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2022

Regulating Charitable Crowdfunding.pdf

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Regulating Charitable Crowdfunding

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Charitable crowdfunding is a global and rapidly growing new method for raising money to benefit charities and individuals in need. While mass fundraising has existed for hundreds of years, crowdfunding is distinguishable from those earlier efforts because of its low cost, speed of implementation, and broad reach. Reflecting these advantages, it now accounts annually for billions of dollars raised from tens of millions of donors through hundreds of internet platforms, including Charidy, Facebook, GoFundMe, and GlobalGiving. Although most charitable crowdfunding campaigns raise only modest amounts, on occasion a campaign attracts tens of millions of dollars in donations. However, charitable crowdfunding also has its downsides. Donors may misunderstand how the beneficiaries will use the funds raised, or a campaign that unexpectedly goes viral may overwhelm a small charity or greatly exceed an individual's needs. There have also been instances of outright fraud, as well as concerns raised about money laundering and terrorist financing.

Existing laws relating to charitable solicitations and charities more generally have either uncertain or limited application to charitable crowdfunding. Broader fraud and money laundering laws may apply to the worst abuses, but government officials rarely invoke these usually criminal statutes. The challenge faced by regulators is therefore whether and how to modify existing laws to address the downsides of this new activity without unduly inhibiting the generosity that charitable crowdfunding encourages. This challenge is made more difficult by the lack of information regarding both the positive effects and downsides of crowdfunding. Finally, existing scholarship relating to charitable crowdfunding focuses on either the motivations of donors or tax implications instead of addressing this regulatory issue, even as governments are developing proposals to address this activity.

This Article reviews the existing, incomplete information regarding charitable crowdfunding and theories for regulating in the face of uncertainty to develop recommendations for addressing this new and growing phenomenon. Given we know very little about the positive and negative effects of charitable crowdfunding, and given that any harms are likely modest, primarily financial, and often readily cured, I recommend that regulators should at this time only take two modest steps. First, they should require notification of designated beneficiaries to help ensure funds raised reach those beneficiaries. Second, they should require notification of regulators, but only for the small subset of campaigns that cross a relatively high threshold to provide information about the scale and growth of charitable crowdfunding and help resolve any problems that arise with the largest campaigns. I therefore disagree with initial steps taken by some regulators to impose more comprehensive consent and administration requirements on many or all charitable

^{*} Professor, Notre Dame Law School. I am very grateful for comments from Putnam Barber, Oonagh Breen, Evelyn Brody, Khrista McCarden, Myles McGregor-Lowndes, Susan Phillips, Dana Brakman Reiser, Mark Sidel, and participants in the American Association of Law Schools Nonprofit and Philanthropy Law Section 2021 session, and research assistance from Kristin Rae Baltazar, Maria Bourdeau, Thomas Everett, Gino Ibanez, and Evan Wright.

crowdfunding campaigns. Such requirements are unnecessary hindrances on this new and innovative way of encouraging generosity, given there is little evidence of widespread problems, and any potential harm is almost certainly relatively small and easily remedied if it occurs.

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INTRODUCTION

Crowdfunding—the raising of funds directly from the public through an internet platform—is a rapidly growing phenomenon.¹ Yet when it comes to whether and how governments should regulate crowdfunding, scholars have for the most part ignored the type of crowdfunding that first arose.² That type is donation-based

1. See *infra* Section I.A.

2. See, e.g., Claire Ingram Bogusz, *Crowdfunding Across Research Fields: An Overview*

crowdfunding, where funders receive only expressions of gratitude, the warm glow from having been altruistic, and similar intangible benefits in return for their contributions.³ This type of crowdfunding is more accurately labelled charitable crowdfunding because it appeals to the generosity of potential funders by highlighting the ability of their contributions either to aid one or more individuals experiencing financial hardship or to support a charitable organization.⁴

Recent events demonstrate the increasing importance of charitable crowdfunding. As the coronavirus pandemic swept the world, people launched hundreds of thousands of crowdfunding campaigns to help individuals and organizations hurt by the disease.⁵ Crowdfunding also played a prominent role in the wake of the killing of George Floyd in Minneapolis, including not only campaigns to help arrested protesters, but also to provide bail for the police officer charged with murdering Mr. Floyd.⁶ In the wake of the attack on the Capitol, a surviving officer launched a GoFundMe campaign to aid the family of murdered officer Brian D. Sicknick.⁷ At

and *Suggestions for Future Investigation*, in HANDBOOK OF RESEARCH ON CROWDFUNDING 23, 26 (Hans Landström, Annaleena Parhankangas & Colin Mason eds., 2019); *infra* notes 38–41 and accompanying text.

3. C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 COLUM. BUS. L. REV. 1, 15 (2012); Stefan Katzenmeier, David Bendig, Steffen Strese & Malte Brettel, *The Supply Side: Profiling Crowdfunders*, in HANDBOOK OF RESEARCH ON CROWDFUNDING, *supra* note 2, at 122, 139–40.

4. Bradford, *supra* note 3, at 15; Jonas Schmidt, *Fundraising with Donation Crowdfunding*, P2PMARKETDATA (Apr. 15, 2020), <https://p2pmarketdata.com/fundraising-charity-donation-crowdfunding/> [https://perma.cc/B6YH-MBEQ]; Emily Chan, *Crowdfunding Charity: Navigating the Legal Landscape*, in EO TAX J. 2018-208 (Paul Streckfus ed., 2018).

5. *Crowdfunding Across the World*, LILLY FAM. SCH. OF PHILANTHROPY, <https://philanthropy.iupui.edu/research/covid/crowdfunding.html> [https://perma.cc/9LBM-JLKR] (stating that as of May 20, 2020, there were 317,407 COVID-19 or coronavirus campaigns on GoFundMe); Alix Moine & Daphnée Papiasse, *Evidence from France: How Crowdfunding Is Being Used to Support the Response to Covid-19*, LONDON SCH. OF ECON. & POL. SCI.: EUR. POL. & POL'Y (Apr. 24, 2020), <https://blogs.lse.ac.uk/euoppblog/2020/04/24/evidence-from-france-how-crowdfunding-is-being-used-to-support-the-response-to-covid-19/> [https://perma.cc/5GTE-L5DG]; Clive Reffell, *Crowdfunding Projects Around the World to Tackle the Impact of Coronavirus*, CROWD SOURCING WK.: BLOG (Apr. 24, 2020), <https://crowdsourcingweek.com/blog/global-crowdfunding-projects-tackle-coronavirus/> [https://perma.cc/B3GV-J3CF].

6. See Adam Benson & Fleming Smith, *Protesters Get Help from Donations to Mass Bail Funds*, POST & COURIER, https://www.postandcourier.com/news/protesters-get-help-from-donations-to-mass-bail-funds/article_1bff564e-abee-11ea-a72d-030d544ec51d.html [https://perma.cc/9J2K-P676] (Sept. 14, 2020); Yahoo News Staff, *Fundraising Twist as Police Officer Charged over George Floyd Death Walks Free*, YAHOO! NEWS (June 11, 2020), <https://au.news.yahoo.com/george-floyd-cop-walks-free-after-crowdfunding-bail-221624441.html> [https://perma.cc/SH5J-BJ5K].

7. Jenni Fink, *GoFundMe for Family of Office Brian Sicknick, Who Died After Capital Riot, Tops \$600,000*, NEWSWEEK (Jan. 12, 2021, 1:08 PM), <https://www.newsweek.com/gofundme-family-officer-brian-sicknick-who-died-after-capitol-riot-tops-600000-1560928> [https://perma.cc/XGG8-E8XD].

the same time, participants in “Stop the Steal” events, including the January 6th rally in Washington, D.C., used crowdfunding to fund their travel and other expenses.⁸

Before the coronavirus pandemic, the largest single charitable crowdfunding effort appears to have come in the wake of the Australian wildfires, when entertainer Celeste Barber made a public appeal that eventually raised more than AUD\$50 million for the New South Wales Rural Fire Service & Brigades Donation Fund.⁹ A close second was a crowdfunding effort in the wake of Hurricane Harvey striking the mainland of the United States, when American football star J.J. Watt launched an online fundraising campaign with a stated goal of raising \$200,000 to help people affected by the hurricane.¹⁰ Within weeks, the campaign had raised over \$10 million. Over the next year, it raised \$41.6 million in total, which the Justin J. Watt Foundation distributed to eight other charities involved in relief efforts.¹¹ Both of these campaigns have recently been eclipsed by the crowdfunding campaign to benefit the CDC Foundation’s efforts to combat the coronavirus pandemic, which has raised more than \$51 million.¹²

GoFundMe, which may be the most well-known charitable crowdfunding platform, reported that as of 2019 more than \$9 billion had been raised since 2010 on its website through more than 120 million donations.¹³ This is almost double the amount GoFundMe reported it had raised through 2017, and more than seventy-five

8. Amy Brittain & David Willman, ‘A Place to Fund Hope’: How Proud Boys and Other Fringe Groups Found Refuge on a Christian Fundraising Website, WASH. POST (Jan. 18, 2021), https://www.washingtonpost.com/investigations/a-place-to-fund-hope-how-proud-boys-and-other-fringe-groups-found-refuge-on-a-christian-fundraising-website/2021/01/18/14a536ee-574b-11eb-a08b-f1381ef3d207_story.html [https://perma.cc/4475-4EXF].

9. MYLES MCGREGOR-LOWNDES & FRANCES M. HANNAH, THE AUSTL. CTR. FOR PHILANTHROPY & NONPROFIT STUD., IN THE MATTER OF THE NEW SOUTH WALES RURAL FIRE SERVICE & BRIGADES DONATIONS FUND; APPLICATION OF MACDONALD & OR [2020] NSWSC 604 (2020), <https://eprints.qut.edu.au/200554/>; Deborah Cornwall, *Celeste Barber Was Warned About Choice of Firefighter Fund*, THE AUSTL. (Feb. 24, 2020), <https://www.theaustralian.com.au/nation/celeste-barber-was-warned-about-choice-of-firefighter-fund/news-story/b4d864e78f6c1539c5a7f4ded8539ee6> [https://perma.cc/FE9H-TNE2].

10. J.J. Watt Foundation Announces Hurricane Harvey Recap and 2018-19 Plans, HOUS. TEXANS (Aug. 27, 2018, 5:47 AM), <https://www.houstontexans.com/news/j-j-watt-foundation-announces-hurricane-harvey-recap-and-2018-19-plans> [https://perma.cc/R8RH-BFZH].

11. Terry Collins, *Celebs Raise Millions in Crowdfunding to Help Harvey Relief*, CNET (Sept. 1, 2017, 12:18 PM), <https://www.cnet.com/news/celebs-raise-millions-in-crowdfunding-to-help-harvey-relief/> [https://perma.cc/6JGS-M4KN]; J.J. Watt Foundation Announces Hurricane Harvey Recap and 2018-19 Plans, *supra* note 10.

12. Texas Governor Greg Abbott’s border wall crowdfunding effort also has raised more than \$50 million, but almost all of the funds raised came from a single \$53.1 million donation. James Barragán & Carla Astudillo, *Texas Has Raised \$54 Million in Private Donations for Its Border Wall Plan. Almost All of It Came from This One Billionaire.*, TEX. TRIB. (Oct. 6, 2021, 5 AM), <https://www.texastribune.org/2021/10/06/timothy-mellon-texas-border-wall/> [https://perma.cc/ZX6N-ZXTX].

13. See *A Year in Giving: GoFundMe 2019*, GOFUNDME, <https://www.gofundme.com/2019> [https://perma.cc/TL69-JNM8]; *infra* note 84 and accompanying text (describing the most active charitable crowdfunding platforms).

times the amount raised in its first several years of existence.¹⁴ GoFundMe currently hosts campaigns based in nineteen countries,¹⁵ and there are many other websites that host similar efforts around the world.¹⁶ While public participation data is difficult to obtain, a 2016 Pew Research Center report found that twenty-two percent of all United States adults had contributed to support a crowdsourced fundraising project, with more than two-thirds of those having done so to help a person in need.¹⁷

Charitable crowdfunding also has its downsides. The speed with which a well-publicized tragedy may generate substantial donations can overwhelm some recipients. For example, this reportedly happened in the wake of both the 2020 George Floyd-inspired racial justice protests and the 2016 Pulse Nightclub shooting in the United States.¹⁸ Or if the recipient is a charity with legal limitations on its

14. See David M. Freedman & Matthew R. Nutting, *A Brief History of Crowdfunding: Including Rewards, Donation, Debt, and Equity Platforms in the USA*, PDF4PRO 5, <https://pdf4pro.com/view/a-brief-history-of-crowdfunding-david-m-freedman-219ec7.html> [<https://perma.cc/QQG8-V2QM>] (Nov. 5, 2015) (providing that from its founding in 2010 through October 2013, GoFundMe campaigns raised \$120 million); *GoFundMe 2017: A Year in Giving*, GoFUNDME, <https://www.gofundme.com/2017> [<https://perma.cc/SH3D-W9DV>] (explaining that GoFundMe has “raised over \$5 billion to date”).

15. *Countries Supported on GoFundMe*, GoFUNDME, <https://support.gofundme.com/hc/en-us/articles/360001972748-Supported-Countries> [<https://perma.cc/ABR3-SYNW>] (Sept. 22, 2021).

16. See, e.g., CHARIDY, <https://www.charidy.com/> [<https://perma.cc/AX7F-PB4X>]; *Our Story*, CHUFFED, <https://chuffed.org/about> [<https://perma.cc/3XDY-SNZ9>] (Australia and Europe); DONORSCHOOSE, <https://www.donorschoose.org> [<https://perma.cc/HGC9-84VV>] (classroom projects); *We Are DonorSee*, DONORSEE, <https://donorsee.com/about> [<https://perma.cc/AZ4H-B5V5>] (explaining that DonorSee supports “the world’s poorest” people); *About Us*, FUNDLY, <https://fundly.com/about-us> [<https://perma.cc/SCM7-JCDA>]; GLOBALGIVING, <https://www.globalgiving.org/> [<https://perma.cc/YV6D-Y9KA>] (“GlobalGiving connects nonprofits, donors, and companies in nearly every country in the world.” (emphasis omitted)); *Is My Campaign Allowed on Indiegogo?*, INDIEGOGO, <https://support.indiegogo.com/hc/en-us/articles/360000574528-Is-My-Campaign-Allowed-on-Indiegogo-> [<https://perma.cc/BFG9-U9HX>] (nonprofit organizations); see *infra* note 25 (estimating a range from 600 to 3500 for the number of charitable crowdfunding platforms worldwide).

17. Aaron Smith, *Shared, Collaborative and On Demand: The New Digital Economy*, PEW RSCH. CTR. 43, 45 (2016), https://www.pewresearch.org/wp-content/uploads/sites/9/2016/05/PI_2016.05.19_Sharing-Economy_FINAL.pdf [<https://perma.cc/N5XS-ZSYL>]. NP Source reports that as of 2018, forty-one percent of donors to charities also donated to a crowdfunding campaign to benefit one or more individuals. *The Ultimate List of Charitable Giving Statistics for 2018*, NP SOURCE, <https://nonprofitsource.com/online-giving-statistics/> [<https://perma.cc/VK3P-F4M3>] (under “Online Crowdfunding Statistics”).

18. See Paul Brinkmann, *State Fines GLBT Center \$1,000 for Violations in Wake of Pulse Shooting*, ORLANDO SENTINEL (Feb. 13, 2017, 9:55 AM), <https://www.orlandosentinel.com/business/os-bz-glbt-center-violations-20170213-story.html> [<https://perma.cc/LQ8P-A66G>]; Kelly Smith, *Facing Criticism, Minnesota Bail Nonprofit Flooded with Donations After George Floyd Killing Says It’s ‘Scaling Up,’* STAR TRIB. (June 17, 2020, 8:30 AM), <https://www.startribune.com/facing-criticism-minnesota-bail-nonprofit-flooded-with-donations-says-it-s-scaling-up/571301692/> [<https://perma.cc/RV9M-C9HQ>].

activities, the funds may only be usable for those activities even though donors may have intended that the funds be used for other activities, as happened with an Australian wildfire campaign.¹⁹ The funds raised may also exceed the identified need, raising the question of what should happen to the excess funds.²⁰ And there are occasional reports of outright fraud.²¹

This new, growing method for charitable giving and its potential downsides raise two key regulation questions. First, how, if at all, do existing laws relating to charitable fundraising apply to charitable crowdfunding? Second, should existing laws be modified either to relax limits that unnecessarily inhibit charitable crowdfunding or to impose new requirements to prevent misunderstandings, misuse, and fraud? While commentators in some jurisdictions have sought to answer the first question,²² and a handful of governments and uniform law bodies have begun considering the second question,²³ this Article is the first comprehensive consideration of these questions.

Part I explains what exactly crowdfunding is and how charities and individuals use it to raise funds for people in need. Part I also highlights the paucity of publicly available data relating to charitable crowdfunding. Part II explores the laws relating to charitable fundraising and how their application to charitable crowdfunding is unclear at best. Part III then discusses how to adapt or extend these laws to specifically address charitable crowdfunding given the uncertain information regarding both its benefits and downsides.

Part III concludes by recommending that, given this lack of information, regulators should at this time only impose two requirements. First, they should require charitable crowdfunding platforms to notify beneficiaries of campaigns for their benefit and give them the option of opting out and so ending the campaign to help ensure funds raised reach their intended beneficiary. Second, they should also require platforms to notify regulators of all campaigns that exceed a relatively high

19. See MCGREGOR-LOWNDES ET AL., *supra* note 9, at 4–5; Myles McGregor-Lowndes, *The Spectacular Tale of a Crowdfunder Gone Wrong: Lessons for Canada from Australia*, CARLETON UNIV.: PANL PERSPS. (Oct. 2, 2020), <https://carleton.ca/panl/story/the-spectacular-tale-of-a-crowdfunder-gone-wrong-lessons-for-canada-from-australia/> [<https://perma.cc/YB5K-DS9M>].

