circulation of any publication, to encourage or prompt the procuring of an abortion.”<sup>144</sup> Abortion was illegal in Virginia at the time, but was legal in New York.<sup>145</sup> The advertisement encouraged Virginia women to use the advertiser’s services to obtain a legal abortion in New York. The Supreme Court recognized the mixed nature of this speech.

The advertisement published in appellant’s newspaper did more than simply propose a commercial transaction. It contained factual material of clear “public interest.” Portions of its message, most prominently the lines, “Abortions are now legal in New York. There are no residency requirements,” involve the exercise of the freedom of communicating information and disseminating opinion.<sup>146</sup>

Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia. The mere existence of the Women’s Pavilion in New York City, with the possibility of its being typical of other organizations there, and the availability of the services offered, were not unnewsworthy.<sup>147</sup>

After noting that mere commercial speech is not free of First Amendment protection, the Court went on to suggest that the political nature of the advertisement enhanced the protection to which it was entitled.

---

143. 421 U.S. 809 (1975).

144. *Id.* at 811.

145. *Id.* at 812-13.

146. *Id.* at 822.

147. *Id.*

The strength of appellant's interest was augmented by the fact that the statute was applied against him as publisher and editor of a newspaper, not against the advertiser or a referral agency or a practitioner. The prosecution thus incurred more serious First Amendment overtones.

If application of this statute were upheld under these circumstances, Virginia might exert the power sought here over a wide variety of national publications or interstate newspapers carrying advertisements similar to the one that appeared in Bigelow's newspaper or containing articles on the general subject matter to which [p829] the advertisement referred. [n15] Other States might do the same. The burdens thereby imposed on publications would impair, perhaps severely, their proper functioning.<sup>148</sup>

The extent to which combining commercial and political speech affects First Amendment protection was perhaps best considered in the latter case of *Bolger v. Youngs Drugs Products Corp.*<sup>149</sup> This case involved a federal law banning unsolicited advertisements for contraceptives.<sup>150</sup> The Defendant in this case sent informational pamphlets through the mail, which in addition to promoting its products discussed the desirability and availability of prophylactics in general.<sup>151</sup> Noting the combined nature of the defendant's pamphlets, the Court stated,

The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. Similarly, the reference to a specific product does not, by itself, render the pamphlets commercial speech. Finally, the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient, by itself, to turn the materials into commercial speech.<sup>152</sup>

---

148. *Id.* at 828-29.

149. 463 U.S. 60 (1983).

150. *Id.* at 59.

151. *Id.* at 62.

152. *Id.* at 66-67 (internal citations omitted).

Yet, upon the facts of this case, the Court nonetheless held,

The combination of all these characteristics, however, provides strong support for the District Court's conclusion that the informational pamphlets are properly characterized as commercial speech. The mailings constitute commercial speech notwithstanding the fact that they contain discussions of important public issues such as venereal disease and family planning. We have made clear that advertising which "links a product to a current public debate" is not thereby entitled to the constitutional protection afforded noncommercial speech. A company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions. Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.<sup>153</sup>

Thus, in the case of speech which combines the promotion of a commercial transaction with discussion and information about a political subject, the *Bolger* court recommends consideration of three factors: whether it exists in the form of a commercial advertisement, whether it mentions a specific product or products, and whether there is an economic motive for the speech.<sup>154</sup> Given that it will always be possible to attribute an economic motivation to any speech uttered by a commercial actor, does this test tend to immunize speech, which does not fulfill the first two items?

In *Kasky v. Nike, Inc.*,<sup>155</sup> a California citizen sued Nike under a California statute authorizing individuals to bring suit against businesses for committing unfair and deceptive practices.<sup>156</sup> The suit alleged that in defending itself against allegations of abusive

---

153. *Id.* at 67-68 (internal citations omitted).

154. *See id.*

155. 119 Cal. Rptr. 2d 296 (2002).

156. *Id.* at 303.

overseas employment practices, Nike had issued allegedly false press releases and other communications favorably describing the working conditions under which Nike products were manufactured.<sup>157</sup> Nike defended itself, in part, by invoking a First Amendment right to make such statements and the plaintiff countered that false and misleading commercial speech is not so protected.<sup>158</sup> Were Nike's statements commercial speech?

The California Supreme Court began its analysis by suggesting the rationale for the distinction between commercial and other forms of speech and the justification for affording the former less protection.

First, [t]he truth of commercial speech . . . may be more easily verifiable by its disseminator than . . . news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else.