20. Blake Scott, Comment, *Save That Money: Ensuring Donations Received Through Crowdfunding Are Properly Protected*, 10 EST. PLAN. & CMTY. PROP. L.J. 395, 397 (2018).

21. See, e.g., *Death of Girl in China Triggers Calls for Better Crowdfunding Supervision*, STRAITS TIMES (May 26, 2018, 1:18 PM), <https://www.straitstimes.com/asia/east-asia/death-of-girl-in-china-triggers-calls-for-better-crowdfunding-supervision> [<https://perma.cc/H388-S9QU>] (describing alleged failure of family to properly use funds raised for a child's eye cancer treatment); Eli Rosenberg, *A Homeless Veteran's Heartwarming Story Led to a \$400,000 GoFundMe. Prosecutors Say It Was a Lie.*, WASH. POST (Nov. 15, 2018), <https://www.washingtonpost.com/nation/2018/11/15/homeless-veterans-heartwarming-story-led-gofundme-prosecutors-say-it-was-lie/> [<https://perma.cc/X2YG-PKYB>]; Nick Harding, *Murky World of Crowdfunding: From 'Abuse and Heartache' to Fraud, We Investigate What Happens When Online Fundraising Goes Wrong*, THE SUN (Jan. 28, 2018, 12:01 AM), <https://www.thesun.co.uk/fabulous/5402752/crowdfunding-katie-cutler-alan-barnes-jermain-defoe/> [<https://perma.cc/GXV4-C53K>].

22. See *infra* notes 120–127 and accompanying text.

23. See *infra* notes 235–240, 249–252 and accompanying text.

threshold to provide those governments with information regarding the scale and growth of charitable crowdfunding and to permit them to resolve problems more easily with the largest campaigns. Regulators should not impose more burdensome consent and administration requirements, as some have already done or have considered. Theories relating to regulating in the face of uncertainty argue against more burdensome regulation that could unnecessarily inhibit this new method for encouraging generosity, as does the fact that the potential harms from charitable crowdfunding appear to be small, primarily financial, and usually readily cured. These recommendations are also consistent with data privacy, free speech, and internet platform liability limitations that exist in some countries, while more aggressive regulatory measures might run afoul of such limits.

I. WHAT IS CHARITABLE CROWDFUNDING?

This Part first explains what is meant by “crowdfunding” as that term is used in this Article. It then describes existing scholarship relating to charitable crowdfunding, its history, and the three forms of charitable crowdfunding: crowdfunding for a charitable organization, crowdfunding for one or more specific individuals in financial need, and crowdfunding for a cause. It also provides an overview of the available data regarding the magnitude and growth of charitable crowdfunding and its downsides.

A. What is Crowdfunding?

“Crowdfunding” refers to raising funds from the public for a particular venture through an online platform, such as GoFundMe, Indiegogo, Kickstarter, or Patreon.²⁴ The scale of crowdfunding is difficult to estimate because private companies operate crowdfunding platforms and government oversight is limited. Estimates of the number of crowdfunding platforms vary widely, ranging from 600 total platforms to more than 3500 dedicated to charitable crowdfunding.²⁵ Similarly,

24. See Annaleena Parhankangas, Colin Mason & Hans Landström, *Crowdfunding: An Introduction*, in HANDBOOK OF RESEARCH ON CROWDFUNDING, *supra* note 2, at 1, 3; Erik Deckers, *Best Crowdfunding Platforms for Your Small Business in 2021*, GO DADDY: BLOG (Mar. 4, 2021), <https://www.godaddy.com/garage/top-20-crowdfunding-platforms/> [<https://perma.cc/FXF6-SM53>]; Arsalan Sajid, *Top 30 Crowdfunding Platforms to Fuel Your Next Project*, CLOUDWAYS: BLOG, <https://www.cloudways.com/blog/crowdfunding-platforms/> [<https://perma.cc/LCW6-HP4J>] (June 17, 2021); *Starting Point: What Is Crowdfunding?*, FUNDABLE, <https://www.fundable.com/learn/resources/guides/crowdfunding/what-is-crowdfunding> [<https://perma.cc/TH96-JDQ3>]; *What Is Crowdfunding? The Clear and Simple Answer*, GO FUND ME, <https://www.gofundme.com/c/crowdfunding> [<https://perma.cc/7LCF-XS2W>].

25. See, e.g., Lysette Sandoval, *Crowdfunding Trends for 2019*, THRINACIA: THRINACIA BLOG (Feb. 11, 2019), <https://www.thrinacia.com/blog/post/crowdfunding-trends-for-2019> [<https://perma.cc/76J3-5N9M>] (estimating 600 crowdfunding platforms globally in 2019); Statista Research Department, *Number of Crowdfunding Platforms Worldwide as of December 2014, by Region*, STATISTA (July 5, 2015), <https://www.statista.com/statistics/497227/number-of-crowdfunding-platforms-globally-by-region/> [<https://perma.cc/7TRQ-JJRV>] (calculating 1250 crowdfunding platforms globally in

estimates of the amount of money flowing through these platforms also vary significantly. For example, the Fundly crowdfunding platform estimates that crowdfunding had raised \$34 billion globally as of 2020.²⁶ In contrast, an article on the Statista website estimates that the market size of crowdfunding worldwide was slightly over \$12 billion in 2020 and will grow to \$25.8 billion by 2027.²⁷ The World Bank in 2013 estimated that global crowdfunding would grow to between \$90 and \$96 billion by 2025.²⁸ Reliable estimates of the number of projects that seek crowdfunding and of contributors who support them are also difficult to obtain, although the Crowdfunding Center has tracked more than 740,000 projects globally since the beginning of 2014. These projects attracted over 66 million backers.²⁹ Regardless of the exact figures, there appear to be hundreds if not thousands of crowdfunding platforms, hosting hundreds of thousands of projects, supported by millions of contributors, who provide billions of dollars collectively. Those flows appear likely to significantly increase, even if they will still be relatively small compared to, for example, the close to \$90 trillion invested through global stock markets as of the end of 2019.³⁰

There are usually up to five sets of parties involved in a crowdfunding campaign: the organizer and promoter of the campaign; the online platform host; a third-party payment processor handling campaign funds; the donors; and the beneficiaries. Those who organize and promote campaigns could be and often are the same.³¹ The funds typically flow from the donors to the third-party payment processor, who then distributes them either to the organizer (who in turn distributes them to the beneficiary if they are not themselves the beneficiary) or directly to the beneficiary, depending on the platform's policies.³² A small portion of the funds raised usually go to the platform and the payment processor as fees for their services.³³

2014); Rebecca Theim, *Crowdfunding Sites that Help People in Tough Times*, FORBES (July 2, 2017, 8:00 AM), <https://www.forbes.com/sites/nextavenue/2017/07/02/crowdfunding-sites-that-help-people-in-tough-times/#2dc5a3f15875> [https://perma.cc/C7G2-NH2X] (noting there were more than 3500 social giving crowdfunding platforms in 2017).

26. *Crowdfunding Statistics [Updated for 2020!]*, FUNDLY, <https://blog.fundly.com/crowdfunding-statistics/> [https://perma.cc/SZ35-J8RW].

27. M. Szmigiera, *Market Size of Crowdfunding Worldwide in 2020 and 2027*, STATISTA (Aug. 27, 2021), <https://www.statista.com/statistics/1078273/global-crowdfunding-market-size/> [https://perma.cc/LC2N-NZM6].

28. *Crowdfunding's Potential for the Developing World*, WORLD BANK 10, 43 (2013), <http://documents.worldbank.org/curated/en/409841468327411701/pdf/840000WP0Box380crowdfunding0study00.pdf> [https://perma.cc/29V4-DFHM].

29. *Projects Stats & Analytics*, THECROWDFUNDINGCENTER: THECROWDDATACENTER, <https://www.thecrowdfundingcenter.com/data/projects> [https://perma.cc/3KNV-NRR5].

30. Jesse Pound, *Global Stock Markets Gained \$17 Trillion in Value in 2019*, CNBC, <https://www.cnbc.com/2019/12/24/global-stock-markets-gained-17-trillion-in-value-in-2019.html> [https://perma.cc/2HSF-4WLY] (Dec. 26, 2019, 9:43 AM) (relying on Deutsche Bank Research).

31. Parhankangas et al., *supra* note 24, at 2–3.

32. See, e.g., *How to Transfer Funds*, GOFUNDME, <https://support.gofundme.com/hc/en-us/articles/360001992767> [https://perma.cc/V3CN-JQAT] (Feb. 14, 2022).

33. See, e.g., *Everything You Need to Know About GoFundMe's Fees*, GOFUNDME (Jan. 13, 2022), <https://www.gofundme.com/c/blog/gofundme-fees/> [https://perma.cc/B9NJ-3S75];

Commentators generally divide crowdfunding into four different types based on what funders receive in return for their contribution: equity, debt, reward, and donation.³⁴ The first three types provide some type of return to the person donating to what is usually a business venture—an equity stake, a promise to repay the contributed funds (with or without interest), or another incentive (for example, free access to music if the venture is a band or free beta access if the venture is a video game).³⁵ A donation crowdfunding campaign is, as the label suggests, one where the funder is being asked to give without any tangible return.³⁶ For the reasons already discussed, donation crowdfunding is better characterized as *charitable crowdfunding* and so the latter label will be used in this Article.³⁷

B. The Study and History of Charitable Crowdfunding

Much has been written about equity, debt, and reward crowdfunding, especially the extent to which securities laws do or should apply to equity and debt

Fees & Pricing for Campaigners: How Much Does Indiegogo Cost?, INDIEGOGO, <https://support.indiegogo.com/hc/en-us/articles/204456408-Fees-Pricing-for-Campaigners-How-much-does-Indiegogo-cost-> [<https://perma.cc/8SCM-X4EU>]; *Fees for the United States*, KICKSTARTER, <https://www.kickstarter.com/help/fees> [<https://perma.cc/7EJ4-NTME>]; *Pricing*, PATREON, <https://www.patreon.com/product/pricing> [<https://perma.cc/JPD7-C5VF>]; *Pricing*, STRIPE, <https://stripe.com/pricing> [<https://perma.cc/WHY4-ZESJ>].

34. See, e.g., EUR. CROWDFUNDING NETWORK, *EARLY IMPACT OF CoVID19 ON THE EUROPEAN CROWDFUNDING SECTOR 4* (2020) (discussing lending, equity, donation, and reward crowdfunding platforms); KRISTOF DE BUYSERE, OLIVER GAJDA, RONALD KLEVERLAAN & DAN MAROM, *A FRAMEWORK FOR EUROPEAN CROWDFUNDING 10–11* (2012) (recognizing additional variations and hybrid forms), <https://eurocrowd.org/wp-content/uploads/2021/12/A-Framework-for-European-Crowdfunding.pdf> [<https://perma.cc/Z85J-SNDM>]; WORLD BANK, *supra* note 28, at 20 (adding a fifth, royalty-based type); Bradford, *supra* note 3, at 14–15 (adding a fifth, “pre-purchase” type); Michael P. Mosher & Alexander C. Campbell, *Crowdfunding in the Tax-Exempt Sector—Legal and Practical Considerations*, 26 TAX’N EXEMPTS 36, 36 (2015) (dividing crowdfunding into four categories: equity based, debt based, donation based, and rewards based); Parhankangas et al., *supra* note 24, at 3–4 (dividing crowdfunding into four models: donation-based, reward-based, lending-based, and equity); DAVID RÖTHLER & KARSTEN WENZLAFF, EUR. EXPERT NETWORK ON CULTURE, *CROWDFUNDING SCHEMES IN EUROPE 12–13* (2011) (stating that crowdfunding types could also be determined by “the purpose of the crowdfunded project (business, creative, political, social)” or “the underlying tax regime (for profit, non-profit)”), <https://www.interarts.net/descargas/interarts2559.pdf> [<https://perma.cc/8EGW-H5FZ>].

35. See Bradford, *supra* note 3, at 16–27.

36. See *supra* note 3 and accompanying text. Donation crowdfunding is sometimes also referred to as peer-to-peer fundraising. Marie Crittal & Judith Herbst, *New Technologies*, in *GIVING AUSTRALIA 2016: LITERATURE REVIEW 208*, 210–11 (Wendy Scaife, Myles McGregor-Lowndes, Jo Barraket & Wayne Burns eds., 2016).

37. See *supra* note 4 and accompanying text.

crowdfunding³⁸ and contract law does or should apply to reward crowdfunding.³⁹ There has been much less attention paid to charitable crowdfunding, and almost all of the academic consideration has focused either on nonlegal issues, such as the motivations of funders and fundraisers,⁴⁰ or on the tax consequences for the participants.⁴¹ But as Orly Lobel has noted, there is no question that tax laws should fully apply to internet platforms and their activities and so the only question with respect to taxation is how those laws apply.⁴² This Article addresses different and arguably more difficult questions: not only how but whether and to what extent consumer protection type laws, such as those relating to charitable fundraising,

38. See, e.g., Kirstene Baillie, *Regulation of Crowdfunding in the UK: Past, Present . . . and Future*, 20 BUS. L. INT'L 147 (2019); Bradford, *supra* note 3; Georg Gutfleisch, *Prospects for Future EU Legislation on Crowdfunding and Initial Coin Offerings*, 37 BANKING & FIN. SERVS. POL'Y REP. 4 (2018); Thomas Lee Hazen, *Crowdfunding or Fraudfunding? Social Networks and the Securities Laws—Why the Specially Tailored Exemption Must Be Conditioned on Meaningful Disclosure*, 90 N.C. L. REV. 1735 (2012); Christian Hofmann, *An Easy Start for Start-ups: Crowdfunding Regulation in Singapore*, 15 BERKELEY BUS. L.J. 219 (2018); Chen Li & Yu Qianqian, *Unravelling China's Gradual Approach to Equity Crowdfunding Regulation*, 8 AM. U. BUS. L. REV. 119 (2019); Anne Matthew, *Crowd-Sourced Equity Funding: The Regulatory Challenges of Innovative Fintech and Fundraising*, 36 U. QUEENSL. L.J. 41 (2017). See generally Dana Brakman Reiser & Steven A. Dean, *SE(c)(3): A Catalyst for Social Enterprise Crowdfunding*, 90 IND. L.J. 1091, 1102 (2015) (noting "[a] growing literature" about "the optimal regulatory approach" to equity crowdfunding).

39. See, e.g., Tanya M. Marcum & Eden S. Blair, *Over- and Under-Funding: Crowdfunding Concerns of the Parties Involved*, 16 DEPAUL BUS. & COM. L.J. 1, 12–15 (2017).

40. See Gary Dushnitsky & Diego Zunino, *The Role of Crowdfunding in Entrepreneurial Finance*, in HANDBOOK OF RESEARCH ON CROWDFUNDING, *supra* note 2, at 46, 49, 58–59, 62, 72–73 (summarizing donation and reward crowdfunding research); Maija Renko, Todd W. Moss & Anna Lloyd, *Crowdfunding by Non-Profit and Social Ventures*, in HANDBOOK OF RESEARCH ON CROWDFUNDING, *supra* note 2, at 249, 255–61 (summarizing research on crowdfunding for nonprofits and social ventures); Inés Alegre & Melina Moleskis, *Beyond Financial Motivations in Crowdfunding: A Systemic Literature Review of Donations and Rewards*, 32 VOLUNTAS 276 (2019) (summarizing donation and reward crowdfunding research); Noelia Salido-Andres, Marta Rey-Garcia, Luis Ignacio Alvarez-Gonzalez & Rodolfo Vazquez-Casielles, *Mapping the Field of Donation-Based Crowdfunding for Charitable Causes: Systemic Review and Conceptual Framework*, 32 VOLUNTAS 288 (2020) (summarizing donation crowdfunding research).

41. See, e.g., Ellen P. Aprill, *Charitable Class, Disaster Relief, and First Responders*, 153 TAX NOTES 949, 967 (2016); Paul Battista, *The Taxation of Crowdfunding: Income Tax Uncertainties and a Safe Harbor Test to Claim Gift Tax Exclusion*, 64 U. KAN. L. REV. 143 (2015); Bailey Hans, *GoFundMe: The Gift That Keeps on Giving, All Tax Season Long*, 172 TAX NOTES FED. 2173 (2021); Jeffrey Kahn, *GoTaxMe: Crowdfunding and Gifts*, 22 FLA. TAX REV. 180 (2018); Fiona Martin & Ann O'Connell, *Crowdfunding: What Are the Tax Issues?*, 20 J. AUSTR. TAX'N 16, 22–26 (2018). But see Brian L. Frye, *Solving Charity Failures*, 93 OR. L. REV. 155, 182–83 (2014) (discussing how the donation model for crowdfunding may mitigate the below-optimal production of charitable goods); Scott, *supra* note 20 (discussing property and estate law issues raised by charitable crowdfunding to help specific individuals).

42. Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 93 (2016).

should apply to charitable crowdfunding.⁴³ While a few practitioners have considered this issue, they have focused on how existing laws may—or may not—apply to charitable crowdfunding.⁴⁴ They have therefore not addressed whether and how existing laws should be modified in light of this new activity.

Charities have, of course, long engaged in fundraising efforts designed to generate financial support from the public.⁴⁵ For example, the first civil case in Australia arose because supplies had gone missing that had been purchased for a young couple and their child using funds received through a media and nobility-driven public fundraising campaign.⁴⁶ During the Civil War the United States Sanitary Commission raised funds from the public to help the wounded; in the decades after the war there were fundraising campaigns in the United States to help the starving in Ireland, to build the Statue of Liberty, to combat the massacres of Armenians, and to support a memorial to assassinated United States President William McKinley.⁴⁷

However, charitable crowdfunding is distinguishable from these previous mass charitable fundraising efforts, particularly in terms of cost, speed, and reach. With respect to time and monetary costs, a letter-writing campaign requires collecting

43. *See id.*

44. *See, e.g.,* RÖTHLER ET AL., *supra* note 34, at 21–35; Christopher M. Hammond, *Social Media and Crowdfunding*, 30 TAX’N EXEMPTS 4, 15 (2019) (state charitable solicitation laws); Michael P. Maloney & David S. Rosenthal, *Charitable Organization Internet Fundraising and State Registration Requirements—Part I*, 29 INTELL. PROP. & TECH. L.J. 3, 3 (2017) (same); Mosher et al., *supra* note 34, at 37–41 (federal tax, intellectual property, state charitable solicitation, and consumer protection laws).

45. *See, e.g.,* SCOTT M. CUTLIP, *FUND RAISING IN THE UNITED STATES* 38 (1965) (describing the rapid growth of public fundraising drives in the United States from 1900 to World War I); ADRIAN SARGEANT & ELAINE JAY, *FUNDRAISING MANAGEMENT: ANALYSIS, PLANNING AND PRACTICE* 7–15 (3d ed. 2014) (describing fundraising by mail in the United Kingdom and United States starting in the Middle Ages and the growth of public fundraising appeals in both countries during the first part of the twentieth century); JOHN R. SEELEY, BUFORD H. JUNKER, R. WALLACE JONES, JR., N.C. JENKINS, M.T. HAUGH & I. MILLER, *COMMUNITY CHEST: A CASE STUDY IN PHILANTHROPY* 17–19 (photo. reprt. 1989) (1957) (describing the growth of public fundraising appeals in the United States during the latter part of the nineteenth century and first part of the twentieth century); OLIVIER ZUNZ, *PHILANTHROPY IN AMERICA: A HISTORY* 45 (2012) (describing how the institutionalization of mass philanthropy and the development of related fundraising techniques began at the turn of the twentieth century in the United States); Redmond Mullin, *Two Thousand Years of Disreputable History*, in *THOUGHTFUL FUNDRAISING: CONCEPTS, ISSUES AND PERSPECTIVES* 9–10 (Jill Mordaunt & Rob Paton eds., 2007) (describing fundraising by charities as having a 2,000-year history, dating back to Paul’s letters to the Corinthians, citing 1 Corinthians 16:1–4 and 2 Corinthians 8:16–21).

46. *See* *Cable v Sinclair* [1788] NSWSupC 7 (Austl.); Kable/Holmes First Fleeter 1788, FELLOWSHIP OF FIRST FLEETERS, http://www.fellowshipfirstfleeters.org.au/henry_kable.htm [<https://perma.cc/NH36-A3UH>] (publishing London newspapers and Lady Codagan-driven public subscription that yielded twenty pounds to purchase goods for the couple, only to have those goods be found missing upon arrival of the relevant ships in Sydney). My thanks to Myles McGregor-Lowndes for bringing this case to my attention.

47. *See* ZUNZ, *supra* note 45, at 44–45; Brian L. Frye, *Social Technology & the Origins of Popular Philanthropy*, 32 GA. ST. U. L. REV. 413, 424–25 (2016); Parhankangas et al., *supra* note 24, at 1.

names and addresses, copying letters, addressing envelopes, and paying for postage. In contrast, charitable crowdfunding requires only creating a webpage, which can easily be done on any of the numerous charitable crowdfunding platforms, and sharing that webpage via often already existing social media networks.⁴⁸ In terms of speed, a campaign organizer can accomplish all of the tasks required to launch a campaign in a matter of minutes.⁴⁹ In addition, and thanks to modern means of transferring funds, donations can start arriving in a matter of seconds. Finally, even the smallest campaign can reach every online individual and entity in the home country of the crowdfunding platform, and many platforms accept donations from residents of multiple countries.⁵⁰ Of course, most campaigns are likely only seen by individuals who are in the social media networks of the organizer, but on occasion a campaign goes viral. For example, an individual who met a struggling teenager decided to launch a GoFundMe campaign (“Chauncey’s Chance”) to raise \$250 to buy a lawnmower for the teen’s planned landscaping business; the teen’s story attracted local and eventually national media interest, raising almost \$350,000 over three months.⁵¹

The combination of these differences means that one person, often not associated with the beneficiary, can now replicate the type of far-reaching fundraising campaign that previously took both significant funding and time. Charitable crowdfunding campaigns also can take advantage of techniques that fundraisers have long known help drive donations, including the ability to put a human face on the appeal and so counter the declining public trust in institutions of all types.⁵² Crowdfunding

48. See, e.g., *Creating a GoFundMe from Start to Finish*, GoFUNDME, <https://support.gofundme.com/hc/en-us/articles/360001992627-Creating-a-GoFundMe-From-Start-to-Finish-> [<https://perma.cc/Z42B-VGAP>] (Dec. 7, 2021) (encouraging sharing campaign through Facebook and email).

49. See, e.g., GoFUNDME, <https://www.gofundme.com> [<https://perma.cc/PZ2J-SC6T>] (describing the simple setup that allows you to personalize and share your GoFundMe in “just a few minutes”); *Creating a GoFundMe from Start to Finish*, *supra* note 48 (describing steps required to start a GoFundMe crowdfunding campaign).

50. See *supra* notes 15–16 and accompanying text.

51. Rachel Monroe, *When GoFundMe Gets Ugly*, THE ATLANTIC (Nov. 2019), <https://www.theatlantic.com/magazine/archive/2019/11/gofundme-nation/598369/> [<https://perma.cc/99RZ-UKLX>].

52. See DAN BUSBY, DONOR-RESTRICTED GIFTS SIMPLIFIED 80 (2007) (stating appeals by individual charity workers for support from family and friends are “an effective alternative to other fund-raising methods because of the greater connection between the donor and the self-supported worker”); Deborah A. Small, George Loewenstein & Paul Slovic, *Sympathy and Callousness: The Impact of Deliberative Thought on Donations to Identifiable and Statistical Victims*, 102 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 143, 143–45 (2007); see, e.g., Tara Bahrapour, *Now Anyone Can Easily Send Items to a U.S. Refugee Family’s Home, Thanks to One Woman’s ‘Mama Bear Instincts,’* WASH. POST (Mar. 26, 2018), <https://www.washingtonpost.com/news/inspired-life/wp/2018/03/26/her-mama-bear-instinct-has-brought-meat-grinders-sewing-machines-and-jumperoos-to-refugees/> [<https://perma.cc/GAR3-K7B9>]. See generally Beth Breeze & Wendy Scaife, *Encouraging Generosity: The Practice and Organization of Fund-Raising Across Nations*, in THE PALGRAVE HANDBOOK OF GLOBAL PHILANTHROPY 570, 590, 593 (Pamela Wiepking & Femida Handy eds., 2015) (noting that “[t]rust is a motif raised often in the data” and the importance of building and maintaining

campaigns are also often led by individuals who are either personally known to the giver or are celebrities—such as Celeste Barber or J.J. Watt—which also helps establish trust.⁵³

As always, where there are significant amounts of money, there are those who will seek to enrich themselves. When it comes to charitable fundraising, most such frauds are likely relatively small in scale, such as when individuals impersonate charity volunteers or set up fake fundraising accounts for a brief period.⁵⁴ Nevertheless, at least in the United States, fundraising abuses are the most common area of enforcement actions reported by state officials that oversee charities.⁵⁵ And sometimes more significant amounts are involved. For example, the U.S. Navy Veterans Association, a fraudulent charity, raised approximately \$100 million in the United States, almost none of which went to its purported charitable activities.⁵⁶ In addition, in countries where this is permitted there are many charities employing for-profit fundraising companies that retain eighty percent, ninety percent, or even all the funds raised to cover their costs and fees.⁵⁷

Even more than with crowdfunding generally, data regarding the scale of charitable crowdfunding is incomplete and inconsistent.⁵⁸ For example and as already noted, GoFundMe reports it had raised more than \$9 billion through 2019,⁵⁹

trust for fundraising) [hereinafter PALGRAVE HANDBOOK].

53. See *supra* notes 10–11 and accompanying text.

54. See, e.g., James J. Fishman, *Who Can Regulate Fraudulent Charitable Solicitation?*, 13 PITT. TAX REV. 1, 3–7 (2015) (examples from the United States); Qiao Xinsheng, *Incidents Reveal Need for Charity Supervision*, CHINA DAILY, <https://global.chinadaily.com.cn/a/202001/15/WS5e1eb945a3101282172712ff.html> [<https://perma.cc/E6FG-UJL6>] (Jan. 15, 2020, 15:03); Austl. Competition & Consumer Comm’n, *Fake Charities*, SCAMWATCH, <https://www.scamwatch.gov.au/types-of-scams/fake-charities> [<https://perma.cc/2WLQ-6GBT>]; *Top 5 Charity Fraud Scams Posing a Threat in 2019*, THIRD SECTOR PROTECT, <https://www.thirdsectorprotect.co.uk/blog/charity-fraud-2/> [<https://perma.cc/YH4L-2SXA>] (example from the United Kingdom).

55. CINDY M. LOTT, ELIZABETH T. BORIS, KARIN KUNSTLER GOLDMAN, BELINDA J. JOHNS, MARCUS GADDY & MAURA FARRELL, *STATE REGULATION AND ENFORCEMENT IN THE CHARITABLE SECTOR 20* (2016), <https://www.urban.org/research/publication/state-regulation-and-enforcement-charitable-sector> [<https://perma.cc/Z6TG-FJ34>].

56. Daniel Fromson, *The Strange, Spectacular Con of Bobby Charles Thompson*, WASHINGTONIAN (Mar. 19, 2017), <https://www.washingtonian.com/2017/03/19/the-strange-spectacular-con-of-bobby-charles-thompson/> [<https://perma.cc/WJW4-29GH>]; see also *FTC, States Settle Claims Against Two Entities Claiming to Be Cancer Charities; Orders Require Entities to Be Dissolved and Ban Leader from Working for Non-Profits*, FED. TRADE COMM’N (Mar. 30, 2016), <https://www.ftc.gov/news-events/press-releases/2016/03/ftc-states-settle-claims-against-two-entities-claiming-be-cancer> [<https://perma.cc/Z6K5-K5U8>] (reporting four purported cancer charities allegedly bilked more than \$187 million from donors).

57. See, e.g., CAL. ATT’Y GEN., SUMMARY OF CHARITABLE SOLICITATION CAMPAIGNS CONDUCTED BY PROFESSIONAL FUNDRAISERS IN CALENDAR YEAR 2019, at 6 (2020); N.Y. ATT’Y GEN., PENNIES FOR CHARITY: WHERE YOUR MONEY GOES 5 (2019).

58. See, e.g., Michael J. Young & Ethan Scheinberg, *The Rise of Crowdfunding for Medical Care: Promises and Perils*, 317 JAMA 1623, 1623 (2017) (“Owing in part to virtually no regulatory reporting standards for crowdfunding portals, robust data on the frequency and scope of medical crowdfunding are limited.”).

59. See *supra* note 13 and accompanying text.

and Facebook reports that as of early 2020 it had helped people raise more than \$3 billion for nonprofits.⁶⁰ One research report states that three charitable crowdfunding platforms in China raised \$3.83 billion in 2017 alone.⁶¹ At the same time and for unknown reasons, Fundly estimates that as of 2020 only \$5.5 billion had been raised through both charitable and reward crowdfunding in the entire world and through all platforms.⁶² The Cambridge Centre for Alternative Finance estimated there was only approximately \$639 million in charitable crowdfunding globally in 2018, but acknowledged that it may have significantly underestimated the actual volume.⁶³

What is clear is that while likely in the billions of dollars annually and growing rapidly, charitable crowdfunding still represents a relatively small portion of total giving. For example, in the United States approximately \$450 billion was given to charitable organizations in 2019, or roughly two orders of magnitude greater than all U.S.-sourced charitable crowdfunding.⁶⁴ Global giving figures, whether to charities or to individuals in need, are not readily available, but at least in a handful of countries—notably Canada, China, and the United Kingdom—giving to charitable organizations exceeds \$10 billion annually.⁶⁵ There do not appear to be any reliable

60. Naomi Gleit, *People Raise Over \$2 Billion for Causes on Facebook*, FACEBOOK, <https://about.fb.com/news/2019/09/2-billion-for-causes/> (Feb. 6, 2020, 9:15 AM) [<https://perma.cc/T3VA-4Y3H>].

61. Pingyue Jin, *Medical Crowdfunding in China: Empirics and Ethics*, 45 J. MED. ETHICS 538, 539 (2019).

62. *Crowdfunding Statistics [Updated for 2020!]*, *supra* note 26; see also MASSOLUTION, 2015CF: THE CROWDFUNDING INDUSTRY REPORT 14 (2015), <https://www.smv.gob.pe/Biblioteca/temp/catalogacion/C8789.pdf> [<https://perma.cc/4EGT-WYME>] (reporting for 2014 about ten percent of crowdfunding volume, or less than \$2 billion, as being donations-based).

63. CAMBRIDGE CTR. FOR ALT. FIN. (CCAF), THE GLOBAL ALTERNATIVE FINANCE MARKET BENCHMARKING REPORT 43 (2020), https://www.jbs.cam.ac.uk/fileadmin/user_upload/research/centres/alternative-finance/downloads/2020-04-22-ccaf-global-alternative-finance-market-benchmarking-report.pdf [<https://perma.cc/Y7CE-2HW3>].

64. *Giving USA 2020: Charitable Giving Showed Solid Growth, Climbing to \$449.64 Billion in 2019, One of the Highest Years for Giving on Record*, GIVINGUSA (June 16, 2020, 8:00 AM), <https://givingusa.org/giving-usa-2020-charitable-giving-showed-solid-growth-climbing-to-449-64-billion-in-2019-one-of-the-highest-years-for-giving-on-record/> [<https://perma.cc/HW9T-RLUR>].

65. See, e.g., CANADAHELPS.ORG, THE GIVING REPORT 2020: ONLINE GIVING IS ON THE RISE 7 (2020), <https://www.canadahelps.org/en/the-giving-report/download-the-report/> [<https://perma.cc/ZC4R-AY2Q>]; CHARITIES AID FOUND., CAF UK GIVING 2019: AN OVERVIEW OF CHARITABLE GIVING IN THE UK 11 (2019), <https://www.cafonline.org/about-us/publications/2019-publications/uk-giving-2019> [<https://perma.cc/T2X2-NR5R>]; *Lucky for Some: Why Do People in China Give so Little Charity?*, ECONOMIST (Sept. 6, 2018), <https://www.economist.com/china/2018/09/06/why-do-people-in-china-give-so-little-to-charity> [<https://perma.cc/65K3-ABCG>]. See generally CHARITIES AID FOUND., GROSS DOMESTIC PHILANTHROPY: AN INTERNATIONAL ANALYSIS OF GDP, TAX AND GIVING 11–12 (2016), <https://www.cafonline.org/about-us/publications/2016-publications/gross-domestic-philanthropy#:~:text=Gross%20Domestic%20Philanthropy%3A%20An%20international,wit hin%20a%20number%20of%20countries> [<https://perma.cc/K7ET-UFZZ>] (reporting charitable giving in twenty-four countries for the latest year available, with the United States

global figures for how much individuals give directly to other individuals based on financial need.

The limited data regarding the geographic distribution of charitable crowdfunding indicates that China and the United States have the largest concentrations of such efforts.⁶⁶ But charitable crowdfunding is certainly not limited to these countries. Significant charitable crowdfunding has been documented in Ireland,⁶⁷ Japan,⁶⁸ the United Kingdom,⁶⁹ and many other countries.⁷⁰ In addition, some U.S.-based charitable crowdfunding platforms are focused on helping people outside of the United States.⁷¹ As for the number of charitable crowdfunding platforms globally, there do not appear to be any reliable, relatively recent estimates,⁷² and any such

(\$258.5 billion in 2014), the United Kingdom (\$17.4 billion in 2014), and Canada (\$12.4 billion in 2013) as the largest source countries); EUR. FUNDRAISING ASS'N, FUNDRAISING IN EUROPE 5 (2017), https://efa-net.eu/wp-content/uploads/2018/10/EFA_Fundraising_in_Europe_Report_Dec_17.pdf [<https://perma.cc/4E3S-J9HS>] (reporting annual charitable donations from all sources, including corporations, foundations, and lotteries as well as individuals, of more than €10 billion in Germany and the United Kingdom).

66. See Jin, *supra* note 61, at 539 (showing in 2017, almost \$4 billion was raised on three Chinese charitable crowdfunding platforms); *Crowdfunding in the Americas: USA, Canada, Latin America & the Caribbean* (2019), P2PMARKETDATA (June 26, 2019), <https://p2pmarketdata.com/blog/crowdfunding-statistics-worldwide/> [<https://perma.cc/W5TK-RNVE>] (showing \$290 million in 2017 donation-based crowdfunding in the Americas, almost all of which was in the United States given it represented 96.5% of all crowdfunding in that part of the world); Jonas Schmidt, *Crowdfunding in China: A Rise and Fall*, P2PMARKETDATA (July 12, 2019), <https://p2pmarketdata.com/crowdfunding-china/> [<https://perma.cc/7Y3B-QBU7>] (reporting \$140 million in 2015 donation-based crowdfunding, with total crowdfunding of all types tripling by 2017). But see CCAF, *supra* note 63, at 43 (reporting for 2018 almost half of global charitable crowdfunding as in the United States but almost none in China).