Second, commercial speech is hardier than noncommercial speech in the sense that commercial speakers, because they act from a profit motive, are less likely to experience a chilling effect from speech regulation

Third, governmental authority to regulate commercial transactions to prevent commercial harms justifies a power to regulate speech that is linked inextricably to those transactions.<sup>159</sup>

Recognizing that Nike's statements did not satisfy either of the first two *Bolger* factors (they were not in the form of an advertisement, nor did they necessarily mention a particular product), the California Court cited *Bolger* as conceding that none of its factors were necessarily dispositive,

the [U.S. Supreme C]ourt not only rejected the notion that any of these factors is *sufficient* by itself, but it also declined to hold that all of these factors in combination, or any one of them individually, is

---

157. *See id.*

158. *Id.* at 304.

159. *Id.* at 307-08, (internal citations and quotation marks omitted).

*necessary* to support a commercial speech characterization.<sup>160</sup>

The California court then went on to announce its own rule:

We conclude, therefore, that *when a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception*, categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message.<sup>161</sup>

And with regard to the above third element,

this typically means that the speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services.<sup>162</sup>

In the view of the California court, therefore, commercial speech need not be in the form of an advertisement and need not expressly promote or mention a particular product.<sup>163</sup> It is enough that the speaker asserts something, which may be intended to put his company or its operations in a more favorable light.<sup>164</sup> The justifications for this expansive rule seem questionable. After all, there really is no reason to believe that commercial speakers know any more about the accuracy of statements made about their company than other speakers may know about subjects they may choose to discuss. And there is similarly no reason to believe that fear of fines, jail, public shame and other punishments would scare commercial speakers any less than other speakers. Lastly, the idea that "governmental authority to regulate commercial

---

160. *Id.* at 309.

161. *Id.* at 311.

162. *Id.* at 312.

163. *Id.*

164. *Id.* at 314.

transactions to prevent commercial harms justifies a power to regulate speech that is “linked inextricably” to those transactions” is largely circular and ignores the fact that there is a First Amendment to the United States Constitution which protects speech while no such constitutional provision gives similar protection to “commercial transactions.”<sup>165</sup>

#### ***D. The Exxon Statements are Political Speech***

But even California’s expansive definition of commercial speech (which the U.S. Supreme Court refused the opportunity to adopt), would not encompass the Exxon statements. The California test requires that the content of the speech must involve “business operations, products, or services of the speaker,” a topic which arguably is “more easily verifiable by its disseminator.”<sup>166</sup> Exxon’s statements about climate change, its eventual effects on the planet and possible strategies to remedy it, are surely not statements about Exxon’s business operations, products or services.<sup>167</sup> Nor would the Exxon statements fall within the definition of commercial speech adopted by *Bolger* for speech combining commercial and political elements, since they are not in the form of advertisements, do not mention particular products and were likely motivated by genuine scientific and political concerns in addition to their economic effect on the company.

Thus, we argue that the Exxon statements must be analyzed as political speech, a category not limited merely to statements regarding candidates for election. In *McIntyre v. Ohio Elections Commission*,<sup>168</sup> the Supreme Court was asked to review an Ohio statute, which required all political communications to disclose the identity of their authors.<sup>169</sup> In this case, Ms. McIntyre had distributed anonymous leaflets advocating the defeat of a proposed school tax levy.<sup>170</sup> In its opinion, the Court adopted an expansive definition of political speech, subjecting regulation thereof to the highest level of scrutiny.<sup>171</sup>

---

165. *Id.* at 307 (internal citations omitted).

166. *Id.* at 312-13 (internal citation omitted).

167. *See id.*

168. 514 U.S. 334 (1995).

169. *Id.* at 341-42.

170. *Id.* at 337.

171. *See id.*

Of course, core political speech need not center on a candidate for office. The principles enunciated in *Buckley* extend equally to issue based elections such as the school tax referendum that Mrs. McIntyre sought to influence through her handbills . . . . Indeed, the speech in which Mrs. McIntyre engaged—handing out leaflets in the advocacy of a politically controversial viewpoint—is the essence of First Amendment expression.<sup>172</sup>

Additionally, “[w]hen a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.”<sup>173</sup>

Similarly, and quite recently, in *281 Care Committee v. Arneson*,<sup>174</sup> the Eighth Circuit Court of Appeals struck down a Minnesota statute that criminalized false statements made in connection with a ballot question.<sup>175</sup> “Like the Stolen Valor Act, section 211B.06 targets falsity, as opposed to the legally cognizable harms associated with a false statement. In this arena, the Court makes clear that there is no free pass around the First Amendment.”<sup>176</sup> The Court applied strict scrutiny to the legislation as an attempt to regulate it.<sup>177</sup>

That such constitutional protection extends beyond the ballot is illustrated by cases such as *Rodriguez v. Maricopa County Community College District*.<sup>178</sup> In that case, a community college professor (Kehowski) sent a number of emails to his colleagues and maintained a website in which he asserted the historical superiority of European/Western culture over other cultures.<sup>179</sup> A group of college employees sued the College insisting that the College suppress these statements and discipline the professor pursuant to its anti-workplace harassment policy.<sup>180</sup> In ruling against the employees, the Court stated:

---

172. *Id.* at 347.