67. Laura Slattery, *GoFundMe, the Crowdfunding Site No One Should Need, Targets European Growth*, IRISH TIMES (Feb. 25, 2019, 5:30 AM), <https://www.irishtimes.com/business/media-and-marketing/gofundme-the-crowdfunding-site-no-one-should-need-targets-european-growth-1.3803841> [<https://perma.cc/9PY9-XN4A>] (reporting more than €30 million donated by Irish users of GoFundMe since 2016).

68. See SHUSAKU SASAKI, GROUP SIZE AND CONFORMITY IN CHARITABLE GIVING: EVIDENCE FROM A DONATION-BASED CROWDFUNDING PLATFORM IN JAPAN 7–8 (2017), <https://ssrn.com/abstract=2972403> [<https://perma.cc/2E4D-NJHQ>].

69. See CCAF, *supra* note 63, at 65 (reporting £39.6 million in donation-based crowdfunding in 2016, triple the amount for the previous year); Bill Borrows, *Crowdfunding: A Fund-Sapping Rival, or a New Opportunity for Charities?*, THIRDSECTOR (Apr. 17, 2020), <https://www.thirdsector.co.uk/crowdfunding-fund-sapping-rival-new-opportunity-charities/fundraising/article/1676580> [<https://perma.cc/A9GT-GXFR>] (reporting more than sixty-five charitable crowdfunding platforms in the United Kingdom).

70. See, e.g., CCAF, *supra* note 63, at 43 (reporting donation-based crowdfunding in every major geographic area of the world except China).

71. See, e.g., *How It Works*, WATSI, <https://watsi.org/crowdfunding> [<https://perma.cc/9GBS-RNN5>] (identifying crowdfunded payment of medical expenses for people in twenty-seven countries).

72. But see Theim, *supra* note 25 (identifying more than 3500 social giving crowdfunding platforms in 2017).

estimates would likely be quickly out-of-date, as platforms emerge, merge, and disappear with some frequency. For example, GoFundMe has recently taken over several other charitable crowdfunding websites.⁷³

As detailed in this Part, charitable crowdfunding can in turn be divided into crowdfunding for a charitable organization, crowdfunding for one or more individuals in financial need, and crowdfunding for a cause, although the last form tends to quickly morph into one or both of the other two forms.⁷⁴ The differences between these categories may lead to significant differences in how relevant laws apply to them, as Part II will detail.

C. Crowdfunding for a Charitable Organization

One common form of charitable crowdfunding is a campaign to raise funds for a particular charitable organization (a “charity”), usually in order to address a particular need or support a particular project.⁷⁵ The effort that supported Australian fire services during the 2020 wildfires is an example of this type of campaign, as the funds it raised went to a charitable trust.⁷⁶ So was one effort to help victims of Hurricane Harvey, for which the funds raised went to the Justin J. Watt Foundation, a nonprofit corporation recognized by the U.S. Internal Revenue Service as tax-exempt under section 501(c)(3) of the Internal Revenue Code.⁷⁷ Many charities also crowdfund through their own websites, but the focus of this Article is on crowdfunding done through third-party platforms because, for reasons detailed below, such crowdfunding raises the most significant regulatory questions.⁷⁸

73. *YouCaring Is Now GoFundMe*, GOFUNDME, <https://www.gofundme.com/c/youcaring> [<https://perma.cc/PKF6-DZ5Y>] (stating GoFundMe has now consolidated GiveForward, Generosity, and YouCaring).

74. See FUNDRAISING REGUL., CODE OF FUNDRAISING PRACTICE 107 (2019), <https://www.fundraisingregulator.org.uk/sites/default/files/fr-code/Code%20Fundraising%20Practice%20October%202019.PDF> [<https://perma.cc/9CLP-65DQ>] (defining charitable crowdfunding); *infra* Section I.D (crowdfunding for a cause).

75. See generally Renko et al., *supra* note 40, at 249.

76. MCGREGOR-LOWNDES ET AL., *supra* note 9, at 1.

77. See *Corporate Records for the Justin J. Watt Foundation, Inc.*, WIS. DEP’T OF FIN. INSTS., <https://www.wdft.org/apps/CorpSearch/Search.aspx?> [<https://perma.cc/FQX6-QMCP>] (search for “Justin J. Watt Foundation, Inc.”); INTERNAL REVENUE SERV., FORM 990 FOR THE JUSTIN J. WATT FOUNDATION, INC. 1 (2018) https://apps.irs.gov/pub/epostcard/cor/273516574_201906_990_2019112216879698.pdf [<https://perma.cc/58HS-C2UV>]; MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 3–4 (2004) (describing legal characteristics of charities in the United States); *supra* notes 10–11 and accompanying text.

78. See Parhankangas et al., *supra* note 24, at 3; *infra* notes 198–199, 283–290 and accompanying text. For similar reasons, this Article does not focus on viral social media campaigns, such as the ALS Ice Bucket Challenge, which involve individuals encouraging others to give directly to a specific charity and so not through a crowdfunding platform. See, e.g., Amanda Trejos, *Ice Bucket Challenge: 5 Things You Should Know*, USA TODAY (July 3, 2017, 1:50 PM), <https://www.usatoday.com/story/news/2017/07/03/ice-bucket-challenge-5-things-you-should-know/448006001/> [<https://perma.cc/3BMN-LK3H>].

Some platforms, such as Classy and Facebook's Social Impact platform, focus specifically on charities by recruiting them to raise funds for themselves.⁷⁹ Other platforms, such as GoFundMe, focus on recruiting campaign organizers, whether they are charities that want to raise funds for themselves or individuals who want to raise funds for a particular charity.⁸⁰ A third set of platforms, which include GlobalGiving and PayPal's Giving Fund, focus on attracting donors by trying to provide them with as broad a menu of potential charity recipients as possible.⁸¹ Finally, some platforms, such as Citizinvestor, ioby, Neighbor.ly, and Spacehive, are known for doing "civic crowdfunding" in that they support projects that "specifically provide service to communities."⁸² Illustrating the diversity of the crowdfunding field, there are also platforms that have more narrow foci; for example, DonorsChoose allows donors to "contribute to classroom projects that need material, equipment or travel expenses."⁸³

The Lilly School of Philanthropy at Indiana University has begun tracking charitable crowdfunding campaigns on four platforms (GoFundMe, GlobalGiving, Charidy, and Indiego) that it has identified as the most active based on a review of more than twenty platforms.⁸⁴ Self-reported data from GoFundMe states it has hosted millions of campaigns, although it does not provide separate figures for campaigns to benefit charities as opposed to campaigns to benefit individuals.⁸⁵ Similarly, Facebook—which is not included in the Lilly School list—reports over 45 million people have donated to or created a fundraiser on Facebook.⁸⁶ But in contrast to the

79. See *Our Story: Mobilize and Empower the World for Good*, CLASSY, <https://www.classy.org/online-fundraising-company/> [<https://perma.cc/W42T-NQLF>]; *Get Started & Fundraise*, FACEBOOK: SOC. IMPACT, <https://socialimpact.facebook.com/get-started/> [<https://perma.cc/3ENJ-8HV6>].

80. See, e.g., *Make a Difference with Fundraising for Nonprofits*, GOFUNDME, <https://www.gofundme.com/start/charity-fundraising> [<https://perma.cc/N3N3-SLV5>]; Jason Vissers, *7 Platforms that Support Crowdfunding for Nonprofits*, MERCH. MAVERICK: BLOG, <https://www.merchantmaverick.com/6-platforms-that-do-crowdfunding-for-nonprofits/> [<https://perma.cc/AA7M-DWEQ>] (May 27, 2021). GoFundMe has also launched a separate, charitable arm. See GOFUNDME.ORG, <https://www.gofundme.org> [<https://perma.cc/X5DU-FL7X>].

81. See *About Us*, GLOBALGIVING, <https://www.globalgiving.org/aboutus/> [<https://perma.cc/G43R-8Y2X>]; *PayPal Giving Fund*, PAYPAL, <https://www.paypal.com/us/webapps/mpp/givingfund/home> [<https://perma.cc/P7UL-H3HN>].

82. Michael P. Ciuchta, Roberto S. Santos, Peiyi Jia & Amy M. Yacus, *Crowdfunding Platforms: Taking Stock and Looking Forward*, in HANDBOOK OF RESEARCH ON CROWDFUNDING, *supra* note 2, at 94, 105–06.

83. Katzenmeier et al., *supra* note 3, at 122, 125; see also Renko et al., *supra* note 40, at 252–54 (listing crowdfunding platforms).

84. *Crowdfunding Across the World*, *supra* note 5.

85. *Inspire Hope: The GoFundMe 2020 Giving Report*, GOFUNDME, <https://www.gofundme.com/2020> [<https://perma.cc/X2LW-2V98>]. GlobalGiving provides statistics for its overall activity, but there does not appear to be any readily available public aggregate data for Charidy or Indiego. See GLOBALGIVING, <https://www.globalgiving.org/> [<https://perma.cc/9N5B-6KEP>] (listing over 26,000 projects benefitting nonprofits with over a million donors); *Crowdfunding Across the World*, *supra* note 5.

86. Gleit, *supra* note 60.

astounding success of the prominent examples noted earlier, the limited data available indicate that most charitable crowdfunding efforts raise only modest amounts. For example, one source reports that the average amount raised by a crowdfunding campaign to benefit a charity was only \$9238 as of 2018.⁸⁷ A recent study found that the average contribution to a GoFundMe campaign from a single donor was only \$67, and that was the highest average of four charitable crowdfunding platforms studied.⁸⁸ Other data reveal even lower figures with respect to average amounts raised per campaign.⁸⁹

Nevertheless, the Australian wildfire and Hurricane Harvey campaigns are not unique in raising millions of dollars for a charity. Other campaigns, particularly ones associated with well-known, tragic events, have enjoyed similar success. For example, two of the top three GoFundMe campaigns in 2018 were associated with an existing charity from their start: the over \$22 million raised for the Time's Up Legal Defense Fund housed at the National Women's Law Center that grew out of the #MeToo movement, and the over \$10 million raised for the official Stoneman Douglas Victims' Fund housed at the Broward Education Foundation.⁹⁰ The third top fundraising campaign, for the families impacted by the Humboldt Broncos bus crash involving a Canadian junior hockey team that killed sixteen people and injured another thirteen, was not initially associated with a charity but a charity was eventually created to handle distributing the funds raised.⁹¹

D. Crowdfunding for One or More Individuals in Need

Another common form of charitable crowdfunding is a campaign to raise funds for a specific individual or group of individuals with an identified need that exceeds their financial capacity. It appears that the most common campaign along these lines is to cover significant medical expenses.⁹² Another common reason for these

87. *The Ultimate List of Charitable Giving Statistics for 2018*, *supra* note 17.

88. Katzenmeier et al., *supra* note 3, at 134.

89. See *See Our Impact Nationwide Since 2000*, DONORSCHOOSE, <https://www.donorschoose.org/about/impact.html> [<https://perma.cc/2TPE-Q8LX>] (reporting an average donation size for new donors of \$52; average cost of funded K-12 education project of \$546); Monroe, *supra* note 51 (reporting the average GoFundMe campaign, which presumably includes both campaigns for charities and for individuals, earns less than \$2000).

90. See *GoFundMe 2018: A Year in Giving*, GoFUNDME, <https://www.gofundme.com/2018> [<https://perma.cc/L2FM-PBBL>]; *Time's Up Legal Defense Fund*, GoFUNDME, <https://www.gofundme.com/timesup> [<https://perma.cc/YA9A-2A9H>]; *Stoneman Douglas Victims' Fund*, GoFUNDME, <https://www.gofundme.com/stonemandouglasvictimsfund> [<https://perma.cc/LX9T-LHSM>]; see also Melina Glusac, *The Most Successful GoFundMe Campaigns of All Time*, INSIDER (Nov. 16, 2018, 2:48 PM), <https://www.insider.com/best-gofundme-campaigns-2018-11> [<https://perma.cc/7DJF-PPDJ>] (listing the then top-twenty GoFundMe campaigns as reported by the platform).

91. See Alex MacPherson, *Judge Approves Humboldt Broncos GoFundMe Payments Despite One Family's Opposition*, SASKATOON STARPHOENIX (Nov. 29, 2018), <https://thestarphoenix.com/news/local-news/judge-approves-payout-plan-for-gofundme-money-following-humboldt-broncos-bus-crash> [<https://perma.cc/T7JW-XAAB>]; *GoFundMe 2018: A Year in Giving*, *supra* note 90.

92. See Fei Gao, Xitong Li, Yuan Cheng & Yu Jeffrey Hu, *Ladies First, Gentlemen Third!*

campaigns is poverty, as exemplified by the (allegedly fraudulent) Pay It Forward campaign to help a homeless veteran.⁹³ These campaigns may be organized by the person in need, a family member, a friend, a neighbor, a stranger who is moved by the plight of the needy individual, or by an organization or other group.

Quantitative data regarding crowdfunding for individuals is particularly difficult to obtain, as GoFundMe and other platforms that host such campaigns tend to also host campaigns benefitting charities and to not differentiate among these two types when reporting aggregate or average campaign information.⁹⁴ For example, while GoFundMe reports total contributions since its founding of over \$9 billion from more than 120 million donors, it does not report how those figures break down between campaigns for charities versus campaigns for individuals.⁹⁵ However, most campaigns for individuals are likely modest in size, as the average GoFundMe campaign reportedly raises less than \$2000 from a couple dozen donors.⁹⁶

As with campaigns raising funds for charities, the individual beneficiary or beneficiaries often are aware of the campaign and at least implicitly consent to it, but sometimes a campaign is launched without their consent or even knowledge.⁹⁷ GoFundMe even has a process by which a purported beneficiary who learns about a campaign launched on their behalf can either be formally designated the beneficiary or report the campaign to GoFundMe.⁹⁸ There appears to be no data regarding the

The Effect of Narrative Perspective on Medical Crowdfunding 12 (2019) (unpublished manuscript) (on file with author) (stating that the largest medical crowdfunding platform in China had collected as of September 2018 \$1.4 billion from more than 340 million donors to help more than 800,000 patients); Jin, *supra* note 61 (noting three Chinese charitable crowdfunding platforms raised \$148 million in 2015, with more than half of the donations for medical causes; the total amount raised by these platforms increased to \$3.83 billion in 2017); TONG WANG, FUJIE JIN, YU (JEFFREY) HU & YUAN CHENG, EARLY PREDICATIONS FOR MEDICAL CROWDFUNDING: A DEEP LEARNING APPROACH USING DIVERSE INPUTS 2 (2019), <https://arxiv.org/pdf/1911.05702.pdf> [<https://perma.cc/XG8T-JVNR>]; Barney Jopson, *Why Are So Many Americans Crowdfunding Their Healthcare?*, FIN. TIMES (Jan. 11, 2018), <https://www.ft.com/content/b99a81be-f591-11e7-88f7-5465a6ce1a00> [<https://perma.cc/S6ZH-TNJZ>] (quoting YouCaring as saying “close to half of its 350,000 active campaigns are related to healthcare”); Carolyn McClanahan, *People Are Raising \$650 Million on GoFundMe Each Year to Attack Rising Healthcare Costs*, FORBES (Aug. 13, 2018, 7:28 AM), <https://www.forbes.com/sites/carolynmcclanahan/2018/08/13/using-gofundme-to-attack-health-care-costs/#3f14931e2859> [<https://perma.cc/5FZU-2AZ9>] (reporting that GoFundMe annually hosts 250,000 medical campaigns that raise \$650 million); Slattery, *supra* note 67 (reporting that one-third of the donations GoFundMe receives are intended to pay for healthcare costs).

93. See Rosenberg, *supra* note 21.

94. But see *Who We Are*, DONORSEE, <https://donorsee.com/whoware> [<https://perma.cc/XH3R-YMCE>] (identifying itself as a platform that only hosts small crowdfunding campaigns focused on helping specific individuals located in impoverished parts of the world).

95. See GOFUNDME, *supra* note 13.

96. Monroe, *supra* note 51.

97. See, e.g., *GiveForward, Inc. v. Hodges*, No. JFM-13-1891, 2015 WL 4716046, at *1 (D. Md. Aug. 6, 2015) (litigating a fraudulent fundraiser for minor child created by noncustodial parent without knowledge of child or custodial parent).

98. *Claiming a GoFundMe Started on Your Behalf*, GOFUNDME (Sept. 14, 2021),

extent to which campaigns—whether well-meaning or fraudulent—are launched without the consent or knowledge of the individual beneficiaries.

Individuals have of course always sought help for themselves or for others. What makes crowdfunding different is the ability to ask for financial help not only from people already known to the campaign organizer or whoever they encounter on the street but also from the entire online world, at minimal cost.⁹⁹ While this greatly expands the potential support base, it also means that most potential supporters have no easy way to verify the authenticity of the stated need or whether the donated funds are in fact used to address that need.