173. *Id.*

174. 766 F.3d 744 (8th Cir. 2014) (cert. den.).

175. *See id.*

176. *Id.* at 783.

177. *Id.* at 784.

178. 605 F.3d 703 (6th Cir. 2010).

179. *Id.* at 706.

180. *Id.* at 707.

Indeed, precisely because Kehowski's ideas fall outside the mainstream, his words sparked intense debate: Colleagues emailed responses, and Kehowski replied; some voiced opinions in the editorial pages of the local paper; the administration issued a press release; and, in the best tradition of higher learning, students protested. The Constitution embraces such a heated exchange of views, even (perhaps especially) when they concern sensitive topics like race, where the risk of conflict and insult is high. . . . Without the right to stand against society's most strongly-held convictions, the marketplace of ideas would decline into a boutique of the banal, as the urge to censor is greatest where debate is most disquieting and orthodoxy most entrenched. . . . The right to provoke, offend and shock lies at the core of the First Amendment.<sup>181</sup>

It follows, then, that any governmental attempt to suppress or punish political speech will be tested to determine whether the statute in question is "narrowly tailored to serve an overriding state interest."<sup>182</sup> Various state governments and the federal government have suggested a variety of possible statutes which may have been violated by the Exxon executive statements, and no doubt a similar variety of compelling state interests will be cited to underlie such prosecutions. But the Courts have been very wary of whether statutes suppressing or punishing speech, outside of the disfavored categories discussed above, can ever be narrowly tailored to whatever state interest is asserted. Typical of this is the conclusion of the *Arneson* case "[t]here is no reason to presume that counter-speech would not suffice to achieve the interests advanced and is a less restrictive means, certainly, to achieve the same end goal."<sup>183</sup>

In *Alvarez*, the Court conceded the importance of the government's interest in ensuring that "military medals" should be used to serve the public function of showing gratitude for heroism and sacrifice demonstrated in the military service as well as to foster a sense of accomplishment among service members.<sup>184</sup>

---

181. *Id.* at 708 (internal citations omitted).

182. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

183. *281 Care Comm. v. Arneson*, 766 F.3d 744, 793 (8th Cir. 2014).

184. *U.S. v. Alvarez*, 132 S. Ct. 2537, 2548 (2012).

The lack of a causal link between the Government's stated interest and the Act is not the only way in which the Act is not actually necessary to achieve the Government's stated interest. The Government has not shown, and cannot show, why counter-speech would not suffice to achieve its interest. The facts of this case indicate that the dynamics of free speech, of counter-speech, of refutation, can overcome the lie.<sup>185</sup>

But to recite the Government's compelling interests is not to end the matter. The First Amendment requires that the Government's chosen restriction on the speech at issue be "actually necessary" to achieve its interest. . . . The link between the Government's interest in protecting the integrity of the military honors system and the Act's restriction on the false claims of liars like respondent has not been shown.<sup>186</sup>

Similarly, in *Susan B. Anthony List v. Driehaus*,<sup>187</sup> the appellant had been charged with violating Ohio's political false-statements laws which "prohibit[s] persons from disseminating false information about a political candidate in campaign materials during the campaign season 'knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate.'"<sup>188</sup> The Sixth Circuit Court of Appeals conceded that Ohio's interest in preserving the integrity of elections was compelling, but its statute failed the second prong of the strict scrutiny test.<sup>189</sup>

Here, Ohio's interests in preserving the integrity of its elections, protecting "voters from confusion and undue influence," and "ensuring that an individual's right to vote is not undermined by fraud in the election process" are compelling. . . . But Ohio's laws do not meet the second requirement: being narrowly

---

185. *Id.* at 2549.

186. *Id.*

187. *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (2016).

188. *Id.* at 469-70 (citing OHIO REV. CODE § 3517.21(B)(10) (2007)).

189. *Susan B. Anthony List*, 814 F.3d at 473-74.

tailored to protect the integrity of Ohio's elections. Thus, this is not such a "rare case" that survives strict scrutiny.<sup>190</sup>

Ohio's laws do not pass constitutional muster because they are not narrowly tailored in their (1) timing, (2) lack of a screening process for frivolous complaints, (3) application to non-material statements, (4) application to commercial intermediaries, and (5) over-inclusiveness and under-inclusiveness.<sup>191</sup>

In striking down a Massachusetts statute quite similar in effect to the Ohio statute in *Susan B. Anthony List* the Massachusetts Supreme Judicial Court targeted the statute's overbreadth as evidence of its failure to be narrowly tailored to its purpose.