E. Crowdfunding for a Cause

Some crowdfunding efforts start out as efforts to raise funds for a cause such as Black Lives Matter, #MeToo, or building a border wall between the United States and Mexico. As a practical matter, such efforts become a campaign to raise funds for a particular organization that supports the cause at issue or a number of campaigns to raise funds for individuals in need, or a combination of the two, since an abstract cause cannot actually receive any funds. For example, the largest 2018 campaign on GoFundMe was for the Time's Up Legal Defense Fund that grew out of the #MeToo movement and was housed at the National Women's Law Center.¹⁰⁰ Many other crowdfunding efforts under the #MeToo banner raise funds for women's rights groups of various stripes while at the same time numerous individuals have launched their own crowdfunding efforts to raise funds to help deal with their personal #MeToo situations or projects relating to the #MeToo movement.¹⁰¹ A similar pattern exists with Black Lives Matter.¹⁰²

As for the GoFundMe effort to build a border wall, it became an effort to raise funds for a U.S. tax-exempt nonprofit that has committed to help build that wall, although the nonprofit was actually tax-exempt as a social welfare organization under section 501(c)(4) of the U.S. Internal Revenue Code instead of as a charity under section 501(c)(3).¹⁰³ The main effect of this difference is that donations to this

<https://support.gofundme.com/hc/en-us/articles/115015913628-Claiming-a-GoFundMe-Started-on-Your-Behalf> [<https://perma.cc/BN77-ZPZ9>].

99. See Ingram Bogusz, *supra* note 2, at 23, 25 (lowering costs for both campaign organizers and funders).

100. Jessica Testa, *Time's Up Has Raised More Money than Any Other GoFundMe Campaign in History*, BUZZFEED NEWS (Dec. 6, 2018, 6:22 AM), <https://www.buzzfeednews.com/article/jtes/gofundme-timesup-metoo-fundraising-record> [<https://perma.cc/799V-UGZ6>]; see *Time's Up Legal Defense Fund*, NAT'L WOMEN'S L. CTR., <https://nwlc.org/times-up-legal-defense-fund/> [<https://perma.cc/Z35H-8E5E>].

101. See, e.g., *Results for "#MeToo,"* GOFUNDME, https://www.gofundme.com/mvc.php?route=homepage_norma/search&term=%23MeToo [<https://perma.cc/8MG8-5EH9>] (reporting over 20,000 results).

102. See *Fund the Movement*, BLACK LIVES MATTER, https://secure.actblue.com/donate/ms_blm_homepage_2019 [<https://perma.cc/A8LS-RM74>] (stating that donations go to ActBlue Charities); *Black Lives Matter Search*, GOFUNDME, <https://www.gofundme.com/s?q=Black%20Lives%20Matter> [<https://perma.cc/P2S3-CTLB>] (indicating on the search bar over 40,000 campaigns).

103. See Mariana Alfaro, *After GoFundMe Refunded Donations to a "Fund the Wall"*

campaign were not tax deductible as charitable contributions for the donors.¹⁰⁴ Donative campaigns focused on specific causes therefore collapse into the other two categories because someone has to actually receive the funds raised, and so crowdfunding for a cause will not be discussed separately in the remainder of this Article.¹⁰⁵

F. Downsides of Charitable Crowdfunding

The growing popularity of charitable crowdfunding and the widely publicized examples of successful campaigns illustrate the ability of this new form of fundraising to encourage generosity. For example, Brian Frye argues that charitable crowdfunding helps solve some “charity failures” in the United States that result from the inability of the current federal charitable contribution deduction to subsidize donations from lower income donors.¹⁰⁶ At the same time, commentators and news stories have highlighted various downsides.¹⁰⁷ These include misunderstandings, misuse, and outright fraud. The potential for organizers to launch campaigns without the consent or even knowledge of the beneficiary may also raise concerns.

Perhaps the most common criticism of charitable fundraising is that individuals often launch campaigns with high expectations only to have the reality that most campaigns raise modest amounts crush their dreams.¹⁰⁸ For example, a couple in the United States with limited financial resources launched a GoFundMe campaign to raise the \$72,000 they estimated they would need to sustain themselves in the wake

Campaign, People Sent the Organizer Over \$7 Million to Build the Wall Privately, BUS. INSIDER (Jan. 20, 2019, 8:14 AM), <https://www.businessinsider.com/fund-the-border-wall-gofundme-refund-build-privately-2019-1> [<https://perma.cc/AVP9-PWYH>].

104. See 26 U.S.C. § 170(a)(1), (c).

105. An exception may be the Insulate Britain campaign, which the Fundraising Regulator in the United Kingdom said was not a formal charity and so did not fall within its remit or that of the Charity Commission for England and Wales; nevertheless, a crowdfunding platform shut down Insulate Britain’s fundraising webpage after discussions with the Fundraising Regulator. Jamie Phillips, *Crowdfunder BLOCKS Contributions to Insulate Britain Fundraising Page that Received More than £60,000 of Donations After It Was Accused of ‘Funding Criminal Activity,’* DAILY MAIL (Oct. 28, 2021, 4:30 PM), <https://www.dailymail.co.uk/news/article-10142159/Crowdfunder-REMOVE-Insulate-Britain-fundraising-page-received-60-000-donations.htm> [<https://perma.cc/3LG3-PETD>].

106. See, e.g., Brandee R. Hancock & Monika N. Turek, *Risks and Abuses of Crowdfunding for Charity*, EXEMPT ORG. TAX REV. 105, 107 (2016) (examples of funds not reaching the identified beneficiary); Monroe, *supra* note 51 (discussing the downsides of both the many campaigns that fail to meet their goals and unexpectedly successful campaigns); *infra* notes 109–128 and accompanying text.

107. Frye, *supra* note 41, at 159.

108. See Mark Igra, Nora Kenworthy, Cadence Luchsinger & Jin-Kyu Jung, *Crowdfunding as a Response to COVID-19: Increasing Inequities at a Time of Crisis*, 282 SOC. SCI. & MED. 114105, at 3 (2021) (showing the median GoFundMe campaign for COVID-19 related needs created between January 1 and July 31, 2020, in the United States raised only \$65 out of a \$5000 goal and attracted two donations, and more than ninety percent did not reach their campaign goal); Monroe, *supra* note 51 (“[M]ost [GoFundMe] efforts fizzle without coming close to their financial goals.”).

of the wife's pancreas transplant, sharing intimate details of their lives, only to have the campaign max out at \$1645.¹⁰⁹

A related problem is that even a wildly successful campaign can lead to unexpected negative results. For example, in the wake of the Humboldt Broncos bus crash in Canada, a dispute arose among the families of the victims over how the millions of dollars raised should be allocated, which took months to resolve.¹¹⁰ After the 2016 Pulse Nightclub shooting in the United States, the GLBT Community Center of Central Florida that raised more than \$500,000 in contributions was fined for registration violations and criticized for a volunteer allegedly mishandling funds.¹¹¹ Or a campaign may raise an amount that significantly exceeds the need sought to be addressed, raising questions about how excess funds should be used.¹¹² This is not a new problem in the fundraising area. Often, particularly compelling situations such as well-publicized natural disasters, mass shootings, or terrorist attacks attract more donations than required to help the affected individuals.¹¹³ But while in the past it has usually been sophisticated and well-resourced organizations that have found themselves in this situation, with charitable crowdfunding a small, under-resourced organization or even a single individual can find themselves wrestling with this problem. For example, in China a mother raised money to help treat her daughter's eye cancer, but allegedly ended up using the funds to treat her son's cleft palate after her daughter died, leading to authorities requiring her to return the remaining funds to the fundraising platform.¹¹⁴ Finally, high-profile tragedies may result in hundreds of fundraisers to help those affected, with limited information distinguishing them.¹¹⁵

It is not only organizers and beneficiaries who may misunderstand the likely results for a campaign. Donors may also misunderstand what their contributions are supporting, even if organizers do not intend any deception. For example, the Australian wildfire campaign provided that the funds would go to a charitable trust that a court found had limited purposes—primarily to provide funds to fire brigades in order to purchase or maintain fire-fighting equipment and facilities, provide training, or provide other resources needed for the volunteer-based fire and

109. See Monroe, *supra* note 51 (Laila and Richard Roy's story).

110. See MacPherson, *supra* note 91; Canadian Press, *Funds to Start Being Distributed to Families of Humboldt Broncos*, iHEARTRADIO (May 17, 2018, 9:22 PM), <https://www.iheartradio.ca/newstalk-1010/news/funds-to-start-being-distributed-to-families-of-humboldt-broncos-1.3827275> [<https://perma.cc/D5NB-8DD9>]; Susan Phillips, *Good News After Humboldt: How a \$15 Crowdfunder Turned Nasty & Got Quickly Resolved*, CARLETON UNIV. (Nov. 9, 2020), <https://carleton.ca/panl/story/how-15-million-humboldt-crowdfunder-that-turned-nasty-got-quickly-resolved/> [<https://perma.cc/79EH-797A>].

111. Brinkmann, *supra* note 18.

112. See Scott, *supra* note 20.

113. See, e.g., Robert A. Katz, *A Pig in a Python: How the Charitable Response to September 11 Overwhelmed the Law of Disaster Relief*, 36 IND. L. REV. 251, 280–83 (2003).

114. STRAITS TIMES, *supra* note 21.

115. See, e.g., Trib. News Servs., *Scams and Waste Loom as Charity Millions Donated After Orlando Nightclub Shooting*, CHI. TRIB. (Aug. 27, 2016, 2:00 PM), <https://www.chicagotribune.com/nation-world/ct-orlando-victims-charity-scams-waste-20160827-story.html> [<https://perma.cc/K75S-BXE7>].

emergency service activities.¹¹⁶ The court therefore rejected the trust's request to transfer funds to other charities, to fund interstate rural fire services, or to help animals affected by the wildfires, despite the vague solicitation language of the campaign and the requests from many donors for their contributions to be used for the latter purposes.¹¹⁷ Similarly, after George Floyd's murder many people donated to the Black Lives Matter Foundation through GoFundMe, including in some instances employees of prominent companies such as Apple, Google, and Microsoft based on encouragement from their employers. It was only later that the donors and their employers learned that the Foundation was not part of the BLM movement but instead had been formed (a number of years earlier) to support police department/community relations.¹¹⁸ Donors may also not understand that while donations that go directly to a charity may provide certain tax benefits, donations that go directly to help a specific individual or individuals generally do not.¹¹⁹

Finally, the speed with which a charitable crowdfunding campaign can be established and its broad reach may attract organizers who intend to deceive.¹²⁰ In the wake of worldwide media coverage of the Australian wildfires, the Australian Competition and Consumer Commission reported having received 425 reports of bushfire scams, many relating to crowdfunding campaigns.¹²¹ One of the largest charitable crowdfunding frauds to date appears to have been the Pay It Forward effort launched in 2017 to benefit a homeless veteran in the United States who had allegedly helped a woman who had run out of gas on a highway, which raised more than \$400,000.¹²² After a dispute arose relating to the use of the funds, prosecutors brought theft charges, alleging that the story was a sham.¹²³ Prosecutors also alleged

116. See MCGREGOR-LOWNDES & HANNAH, *supra* note 9, at 3–4.

117. *Id.* at 4–5.

118. Ryan Mac & Brianna Sacks, “The Black Lives Matter Foundation” Raised Millions. It’s Not Affiliated with The Black Lives Matter Movement, BUZZFEED NEWS (June 15, 2020, 7:03 PM), <https://www.buzzfeednews.com/article/ryanmac/black-lives-matter-foundation-unrelated-blm-donations> [<https://perma.cc/P39X-5BAG>].

119. See, e.g., Rev. Rul. 62-113, 1962-2 C.B. 10 (explaining United States federal tax law).

120. See Hancock & Turek, *supra* note 106 (examples); Nathaniel Popper & Taylor Lorenz, *GoFundMe Confronts Coronavirus Demand*, N.Y. TIMES (Mar. 26, 2020), <https://www.nytimes.com/2020/03/26/style/gofundme-coronavirus.html> [<https://perma.cc/3MKN-22QX>] (GoFundMe estimates less than 0.1% of campaigns are fraudulent); GOFRAUDME, <http://gofraudme.com/> [<https://perma.cc/6ULH-YCLT>]; *supra* note 49 and accompanying text (GoFundMe speed of setup).

121. Rachel Clayton, *More than 400 Bushfire Fundraiser Scams Reported as Well-Wishers Dig Deep for Fire Relief*, ABC NEWS, <https://www.abc.net.au/news/2020-01-16/gofundme-donorbox-scams-targeting-bushfire-relief-funds/11870558> [<https://perma.cc/U778-SKBUI>] (Apr. 14, 2020, 5:10 AM).

122. Kelli B. Grant, *On #GivingTuesday, Check into That Crowdfunding Campaign Before You Donate*, CNBC (Nov. 27, 2018, 9:47 AM), <https://www.cnbc.com/2018/11/27/how-to-avoid-fraud-on-crowdfunding-sites.html> [<https://perma.cc/X38F-NDPW>]; Rosenberg, *supra* note 21.

123. Rosenberg, *supra* note 21; Virginia Streva, *GoFundMe Scammer Mark D’Amico Indicted on 16 More Charges by Feds*, PHILLY VOICE (Jan. 9, 2020), <https://www.phillyvoice.com/gofundme-scam-homeless-man-mark-damico-federal-charges-katelyn-mcclure-johnny-bobbitt/> [<https://perma.cc/EXD3-EAN3>].

that the effort to fund a border wall between the United States and Mexico was fraudulent because organizers told donors that all of the funds raised would go toward wall construction when in fact some contributions went to compensate or pay for personal expenses of the beneficiary nonprofit's leaders.¹²⁴

Crowdfunding may be particularly vulnerable to fraud, money laundering, and even terrorist financing given the low barriers to entry for campaign organizers and current uncertain and limited regulation.¹²⁵ Yet data regarding the extent of crowdfunding-related fraud, money laundering, and similar illegal activities, much less specifically relating to charitable crowdfunding, are generally lacking.¹²⁶ In addition, the incomplete and limited data collected so far indicates that crowdfunding fraud is relatively rare.¹²⁷ Of course, part of the reason for the low level of observed fraud may be limited incentives to detect fraud in the first place.¹²⁸ For example, the relatively small amount given by most donors means that individual donors probably have little motivation to try to detect and report fraud.

Finally, at least some platforms allow organizers to launch a campaign without the consent or even knowledge of the beneficiary, which also may raise issues.¹²⁹ In one prominent example, the PayPal Giving Fund—itself a charity—had to resolve a legal dispute with regulators arising from allegations that it received donations that donors thought would go to certain charities but that the Fund allegedly redirected to

124. See Press Release, U.S. Attorney's Office (S.D.N.Y.), Leaders Of 'We Build The Wall' Online Fundraising Campaign Charged With Defrauding Hundreds of Thousands of Dollars (Aug. 20, 2020), <https://www.justice.gov/usao-sdny/pr/leaders-we-build-wall-online-fundraising-campaign-charged-defrauding-hundreds-thousands> [<https://perma.cc/6EYK-QYNA>]; *READ: Indictment in Bannon, Border Wall Fundraising Case*, CNN (Aug. 20, 2020, 10:04 AM), <https://www.cnn.com/2020/08/20/politics/bannon-indictment/index.html> [<https://perma.cc/J69C-9ML5>].

125. See Francesca Tenca & Chiara Franzoni, *Crowdfunding: Risk, Fraud and Regulation*, in HANDBOOK OF RESEARCH ON CROWDFUNDING, *supra* note 2, at 323, 324–25; Ahsan Habib, *ACFCS Special Contributor Report: Crowdfunding-An Unorthodox Way of Money Laundering? Definitely. . . Maybe. . .*, CERTIFIED FIN. CRIME SPECIALISTS BLOG (Feb. 27, 2020), <https://www.acfcs.org/acfcs-special-contributor-report-crowdfunding-an-unorthodox-way-of-money-laundering-definitelymaybe/> [<https://perma.cc/NZ5W-4E3R>].

126. See Parhankangas et al., *supra* note 24, at 16 (limited research relating to “the negative side of crowdfunding”).

127. See, e.g., DOUGLAS CUMMING, LARS HORNUF, MOEIN KARAMI & DENIS SCHWEIZER, *DISENTANGLING CROWDFUNDING FROM FRAUDFUNDING* 3, 7 (2020) (“crowdfunding fraud is a rare event” based on a survey of media reports about Kickstarter campaigns from 2010 through 2015 in nine countries); Tenca & Franzoni, *supra* note 125, at 332–33, 337 (stating based on own study, “we can conclude that frauds in [crowdfunding] have been limited compared to the overall volumes of projects and on the main platforms [for rewards crowdfunding] (that is, Kickstarter and Indiegogo)”; FIN. CRIMES ENF'T NETWORK, SAR STATS: TECHNICAL BULLETIN 8 (2015) (in the United States, seventy-nine suspicious activity reports were filed with the Financial Crimes Enforcement Network between January 2010 and May 2015, involving \$27.9 million in transactions).

128. Tenca & Franzoni, *supra* note 125, at 333.

129. See NATIONAL ASSOCIATION OF STATE CHARITY OFFICIALS (NASCO), *INTERNET AND SOCIAL MEDIA SOLICITATIONS: WISE GIVING TIPS 2* (2018) (warning charities that some crowdfunding platforms allowed individuals to initiate fundraising for a charity without the charity's knowledge).

other charities without informing either the donors or the originally designated charity.¹³⁰ The resolution required the Fund to be more forthcoming with donors about where their donations go and to also report data to fundraising regulators in the United States.¹³¹

So while examples of charitable crowdfunding downsides certainly exist, at this point the information available is primarily, if not almost entirely, *anecdotal*.¹³² The questions this Article addresses—how current law does and should regulate charitable crowdfunding—therefore need to be answered with very limited information regarding the extent of these downsides.

II. CURRENT REGULATION OF CHARITABLE CROWDFUNDING

A. Laws Governing Charitable Fundraising

While the relevant rules vary significantly across jurisdictions, as this Section will detail, governments generally regulate charitable fundraising using three types of laws.¹³³ The first and most obvious type are laws that specifically regulate charitable solicitation, including by imposing registration, reporting, and other requirements. The second type are other laws that regulate charities or nonprofits more generally but may affect fundraising because they either restrict the use of donations received or require certain fundraising practices for organizations that want to claim various legal benefits. The third type are broadly applicable laws that may be implicated by problematic behavior relating to charitable fundraising, particularly consumer protection, fraud, and money laundering laws. This Section describes each of these bodies of law and how they apply to charitable fundraising, with an emphasis on the

130. See Assurance of Discontinuance, *In re Investigation by PPGF Multistate Group of PayPal Charitable Giving Fund, Inc.*, Assurance No. 20-001 (Jan. 14, 2020) (settlement); Karen I. Wu, *PayPal Giving Fund Enters Multi-State Settlement to Ensure Transparency to Donors*, PERLMAN & PERLMAN LLP: BLOG (Jan. 16, 2020), <https://www.perlmanandperlman.com/paypal-giving-fund-enters-multi-state-settlement-ensure-transparency-donors/> [<https://perma.cc/HC4Y-G2YX>]. A related class action lawsuit is still pending. See Am. Class Action Compl. and Demand for Jury Trial, *Friends for Health: Supporting the North Shore Health Center v. Paypal, Inc.*, No. 17-cv-1542 (N.D. Ill. Dec. 15, 2017); Camila Domonoske, *Lawsuit Alleges that PayPal Diverted Donations to Different Charities*, NPR (Feb. 28, 2017, 4:00 PM), <https://www.npr.org/sections/thetwo-way/2017/02/28/517790137/lawsuit-alleges-that-paypal-diverted-donations-to-different-charities> [<https://perma.cc/B2CY-C7JT>].

131. Attorney General James Announces Settlement with PayPal Charitable Giving Fund, Inc. to Ensure Transparency in Charitable Donations, LETITIA JAMES NY ATTORNEY GENERAL (Jan. 14, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-announces-settlement-paypal-charitable-giving-fund-inc> [<https://perma.cc/P7J2-PT4P>].

132. The first law review article mention of the term *anecdotal* appears to have been in 1989, when it was attributed to Professor Don Herzog. Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2073 & n.3 (1989).

133. See generally EUR. CTR. FOR NOT-FOR-PROFIT L., THE REGULATORY FRAMEWORK FOR FUNDRAISING IN EUROPE 18–22 (2017) [hereinafter ECNL]; BRUCE R. HOPKINS & ALICIA M. KIRKPATRICK, THE LAW OF FUNDRAISING 86–88 (5th ed. 2013) (United States).

United States because its residents are the largest source of contributions for charities.¹³⁴

1. Charitable Solicitation Laws

Direct regulation of charitable solicitation varies widely between jurisdictions, ranging from non-existent to “strongly prescriptive and involved.”¹³⁵ Countries with laws specifically addressing charitable solicitation may apply those laws to the charities themselves, to for-profit companies that assist charities in their fundraising, or both.¹³⁶ Those laws usually require registration and public financial reporting.¹³⁷ Less frequently, those laws impose substantive restrictions such as limiting the purposes for which fundraising can be done,¹³⁸ who can do fundraising,¹³⁹ or the proportion spent on fundraising or administrative costs overall.¹⁴⁰ In some countries the ability of legislators to impose requirements on fundraising may be limited by other legal provisions, such as free speech protections.¹⁴¹

134. See *supra* notes 65–67 and accompanying text.

135. Breeze & Scaife, *supra* note 52, at 584; see also *id.* at 590 (“A range of countries report the lack, or only a nascent system, of capturing fund-raising activities and costs”); REGULATING CHARITIES: THE INSIDE STORY (Myles McGregor-Lowndes & Bob Wyatt eds., 2017) [hereinafter REGULATING CHARITIES] (comparing laws relating to charities for five common law jurisdictions); REGULATORY WAVES: COMPARATIVE PERSPECTIVES ON STATE REGULATION AND SELF-REGULATION POLICIES IN THE NONPROFIT SECTOR 18 (Oonagh B. Breen, Alison Dunn & Mark Sidel eds., 2017) [hereinafter REGULATORY WAVES] (case studies of sixteen jurisdictions); *Domestic Fundraising*, INT’L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/our-work/domestic-fundraising> [<https://perma.cc/3GSS-NEQ8>] (reports on the legal framework for fundraising and philanthropy in a variety of countries and regions).

136. See, e.g., ECNL, *supra* note 133, at 19, 45–46 (regulation of charities and for-profit entities involved with charitable fundraising in some European countries); Fishman, *supra* note 54 at 14–15 (most states in the United States require registration and reporting by both charities and for-profit entities involved in charitable fundraising).

137. See, e.g., ECNL, *supra* note 133, at 27–28, 41 (some European countries require pre-solicitation applications, others require pre-solicitation notification and many European countries have reporting requirements); Fishman, *supra* note 54, at 14 (most states in the United States require registration and reporting).

138. See, e.g., ECNL, *supra* note 133, at 24–25 (most European countries allow fundraising for any nonprofit purpose, but some limit appeals to charitable purposes).

139. See, e.g., *id.* at 25–27 (most European countries allow charitable fundraising by all nonprofits, with some also allowing such fundraising by for-profit entities or individuals, and natural persons who fundraise may have to meet certain minimum requirements).

140. See, e.g., *id.* at 40 (some European countries limit administrative and/or fundraising costs); Oonagh B. Breen, *Regulating Charitable Solicitation Practices – The Search for a Hybrid Solution*, 25 FIN. ACCOUNTABILITY & MGMT. 115, 118, 139 n.4 (2009) (Ireland, New South Wales, and Canada (the latter through tax laws)).

141. See, e.g., Putnam Barber & Megan M. Farwell, *Charitable Solicitations Regulation and the Principles of Regulatory Disclosure*, 7 NONPROFIT POL’Y F. 311, 315 (2016) (attempts by United States jurisdictions to limit administrative and fundraising costs foreclosed by court free speech decisions).

The locus of regulatory authority for charitable fundraising varies widely, depending on the country.¹⁴² In many countries, regulation is primarily by state, provincial, or other subgovernments and so varies within the country.¹⁴³ As detailed below, the United States falls into this category.¹⁴⁴ But in some other countries, there is a national registration requirement for fundraising—so a uniform standard applies countrywide, at least in theory—that is administered in part at the local level.¹⁴⁵

In jurisdictions with little or no specific regulation of charitable solicitation or fundraising, agencies sometimes issue voluntary guidelines. For example, in Canada federal tax authorities have issued a detailed “Guidance on Fundraising” addressing everything from proper categorization of expenses to governance best practices.¹⁴⁶ In the United Kingdom, the relatively new Fundraising Regulator has issued a voluntary “Code of Fundraising Practice” applicable to both charities and third-party fundraisers.¹⁴⁷ This is also true in Hong Kong, which while part of China has a distinct set of voluntary fundraising guidelines for charities.¹⁴⁸

In addition, in many countries there are efforts at self-regulation by charities themselves, sometimes alongside (or in tension with) government regulation or guidelines and sometimes in the absence of government action.¹⁴⁹ Without going into the numerous details, the exact relationship between self-regulation and government

142. See, e.g., ECNL, *supra* note 133, at 29–30 (regulatory authority in European countries includes national, regional, and local, and hybrid models).

143. See, e.g., Thomas Von Hippel, *Nonprofit Organizations in Germany*, in COMPARATIVE CORPORATE GOVERNANCE OF NON-PROFIT ORGANIZATIONS 197, 220 (Klaus J. Hopt & Thomas Von Hippel eds., 2010) (Germany); Myles McGregor-Lowndes, *Introduction*, 23 VOLUNTAS 734, 734 (2012) (Australia); see also Mark Sidel, *State Regulation and the Emergence of Self-Regulation in the Chinese and Vietnamese Nonprofit and Philanthropic Sectors*, in REGULATORY WAVES, *supra* note 135, at 92, 110 (China localities experimenting with regulation of fundraising).

144. See *infra* note 152 and accompanying text.

145. See Henrietta Grönlund & Anne Birgitta Pessi, *Giving in Finland: The Multidimensional Role of Giving in a Context of a Changing Welfare Model*, in PALGRAVE HANDBOOK, *supra* note 52, at 155, 159–60; Chulhee Kang, Erica Yoonkyung Auh & Younghye Hur, *Giving in South Korea: A Nation of Givers for the Population Under Public Assistance*, in PALGRAVE HANDBOOK, *supra* note 52, at 426, 432.

146. See Susan D. Phillips, *Canadian Leapfrog: From Regulating Charitable Fundraising to Co-Regulating Good Governance*, 23 VOLUNTAS 808, 819–20 (2012).

147. See FUNDRAISING REGUL., *supra* note 74; see also Alison Dunn, *Eddies and Tides: Statutory Regulation, Co-Regulation, and Self-Regulation in Charity Law in Britain*, in REGULATORY WAVES, *supra* note 135, at 21, 27; Sir Stuart Etherington, *Reflections on Modernizing and Reforming Regulation*, in REGULATING CHARITIES, *supra* note 135, at 59, 69–71; Richard Fries, *Towards Regulation: Modernizing the Original Charity Commission*, in REGULATING CHARITIES, *supra* note 135, at 17, 30 (Charity Commission for England and Wales authority over fundraising although no specific statutory provisions); Lindsay Driscoll, *The Reforming Regulator*, in REGULATING CHARITIES, *supra* note 135, at 37, 43 (same).

148. Elaine Chan & Wai Fung Lam, *Giving in Hong Kong: A Growing Sector Evading Regulation*, in PALGRAVE HANDBOOK, *supra* note 52, at 369, 373.

149. See, e.g., ECNL, *supra* note 133, at 22 (explaining that Scandinavia and some Western European countries rely primarily on self-regulation, while in the United Kingdom, Ireland, Southern European countries, and some Central and Eastern European countries self-regulation operates alongside government regulation).

regulation varies significantly among countries.¹⁵⁰ These efforts generally rely on voluntary participation and so usually only reach a portion of charities engaged in fundraising.¹⁵¹

In the United States, regulation of charitable solicitation is primarily by state governments, with almost all states and the District of Columbia having enacted charitable solicitation registration and reporting laws.¹⁵² As others have documented, state charitable solicitation laws vary significantly.¹⁵³ In most but not all states, there are laws that apply directly to charities that ask the public for donations, either directly or through a for-profit vendor.¹⁵⁴ Some states also or instead impose

150. See, e.g., JUDITH A. TOWLE, WILLIAM S. MOODY & ADRIAN J.L. RANDALL, *PHILANTHROPY, CIVIL SOCIETY AND LAW IN THE CARIBBEAN* vii (2010), http://www.irf.org/wp-content/uploads/2017/04/CPN-2010-Philanthropy-and-Law-in-the-Caribbean_FINAL_201005.pdf [<https://perma.cc/E3TN-59YX>]; Putnam Barber & Megan M. Farwell, *The Relationships Between State and Nonstate Interventions in Charitable Solicitation Law in the United States*, in *REGULATORY WAVES*, *supra* note 135, at 199, 199–200; Oonagh B. Breen, *Waiting for the Big Wave: A Fifty-Year Retrospective on the Ebb and Flow of Irish Charity Regulation*, in *REGULATORY WAVES*, *supra* note 135, at 45, 49–51; Mary Kay Gugerty, *Shifting Patterns of State Regulation and NGO Self-Regulation in Sub-Saharan Africa*, in *REGULATORY WAVES*, *supra* note 135, at 69, 72; Hagai Katz & Itay Greenspan, *Giving in Israel: From Old Religious Traditions to an Emerging Culture of Philanthropy*, in *PALGRAVE HANDBOOK*, *supra* note 52, at 316, 323 (alongside); Myles McGregor-Lowndes, *Australia: Co-Production, Self-Regulation and Co-Regulation*, in *REGULATORY WAVES*, *supra* note 135, at 176, 180, 188–90; Marius Mews & Silke Boenigk, *Giving in Germany: Toward Systematic Information on a Fragmented Nonprofit Sector*, in *PALGRAVE HANDBOOK*, *supra* note 52, at 170, 174–75; Michaela Neumayr, *Giving in Austria: A Corporatist Relationship Between the Nonprofit Sector and the State*, in *PALGRAVE HANDBOOK*, *supra* note 52, at 100, 105; Phillips, *supra* note 146, at 821–22 (Canada); Pamela Wiepking & René Bekkers, *Giving in the Netherlands: A Strong Welfare State with a Vibrant Nonprofit Sector*, in *PALGRAVE HANDBOOK*, *supra* note 52, at 211, 215; Karl Henrik Sivesind, *Giving in Norway: An Ambitious Welfare State with a Self-Reliant Nonprofit Sector*, in *PALGRAVE HANDBOOK*, *supra* note 52, at 230, 236; Georg von Schnurbein & Steffen Bethmann, *Giving in Switzerland: High Engagement and International Outreach*, in *PALGRAVE HANDBOOK*, *supra* note 52, at 267, 270–71.

151. See, e.g., Oonagh B. Breen & James Carroll, *Giving in Ireland: A Nation of Givers in a Largely Unregulated Arena*, in *PALGRAVE HANDBOOK*, *supra* note 52, at 190, 194 (slow adoption of self-regulatory best practices by charities in Ireland). See generally Breen, *supra* note 140, at 122–23; Gugerty, *supra* note 150.

152. See SHIRLEY ADELSTEIN & ELIZABETH T. BORIS, *STATE REGULATION OF THE CHARITABLE SECTOR: ENFORCEMENT, OUTREACH, STRUCTURE, AND STAFFING* 5–6 (2018); FREMONT-SMITH, *supra* note 77, at 372–73; Putnam Barber, *Regulation of US Charitable Solicitation Since 1954*, 23 *VOLUNTAS* 737, 739 (2012); Barber & Farwell, *supra* note 150, at 199–200; Fishman, *supra* note 54, at 14–15; *Regulation of Nonprofits and Philanthropy Project*, URB. INST. (providing the Legal Compendium of state laws), <https://www.urban.org/policy-centers/center-nonprofits-and-philanthropy/projects/regulation-charitable-sector-project> [<https://perma.cc/SH26-ECS8>].

153. See FREMONT-SMITH, *supra* note 77, at 373–74; Nathan Dietz, Putnam Barber, Cindy Lott & Mary Shelly, *Exploring the Relationship Between State Charitable Solicitation Regulations and Fundraising Performance*, 8 *NONPROFIT POL'Y F.* 183, 184 (2017); Fishman, *supra* note 54, at 14–15.

154. See Dietz et al., *supra* note 153, at 195–98 (third and ninth columns in table of state

obligations on for-profit companies that help charities raise funds. These companies can include both commercial or professional fundraisers who contact the public to ask for donations and handle donated funds and also fundraising counsel who advise charities on fundraising campaigns but do not make solicitations or handle donations.¹⁵⁵ Some state laws also apply to commercial coventurers, that is for-profit companies that do a joint appeal with a charity (e.g., “For every car sold, our dealership will give \$X to Charity Y!”).¹⁵⁶ A few states lack any laws explicitly aimed at charitable fundraising.¹⁵⁷ Finally, state laws are supplemented in many cities and counties by local government rules relating to charitable fundraising.¹⁵⁸

That said, the U.S. laws share some common characteristics. First, they are generally limited to imposing registration and reporting obligations on the covered entities,¹⁵⁹ primarily because of constitutional free speech protections that limit the ability of states to impose any more burdensome requirements.¹⁶⁰ Second, they are riddled with exceptions, including for churches, alumni associations, and membership organizations only soliciting their members.¹⁶¹ Third, while it is relatively simple to comply with the requirements for any given jurisdiction, in the aggregate the burden of complying with these requirements can be quite significant for a charity with donors in many states and localities.¹⁶² For this reason, there are a number of specialized vendors who will—for a fee—handle the registration and reporting requirements in multiple jurisdictions.¹⁶³ Additionally, the states have worked to create a Unified Registration Statement that can be used in multiple jurisdictions and have been working on creating an online single portal that would allow covered entities to register and report in multiple jurisdictions simultaneously.¹⁶⁴

charitable solicitation laws).

155. *See id.* (second, fourth, and seventh columns).

156. *See id.* (sixth column); Robert T. Esposito, *Charitable Solicitation Acts: Maslow’s Hammer for Regulating Social Enterprise*, 11 N.Y.U. J.L. & BUS. 463, 477–80 (2015).

157. *See* Dietz et al., *supra* note 153, at 195–98 (Arizona, Idaho, Montana, Nebraska, and Wyoming).

158. *See* Joseph W. Mead, *Local Regulation of Charitable Solicitation*, 5 J. PUB. & NONPROFIT AFFS. 178 (2019).

159. *See* Fishman, *supra* note 54, at 14–15; Cindy M. Lott & Marion Fremont-Smith, *State Regulatory and Legal Framework*, in NONPROFITS AND GOVERNMENT: COLLABORATION AND CONFLICT 163, 166–67 (Elizabeth T. Boris & C. Eugene Steuerle eds., 3d ed. 2017).

160. *See infra* note 359 and accompanying text.

161. *See* FREMONT-SMITH, *supra* note 77, at 373–74; *see also* ECNL, *supra* note 133, at 28–29 (exceptions in some European countries).

162. *See* Esposito, *supra* note 156, at 475–76.