As the facts of this case demonstrate, the danger of such breadth is that the statute may be manipulated easily into a tool for subverting its own justification, i.e., the fairness and freedom of the electoral process, through the chilling of core political speech.<sup>192</sup>

Thus, in the election context, as elsewhere, it is apparent "that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [the people's] wishes safely can be carried out. That at any rate is the theory of our Constitution."<sup>193</sup>

***E. Narrow Tailoring is Still Required Even if the Exxon Statements are Commercial Speech***

Even were we to concede that under the *Kasky* analysis, the Exxon statements could be treated as a form of commercial

---

190. *Id.* at 473-74.

191. *Id.* at 474.

192. *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1255 (Mass. 2015).

193. *Id.* at 1256 (quoting *Lyons v. Globe Newspaper Co.*, 612 N.E.2d 1158 (1993)).

speech, the Courts applying *Central Hudson* have also demanded a form of narrow tailoring, albeit not quite as exacting as in the political context.

[W]e have not gone so far as to impose upon them the burden of demonstrating that . . . the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a “fit’ between the legislature’s ends and the means chosen to accomplish those ends,” . . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition, but one whose scope is “in proportion to the interest served,” . . . that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.<sup>194</sup>

Thus, the Securities and Exchange Commission’s conflict minerals disclosure regulations were struck down by the United States Court of Appeals for the District of Columbia Circuit when, even assuming *arguendo* that disclosures made by a corporation in SEC filings may be categorized as commercial speech, the Court required more than mere “speculation or conjecture” to establish the requisite fit between the government’s interest and its regulations.<sup>195</sup> The conflict minerals regulations require reporting companies to disclose whether they make use of certain designated minerals in their operations, and if so, whether such minerals have origin in the Democratic Republic of Congo (DRC) and whether the proceeds therefrom have been used to finance the conflict there.<sup>196</sup> The government’s proffered interest was “ameliorat[ing] the humanitarian crisis in the DRC.”<sup>197</sup>

Although the burden was on the government, . . .  
here again the SEC has offered little substance

---

194. *Bd. of Tr. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (internal citations omitted).

195. *Nat’l Ass’n of Mfr. v. Sec. & Exch. Comm’n*, 800 F.3d 518, 526 (D.C. Cir. 2015).

196. *Id.* at 544.

197. *Id.* at 524.

beyond citations to statements by two Senators and members of the executive branch, and a United Nations resolution. The government asserts that this is a matter of foreign affairs and represents “the type of ‘value judgment based on the common sense of the people’s representatives’ for which this Court has not required more detailed evidence.”<sup>198</sup>

The idea must be that the forced disclosure regime will decrease the revenue of armed groups in the DRC and their loss of revenue will end or at least diminish the humanitarian crisis there. But there is a major problem with this idea—it is entirely unproven and rests on pure speculation.<sup>199</sup>

Similarly, and regarding another product politically disfavored in the manner of fossil fuels, certain prohibitions of types of advertising for smokeless tobacco products and cigars adopted by the State of Massachusetts were struck down by the Supreme Court using Central Hudson’s intermediate scrutiny.<sup>200</sup> Specifically, the regulations had prohibited outdoor advertising of such products within a thousand feet of a school or playground and had required indoor advertising of such products within such perimeter to be placed at least five feet above the floor.<sup>201</sup> The last step in this analysis requires “a reasonable fit between the means and ends of the regulatory scheme.”<sup>202</sup> Accordingly, the regulations of the Attorney General do not meet this requirement; additionally, the Attorney General did not calculate carefully what the costs and benefits that would be associated because of the burden on speech that is imposed by these regulations.<sup>203</sup>

Issues of broad public concern should be resolved through debate and counter- speech. The statements made by Exxon executives are most likely highly protected political speech, but even if they were considered commercial speech, it is highly unlikely that they could be punished as fraudulent under existing precedent.

---

198. *Id.* at 525.

199. *Id.*

200. *Id.* at 524.

201. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561-62 (2001).

202. *Id.* at 561.

203. *Id.*

## V. CONCLUSION

Each of the Exxon statements but number eleven is an opinion. The law makes it difficult to prosecute someone because an opinion of theirs differs from that of the prosecutor. The federal mail and wire fraud statutes are directed against misstatements of fact since, as a general matter, an opinion cannot be false. A case could be made against the Exxon chairmen only if the chairmen did not actually believe the opinions they uttered. Holding the chairmen to the standard of an expert, their opinions entail liability only if the opinions lacked a reasonable basis, or if the chairmen knew material facts, unknown to the public, which conflicted with their opinions.

But even if the eleven statements were not true, climate change is a matter of public concern and active public debate, and since the eleven statements are not commercial speech, the First Amendment would allow only counter-speech as a remedy. Thus, we conclude that Sen. Whitehouse's analogy to the tobacco case was misconceived, that it is highly unlikely that the Exxon statements can lead to RICO liability, or fraud liability of any kind, that there is no probable cause to believe that an offense has been committed, and that the AGs' investigations are misconceived.