163. *See, e.g., Mission*, COPILEVITZ LAM & RANEY, <http://clrk.com/mission> [<https://perma.cc/F9VJ-CVUF>]; *Charity Registration*, LABYRINTH, INC., <https://labyrinthinc.com/>; *Fundraising Compliance*, PERLMAN & PERLMAN LLP, <https://www.perlmanandperlman.com/fundraising-compliance/> [<https://perma.cc/FVZ5-YLKQ>]; URS COMPLIANCE, <https://www.urscomply.com/index.html> [<https://perma.cc/KCT5-4SMT>].

164. *See The Unified Registration Statement*, THE MULTI-STATE FILER PROJECT, <http://multistatefiling.org/> [<https://perma.cc/BV9W-VC79>]; Ron Barrett, *Single Portal Multistate Charitable Registration: For Real This Time?*, CORP. TRANSACTIONS &

2. Other Charity and Nonprofit Laws

Many countries require charities or nonprofits more generally to register and report information with one or more government agencies regardless of their fundraising practices.¹⁶⁵ These rules may include certain requirements with respect to financial practices.¹⁶⁶ Implicit and sometimes explicit in these requirements is the possibility that those agencies will investigate and sanction alleged diversions of funds from the stated purposes of the organizations, especially if the diversion is to individuals or for-profit entities that have substantial influence over the organization.¹⁶⁷

Many countries also provide tax benefits to charities and their donors, and in some of these countries regulation of charitable solicitation is tied to the receipt of tax benefits.¹⁶⁸ For example in Austria, nonprofits that register with the Ministry of Finance so that donors may deduct their contributions are required to limit their costs for administering donations (which does not include fundraising costs) to ten percent or less.¹⁶⁹ In Mexico, no more than five percent of donations may be spent on administrative costs (which may include fundraising costs) by tax-exempt organizations, leading many organizations not to seek tax-exempt status.¹⁷⁰

COMPLIANCE BLOG (Nov. 16, 2017), <https://www.cogencyglobal.com/blog/single-portal-multistate-charitable-registration-for-real-this-time> [https://perma.cc/C6BL-SPHK].

165. See, e.g., ECNL, *supra* note 133, at 19 (England and Wales, Ireland, and Hungary); Khaldoun AbouAssi, *Giving in Lebanon: Traditions and Reality in an Unstable Environment*, in PALGRAVE HANDBOOK, *supra* note 52, at 338, 345; Franziska Bieri & Nevan T. Valev, *Giving in Bulgaria: A Nonprofit Sector in Transition*, in PALGRAVE HANDBOOK, *supra* note 52, at 118, 124; Sharilyn Hale, *Giving in the Caribbean: Building upon Cultures of Generosity to Strengthen the Nonprofit Sector*, in PALGRAVE HANDBOOK, *supra* note 52, at 88, 93; Kang et al., *supra* note 145, at 432 (South Korea); Una Osili & Çağla Ökten, *Giving in Indonesia: A Culture of Philanthropy Rooted in Islamic Tradition*, in PALGRAVE HANDBOOK, *supra* note 52, at 388, 392; Sidel, *supra* note 133, at 102–03 (China); Wang Xinsong, Liu Fengqin, Nan Fang, Zhao Xiaoping & Zhang Xiulan, *Giving in China: An Emerging Nonprofit Sector Embedded Within a Strong State*, in PALGRAVE HANDBOOK *supra* note 52, at 354, 358.

166. See generally Carolyn Cordero, *Regulating Small and Medium Charities: Does It Improve Transparency and Accountability?*, 24 VOLUNTAS 831 (2013).

167. See, e.g., Driscoll, *supra* note 147, at 43 (Charity Commission for England and Wales); Fries, *supra* note 147, at 30 (same); Irina Mersianova, Lev Jakobson & Irina Krasnopolskaya, *Giving in Russia: The Difficult Shaping of the New Nonprofit Regime*, in PALGRAVE HANDBOOK, *supra* note 52, at 249, 254. Some European countries have explicit laws requiring that collected funds only be used for purposes designated at the time of collection. See, e.g., ECNL, *supra* note 133, at 40.

168. See, e.g., David Lasby & Cathy Barr, *Giving in Canada: Strong Philanthropic Traditions Supporting a Large Nonprofit Sector*, in PALGRAVE HANDBOOK, *supra* note 52, at 25, 30; *infra* note 169 and accompanying text.

169. Neumayr, *supra* note 150, at 105. In Germany tax regulators and the courts have taken the position that fundraising costs must not be excessive for an organization to qualify for tax exemption, although they disagree over how much is excessive. Von Hippel, *supra* note 143, at 221.

170. Michael D. Layton & Valérie Mossell, *Giving in Mexico: Generosity, Distrust and Informality*, in PALGRAVE HANDBOOK, *supra* note 52, at 64, 68–69.

In the United States, oversight over charitable assets is primarily in the hands of state governments.¹⁷¹ In every state and the District of Columbia, either the attorney general or another state official has authority to oversee the use of assets dedicated to charitable purposes.¹⁷² That said, the federal government also plays a role in this oversight because of the tax benefits provided to almost all nonprofits, and particularly charities.¹⁷³ But only rarely have federal tax authorities used that role to challenge fundraising practices.¹⁷⁴ For example, the U.S. Internal Revenue Service has held there are no tax-related restrictions on tax-exempt charities engaging in online fundraising,¹⁷⁵ although charitable crowdfunding platforms do not themselves qualify for tax exemption.¹⁷⁶

The authority for oversight of charitable assets originally came from the common law but is now codified in many U.S. jurisdictions.¹⁷⁷ In some—but far from all—states this authority has been used to require registration and reporting by entities holding assets for charitable purposes. These requirements are distinct from any applicable charitable solicitation registration and reporting requirements.

3. Generally Applicable Laws

Many other types of laws may apply to charitable fundraising.¹⁷⁸ The most relevant for purposes of this Article are those laws designed to protect consumers¹⁷⁹ and to combat fraud.¹⁸⁰ Also relevant are laws designed to combat money laundering

171. See JAMES J. FISHMAN, *THE FAITHLESS FIDUCIARY AND THE QUEST FOR ELUSIVE CHARITABLE ACCOUNTABILITY 1200–2005*, at 270–73 (2007); FREMONT-SMITH, *supra* note 77, at 305–08; Lott & Fremont-Smith, *supra* note 159, at 164.

172. See NAT'L CONF. OF COMM'RS ON UNIF. STATE L., *MODEL PROTECTION OF CHARITABLE ASSETS ACT 1* (with comments); FREMONT-SMITH, *supra* note 77, at 306–07; LOTT ET AL., *supra* note 55, at 12–13.

173. FREMONT-SMITH, *supra* note 77, at 377.

174. See Fishman, *supra* note 54, at 17–29 (describing the mostly unused approaches federal tax authorities could take to challenge certain fundraising practices).

175. I.R.S. Info. Ltr. 2013-0001 (Mar. 29, 2013).

176. I.R.S. Priv. Ltr. Rul. 2018-14-009 (Apr. 6, 2018).

177. See FISHMAN, *supra* note 171, at 270–71; *supra* note 172.

178. See ECNL, *supra* note 133, at 20–22 (tax, data protection, accounting and bookkeeping, banking, licensing, media, marketing, consumer protection, games of chance, child protection, anti-money-laundering, and counter-terrorism-financing laws).

179. See Ely R. Levy & Norman I. Silber, *Nonprofit Fundraising and Consumer Protection: A Donor's Right to Privacy*, 15 STAN. L. & POL'Y REV. 519, 537–38 (2004); GARRY A. GABISON, *UNDERSTANDING CROWDFUNDING AND ITS REGULATIONS* 3, 20 n.120 (2015), <https://publications.jrc.ec.europa.eu/repository/handle/JRC92482> [<https://perma.cc/78M2-F3R9>] (assuming European consumer law would apply to donation-based crowdfunding).

180. See, e.g., *Ill. ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 607–08 (2003) (civil fraud claim against for-profit fundraising company for alleged misrepresentations to prospective donors relating to client charity); *State v. Burgett*, No. C-180029 2019 Ohio App. LEXIS 5433, *2 (Ohio Ct. App. Dec. 27, 2019) (criminal telecommunications fraud conviction of individual who misrepresented on GoFundMe that her son suffered from a terminal illness); Fishman, *supra* note 54, at 14 (in the United States, “[f]raudulent solicitation activities are

and terrorism financing, which governments have applied when the fundraiser is allegedly using the purported fundraising to launder funds from or to support illegal activities.¹⁸¹

a. Consumer Protection Laws

Essentially every country has some form of consumer protection laws.¹⁸² Some, perhaps most, of these laws arguably apply both to appeals for donations by charities¹⁸³ and to internet transactions.¹⁸⁴ In the United States, many jurisdictions provide that violations of charitable solicitation laws are also violations of consumer protection laws, although it is unclear to what extent regulators actually invoke the sanctions available under the latter laws.¹⁸⁵ A recent European Commission report assumed that “donation/reward [crowdfunding] campaigns have traditional consumer law remedies at their disposal.”¹⁸⁶

b. Fraud Laws

Essentially every country also has laws targeting fraud—that is, obtaining something economically valuable from another party through deceptive means.¹⁸⁷ Such laws are typically written broadly enough to include fraudulent charitable

unlawful, and perpetrators are subject to fines and criminal prosecution.”); *An Introduction to Fundraising Event Fraud*, ASSETS PUBL’G SERV. (Oct. 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/780029/7_CFAW_2018_Fundraising_Fraud.pdf [<https://perma.cc/B9U6-DZ4C>] (United Kingdom).

181. See, e.g., INSTITUTE OF FUNDRAISING, ACCEPTANCE REFUSAL & RETURN: A PRACTICAL GUIDE TO DEALING WITH DONATIONS 11 (2018), [https://ciof.org.uk/IoF/media/IOF/Policy/iof-acceptance-refusal-and-return-a-practical-guide-to-dealing-with-donations-\(5\).pdf?ext=.pdf](https://ciof.org.uk/IoF/media/IOF/Policy/iof-acceptance-refusal-and-return-a-practical-guide-to-dealing-with-donations-(5).pdf?ext=.pdf) [<https://perma.cc/F468-BHC7>] (“There have been cases in the past where donations to charities have been used to facilitate criminal activity such as money laundering.”).

182. See generally Fabrizio Cafaggi, *The Great Transformation. Administrative and Judicial Enforcement in Consumer Protection: A Remedial Perspective*, 21 LOY. CONSUMER L. REV. 496 (2009) (Europe and the United States); Michael Faure, Anthony Ogus & Niels Philipsen, *Enforcement Practices for Breaches of Consumer Protection Legislation*, 20 LOY. CONSUMER L. REV. 361 (2008) (OECD jurisdictions); Jennifer S. Martin, *An Emerging Worldwide Standard for Protections of Consumers in the Sale of Goods: Did We Miss an Opportunity with Revised UCC Article 2?*, 41 TEX. INT’L L.J. 223, 238–57 (2006) (consumer protection laws relating to the sale of goods in a variety of countries).

183. See *supra* text accompanying note 179.

184. See generally Jeffrey A. Modisett & Cindy M. Lott, *Cyberlaw and E-Commerce: A State Attorney General’s Perspective*, 94 NW. U. L. REV. 643 (2000).

185. Barber & Farwell, *supra* note 141, at 321–22.

186. GABISON, *supra* note 179, at 20 n.120.

187. See generally ASS’N OF CERTIFIED FRAUD EXAM’RS, REPORT TO THE NATIONS: 2020 GLOBAL STUDY ON OCCUPATIONAL FRAUD AND ABUSE 59–60 (2020) (analysis of more than 2500 occupational fraud cases from around the world, with 59% reported to law enforcement and none reporting the reason for not reporting as being the fraud was not a crime under local laws); Joseph Lanuti, Note, *Mail and Wire Fraud*, 56 AM. CRIM. L. REV. 1151 (2019) (United States national laws).

solicitations, and so can be applied to individuals or organizations that lie about how funds obtained will be used.¹⁸⁸ Such situations may even lead to harsher sanctions than other kinds of fraud, presumably because of the diversion of funds from charitable purposes.¹⁸⁹

In the United States, in addition to state fraud laws that may apply to fraudulent charitable fundraising, the federal government oversees for-profit entities involved in charitable fundraising, primarily through the Federal Trade Commission (FTC).¹⁹⁰ The FTC's statutory authority is limited to for-profit entities.¹⁹¹ However, even with this limited authority the FTC has on occasion pursued actions against both for-profit vendors and "sham" charities involved in allegedly fraudulent charitable solicitations, justifying its pursuit of the latter entities on the ground that sham charities are not true nonprofits and so within its reach.¹⁹² Because it usually takes these actions in cooperation with state authorities, the frequency of such actions may be limited because of the amount of intergovernmental coordination required.¹⁹³

c. Money Laundering and Terrorism Financing Laws

Especially in the wake of 9/11 and the rise of ISIS, governments have increasingly investigated charities for possible ties to criminal activity and terrorism.¹⁹⁴ In some countries, restrictions on charitable funding imposed purportedly because of terrorism or other national security concerns have arguably been imposed to in fact stifle dissent or for other less legitimate reasons.¹⁹⁵ But well-respected organizations, such as the Financial Action Task Force, have also raised concerns about charitable fundraising and specifically crowdfunding being used to move financial resources to

188. See, e.g., *United States v. Smith*, 133 F.3d 737, 740–41 (10th Cir. 1997) (fraud conviction under United States law for soliciting donations for a charity deceptively).

189. See, e.g., U.S. SENTENCING COMM'N., GUIDELINES MANUAL § 2B1.1(b)(9) (Nov. 2021) (sentence enhancement for engaging in illegal fraud relating to charitable solicitations).

190. See *FREMONT-SMITH*, *supra* note 77, at 424–25; *Fishman*, *supra* note 54, at 34–35.

191. See *Cnty. Blood Bank v. FTC*, 405 F.2d 1011, 1018–19, 1022 (8th Cir. 1969) (citing 15 U.S.C. §§ 44, 45(a)(2)).

192. See, e.g., Press Release, Letitia James, N.Y. Atty. Gen., Attorney General James Shuts Down Fundraising Operation That Solicited Donations on Behalf of Sham Charities (Sept. 16, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-shuts-down-fundraising-operation-solicited-donations> [<https://perma.cc/X6ET-RQJ8>]; Colleen Tressler, *Sham Charity Operators Turn the Big C into a Big Con*, FTC CONSUMER INFO. (May 19, 2015), <https://web.archive.org/web/20210726173036/https://www.consumer.ftc.gov/blog/2015/05/sham-charity-operators-turn-big-c-big-con> [<https://perma.cc/CE3T-HW3A>].

193. See *supra* text accompanying note 192.

194. See generally Jennifer Lynn Bell, *Terrorist Abuse of Non-Profits and Charities: A Proactive Approach to Preventing Terrorist Financing*, 17 KAN. J.L. & PUB. POL'Y 450 (2008).

195. See MAINA KIAI, REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHTS TO FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATION 5 (2013), <https://undocs.org/A/HRC/23/39> [<https://perma.cc/D3DC-GQEM>]; Lloyd Hitoshi Mayer, *Globalization Without a Safety Net: The Challenge of Protecting Cross-Border Funding of NGOs*, 102 MINN. L. REV. 1205, 1217–19 (2018); Mead, *supra* note 158, at 182.

individuals or entities that in turn support terrorism.¹⁹⁶ While concerns about such ties predate crowdfunding, some commentators have highlighted the potential use of crowdfunding for supporting terrorism or other forms of money laundering, since an on-its-face innocuous project—whether charitable or otherwise—could easily be used to make illegally obtained funds appear to be from a legitimate source.¹⁹⁷

B. Application to Charitable Crowdfunding

This Section considers to what extent the laws previously described apply to crowdfunding to benefit a charity and crowdfunding to benefit a specific individual or set of individuals. With respect to each type of crowdfunding, it also considers proposals developed in a variety of countries relating to regulation of this new type of charitable fundraising. Finally, this Section considers a particularly difficult legal question that arises in the context of almost all online activity—to what extent geographically limited governments have personal jurisdiction to apply their rules to parties engaged in geographically ambiguous online activity.

1. Crowdfunding for a Charity

It would be easy but incorrect to assume that charitable crowdfunding is automatically subject to charitable solicitation laws. In some but not all countries this is the case when the organizer of a campaign is the benefitting charity itself (whether the campaign is hosted on the charity's own website or a crowdfunding platform), as long as the laws directly regulating charitable solicitation do not depend on the means used to communicate the solicitation.¹⁹⁸ In these instances, the only significant legal

196. FIN. ACTION TASK FORCE, EMERGING TERRORIST FINANCING RISKS 31–35 (2015), <https://www.fatf-gafi.org/media/fatf/documents/reports/Emerging-Terrorist-Financing-Risks.pdf> [<https://perma.cc/BVT4-69R3>]; see also Alexandra Posadzki, *Hard to Identify Crowdfunding Platforms Financing Terrorism*, THE TORONTO STAR, May 19, 2017, at B1 (Canada's money-laundering watchdog).

197. See Ahsan Habib, *ACFCS Special Contributor Report: Crowdfunding – An Unorthodox Way of Money Laundering? Definitely . . . Maybe . . .*, CERTIFIED FIN. CRIME SPECIALISTS (Feb. 27, 2020), <https://www.acfcs.org/acfcs-special-contributor-report-crowdfunding-an-unorthodox-way-of-money-laundering-definitelymaybe/> [<https://perma.cc/X5UB-7TFE>]; *SAR Stats: Technical Bulletin*, FINCEN 7–10 (Oct. 2015), https://www.fincen.gov/sites/default/files/sar_report/SAR_Stats_2_FINAL.pdf [<https://perma.cc/PQ2N-GNM7>] (small but increasing number of suspicious activity reports to the United States Financial Crimes Enforcement Network relating to reward-based crowdfunding from 2012 to 2015, including not only possible fraud but also money laundering and terrorist financing).

198. See ADELSTEIN & BORIS, *supra* note 152, at 5–6 (showing that ninety percent of states in the United States regulate internet fundraising by charities); Carly Leinheiser, Address *Digital Pitfalls at The Nonprofit Practitioner: What Keeps You Up at Night*, 20141027P NYCBAR 38 (Oct. 27, 2014) (“Fundraising activity that occurs online constitutes a ‘solicitation’ for purposes of state charitable solicitation laws.”); Maloney & Rosenthal, *supra* note 44, at 5 (“Charitable solicitation laws . . . define the term ‘solicit’ broadly, and this broad definition includes internet fundraising.”) (citations omitted). But see ECNL, *supra* note 133, at 27 (“Except for France, none of the [European] countries covered by this report requires

issue that tends to arise is whether the internet-based solicitation results in sufficient contacts to provide personal jurisdiction over the charity for a given government regulator.¹⁹⁹

However, many crowdfunding campaigns are not organized by the benefitting charity but instead by an individual who supports the charity without being directly affiliated with it.²⁰⁰ Charitable solicitation laws, usually enacted before widespread public use of the internet, often impose requirements both on the charity seeking funds for itself and on other parties that are compensated to help the charity raise funds, such as paid professional fundraisers and fundraising consultants.²⁰¹ In the typical charitable crowdfunding situation, the individual organizer is not compensated and so would not fall into any of these categories. It therefore appears that charitable solicitation laws generally will *not* apply to individuals who organize a campaign to benefit a specific charity if they are uncompensated and not acting as agents of the charity. Some jurisdictions do require that an individual soliciting funds to support a given charity or the platform hosting such a campaign receive the permission of the charity in advance of doing so.²⁰² However, it is unclear to what extent this requirement is enforced, especially given that typically only the government—not the charity—is able to do so.²⁰³

Of course, there are other parties involved in a charitable crowdfunding campaign that may receive compensation. Both the crowdfunding platform and its third-party

permission for online fundraising.”); Lauren Simpson, *Charitable Solicitations in the Digital Age: Crowdfunding, Social Media, and Compliance/Best Practices (Outline)*, 20181029P NYCBAR 217 (Oct. 29, 2018) (In the United States, “the determination of when online fundraising triggers registration [under charitable solicitation laws] is still fairly ambiguous.”).

199. See *infra* Section II.B.3.

200. For example, Facebook’s social impact program is designed to permit individual supporters of a charity to fundraise for it. *Giving Together*, META, <https://about.facebook.com/giving-together/> [<https://perma.cc/PD4T-9XH9>]; Gleit, *supra* note 60. Similarly, GoFundMe has a webpage dedicated to helping individuals raise funds for charities they support. *Make a Difference with Fundraising for Nonprofits*, GOFUNDME, <https://www.gofundme.com/start/charity-fundraising> [<https://perma.cc/54L5-SV83>]. Even TikTok encourages its influencers to appeal for donations to their favorite charities. Eden Stiffman, *Fundraising Update: The Promise of TikTok Fundraising*, THE CHRONICLE OF PHILANTHROPY (Apr. 14, 2021), <https://www.philanthropy.com/newsletter/fundraising-update/2021-04-14> [<https://perma.cc/M5W5-FBC2>].

201. See Hammond, *supra* note 44, at 13–14; see *supra* text accompanying notes 136, 155.

202. See, e.g., MICH. COMP. LAWS § 400.288(1)(c); *Collections Act 1966* (Qd) s 11(1)(a)(i) (Austl.), <https://www.legislation.qld.gov.au/view/html/inforce/current/act-1966-007#sec.11> [<https://perma.cc/B4C4-F4YC>]; NAT’L ASS’N OF STATE CHARITIES OFFS., *Results from 50 State Survey on Regulation of Crowdfunding Activities* 14, 17 (Oct. 3, 2017), <http://www.nasconet.org/wp-content/uploads/2018/02/50-State-Crowdfunding-Survey-.pptx> [<https://perma.cc/Q9MZ-585T>] (showing that twenty-six of forty-one U.S. jurisdictions report requiring the charity permission, and eleven of thirty-one jurisdictions report requiring the platform to obtain the charity’s permission).

203. See NAT’L ASS’N OF STATE CHARITIES OFFS., *supra* note 202, at 23 (showing that only seventeen of forty-one U.S. jurisdictions responding had engaged in any enforcement activity arising out of crowdfunding, and of those, only three involved fundraising for a charity without its permission).

payment processor(s) fall(s) into this category. Crowdfunding platforms of all types commonly charge a five percent fee, although some only do so if the campaign reaches its goal, and GoFundMe does not currently charge any platform fees.²⁰⁴ In addition, payment processing fees tend to be several percent, plus a nominal per-transaction fee.²⁰⁵ For example, GoFundMe uses PayPal and WePay, a division of Chase Bank, as two of its payment processors, and they charge just under three percent plus thirty cents per transaction.²⁰⁶ In addition, GoFundMe uses a charity, PayPal Giving Fund, to collect and distribute funds donated when the organizer designates a specific charity to have funds paid directly to it (as opposed to another model GoFundMe permits where the organizer receives funds and then pays the identified charity).²⁰⁷ In this situation, the PayPal Giving Fund creates a donor-advised fund that holds the funds until the charity meets certain due diligence requirements that the Fund imposes; if a charity fails to do so, the Fund is free to instead contribute the funds to a different charity, as the “advice” of the donors to contribute to the specified charity is not legally binding.²⁰⁸ PayPal Giving Fund is registered and files reports with at least some U.S. jurisdictions, which is not surprising given some U.S. jurisdictions subject charity intermediaries to regulation.²⁰⁹

So, while the definitions of the for-profit participants that are subject to charitable solicitation laws tend to be broad, it is still generally unclear whether either the

204. *Our Pricing and Fees in the United States*, GoFUNDME, <https://www.gofundme.com/c/pricing#US> [<https://perma.cc/KVW5-UY9X>] (no platform fee); *see, e.g., Fees & Pricing for Campaigners: How Much Does Indiegogo Cost?*, INDIEGOGO, <https://support.indiegogo.com/hc/en-us/articles/204456408-Fees-Pricing-for-Campaigners-How-much-does-Indiegogo-cost-> [<https://perma.cc/N5N7-T53H>] (five percent platform fee); *Fees for the United States*, KICKSTARTER, <https://www.kickstarter.com/help/fees> [<https://perma.cc/2WV3-Z3CA>] (five percent platform fee only if campaign successful); *Pricing*, PATREON, <https://www.patreon.com/product/pricing> [<https://perma.cc/U8PY-RNNZ>] (five percent platform fee, with higher fees in exchange for additional services).

205. *See, e.g.,* GoFUNDME, *supra* note 204 (2.9% plus \$0.30 per transaction); KICKSTARTER, *supra* note 204 (3.0% plus \$0.20 per pledge, with higher amounts for pledges under \$10); *Pricing*, STRIPE, <https://stripe.com/pricing> [<https://perma.cc/H8NL-5UQ4>] (2.9% plus \$0.30 per transaction).

206. *See* GoFUNDME, *supra* note 204; WEPAY, GoFUNDME CASE STUDY, (2017) (on file with *Indiana Law Journal*).

207. *Choosing a Fundraiser Type*, GoFUNDME, <https://support.gofundme.com/hc/en-us/articles/203603984-Choosing-a-Campaign-Type> [<https://perma.cc/MEN5-ZZ25>] (Feb. 10, 2022).

208. *Donation Delivery Policy*, PAYPAL GIVING FUND, <https://www.paypal.com/us/webapps/mpp/givingfund/policies/donation-delivery-policy> [<https://perma.cc/3FSS-WH27>] (Apr. 8, 2020).

209. *See* NAT’L ASS’N OF STATE CHARITIES OFFS., *supra* note 202, at 19 (showing that twenty-five of forty-one U.S. jurisdictions report regulating charity intermediaries); *Donor Terms of Service*, PAYPAL GIVING FUND (May 10, 2018), <https://www.paypal.com/us/webapps/mpp/givingfund/policies/donor-terms-of-service> [<https://perma.cc/MRV3-4PME>] (listing state fundraising notices).

crowdfunding platforms or their third-party payment processors fall within them.²¹⁰ For the platforms, this is in part because they do not control the campaigns, determine which charities will benefit from them, or handle the funds raised.²¹¹ At least some of the platforms are aware of this ambiguity, as they have taken steps to create as strong a position as possible that they are *not* subject to these laws.²¹² For example, GoFundMe includes in its terms of service a section titled “The Services are Platforms; We are not a Broker, Financial Institution, Creditor or Charity” and also a “No Solicitation” section that states GoFundMe does not itself engage in any soliciting.²¹³ At the same time, some jurisdictions take the position that the platforms do fall into one of these regulated categories.²¹⁴ As for the third-party payment processors, they may be able to generally avoid registration, reporting, and other requirements because they do not play any role in asking for donations or developing the crowdfunding appeal.

Since charitable solicitation laws generally do not apply (or their application is uncertain) to individual organizers, platforms, third-party payment processors, and benefitting charities, the question then becomes whether there are other charity laws that may apply to one or more of these parties. As noted above, most jurisdictions around the world have general charity or nonprofit laws that impose various requirements, particularly with respect to registration, reporting, and handling of assets.²¹⁵ These laws usually would apply to the beneficiary charity, but subject to the important caveat that they would apply only to the extent the charity falls within the personal jurisdiction of the government imposing any particular set of rules. They also would apply to any intermediary charity, such as PayPal Giving Fund, again

210. See, e.g., Hammond, *supra* note 44, at 13–16; Leinheiser, *supra* note 198; Mosher & Campbell, *supra* note 34, at 40; Simpson, *supra* note 198; see also GiveForward, Inc. v. Hodges, No. JFM-13-1891, 2015 WL 4716046, at *16–17 (D. Md. Aug. 6, 2015) (identifying but not reaching issue). This lack of coverage is not limited to the United States. See Myles McGregor-Lowndes & Frances Hannah, Ten Cases That Shaped Charity and Nonprofit Law in 2020 and Ten Trends to Consider 8–9 (2021) (unpublished), https://eprints.qut.edu.au/207238/1/Ten_Cases_that_shaped_Charity_and_Nonprofit_Law_in_2020_and_Ten_Trends_to_Consider_10_01_21.pdf [<https://perma.cc/DQJ8-RZAU>] (discussing gaps in Australian regulation of solicitations when it comes to charitable crowdfunding).

211. See CAL. DEP’T OF JUSTICE, CHARITABLE TRS. SECTION, ATTORNEY GENERAL’S GUIDE FOR ONLINE CHARITABLE GIVING 10 (2019), <https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/guide-online-charitable-giving.pdf> [<https://perma.cc/DYH7-3Y78>] (platform activities that may require registration under state charitable solicitation laws); Gene Takagi, *Crowdfunding: Considerations and Issues for Nonprofits*, EO TAX J., Dec. 21, 2016.

212. See Takagi, *supra* note 211.

213. *GoFundMe Terms of Service*, GoFUNDME, <https://www.gofundme.com/terms> [<https://perma.cc/9A99-ZCLA>] (last updated Dec. 31, 2021).

214. NAT’L ASS’N OF STATE CHARITIES OFFS., *supra* note 202, at 12, 17 (nineteen of forty-one U.S. jurisdictions reported regulating platforms when a charity organizes a campaign to benefit itself, although only eleven did so if the platform did not charge a fee, and eight jurisdictions reported regulating platforms when an individual organizes a campaign to benefit a charity, although only if the platform is compensated).

215. See Mosher & Campbell, *supra* note 34, at 40–41; *supra* Section II.A.2.

subject to a personal jurisdiction caveat, which the Fund appears to recognize.²¹⁶ The individual organizer, platform, and for-profit third-party payment processors would usually not be reached by these laws since these entities generally are not charities or another type of nonprofit.

It is also unclear to what extent more general consumer protection laws apply to crowdfunding for a charity unless they explicitly relate to charitable solicitation, especially since such laws are normally targeted at situations where a consumer buys something as opposed to making a donation.²¹⁷ On the other hand, it appears that fraud laws would reach charitable crowdfunding involving intentional deception.²¹⁸ But authorities may be reluctant to invoke these laws in many situations because they tend to be criminal laws and so carry relatively severe penalties and require the government to satisfy a high burden of proof to obtain a conviction.²¹⁹ Finally, governments could invoke money laundering or terrorism financing laws, but only in situations where the funds involved are from or going to criminal or terrorist activities (and again subject to the reluctance arising from the severe penalties and high burden of proof that come with these typically criminal laws).

The bottom line is, therefore, that for crowdfunding campaigns organized by an individual to support a specific charity, generally only charity or nonprofit laws clearly apply (as opposed to charitable solicitation laws). These only apply to the beneficiary charity and, if there is one, intermediary charity but not the organizer, platform, or third-party payment processor.²²⁰ While in fraud, money laundering, or terrorism financing situations government regulators could invoke the usual criminal laws prohibiting such behavior, high burdens of proof and severe penalties may deter the invocation of those laws except in egregious situations. So, crowdfunding for a charity and the parties involved with it are, for the most part, arguably not reached by the most relevant current laws in most jurisdictions.

Some charity regulators have addressed this lack of coverage by issuing non-binding, voluntary guidance. For example, in the United Kingdom, the Financial Conduct Authority has issued guidance stating that its existing payment services rules apply to platforms that facilitate charitable crowdfunding, but does not

216. See *supra* text accompanying note 209.

217. See, e.g., Mosher & Campbell, *supra* note 34, at 40–41; Takagi, *supra* note 211. But see *supra* note 179 (possible application of such laws).

218. See, e.g., Mosher & Campbell, *supra* note 34, at 41 (United States); see *supra* note 21 and accompanying text (examples of fraud investigations in several countries). See generally Lanuti, *supra* note 187, at 1151 (in the United States, national mail and wire fraud laws “have often been used as a stopgap to enable prosecution of new forms of fraud until Congress enacts more particularized legislation”).

219. See NAT’L ASS’N OF STATE CHARITIES OFFS., *supra* note 202, at 23 (as of 2017, charity regulators from only four U.S. jurisdictions (out of forty-one responding) reported making a criminal referral for fraud arising out of crowdfunding).

220. This conclusion is consistent with more general conclusions of other commentators. See, e.g., A.F. Cicchiello, *Harmonising the Crowdfunding Regulation in Europe: Need, Challenges, and Risks*, J. SMALL BUS. & ENTREPRENEURSHIP (forthcoming 2020) (manuscript at 8), https://www.researchgate.net/publication/332624136_Harmonizing_the_crowdfunding_regulation_in_Europe_need_challenges_and_risks [<https://perma.cc/3LX8-8MZY>] (“[I]n most European countries, crowdfunding forms based on donation and reward still remain unregulated.”).

otherwise appear to regulate this form of crowdfunding,²²¹ and the Fundraising Regulator has also provided a list of voluntary best practices for platforms.²²² In the United States, the FTC provides cautions to individuals considering donating to a charitable crowdfunding campaign but does not impose any specific rules.²²³

Some of the crowdfunding platforms that host campaigns to benefit charities have developed and touted self-regulatory measures to address this lack of coverage.²²⁴ For example, GoFundMe has what it claims is the highest level of safety,²²⁵ including a policy to protect donors and beneficiaries in which it promises to refund donations of up to \$1000 per donor per campaign for any “misuse” and also to transfer up to \$25,000 in collected but undelivered funds to an intended beneficiary.²²⁶ Misuse is defined as a failure by the organizer to deliver funds to the beneficiary, a campaign description that is intentionally misleading to donors, or an instance where the organizer or beneficiary is charged with a crime relating to misrepresentations made in their campaign.²²⁷ This policy has led to GoFundMe refunding donors not only in allegedly fraudulent situations but also in other problematic situations, such as a case where \$17,000 was raised for the hospitalization and funeral of an infant but the father was ultimately charged with murdering her.²²⁸ In another situation, the organizer planned to return more than \$14,000 in donations to help a family seen sleeping on a Chicago subway when the family did not satisfy the GoFundMe documentation requirements for transfer of the funds.²²⁹ For the border wall building

221. *Crowdfunding*, FIN. CONDUCT AUTH, (Apr. 18, 2016), <https://www.fca.org.uk/consumers/crowdfunding> [<https://perma.cc/M667-LG7T>].

222. FUNDRAISING REGUL., *supra* note 74, at 78–81. In France, a general crowdfunding decree is not compulsory for charitable crowdfunding, but charities may apply it to their crowdfunding practices. *See* ECNL, *supra* note 133, at 38.

223. *See Donating Through Crowdfunding, Social Media, and Fundraising Platforms*, FED. TRADE COMM’N, <https://www.consumer.ftc.gov/articles/donating-through-crowdfunding-social-media-and-fundraising-platforms> [<https://perma.cc/E4VC-F5GX>].

224. *See, e.g.,* GiveForward, Inc. v. Hodges, No. JFM-13-1891, 2015 WL 4716046, at *1 (D. Md. Aug. 6, 2015) (fraudulent charitable crowdfunding for individual where platform repaid all donors); *Roe v. Halbig*, 240 Cal. Rptr. 3d 104, 108 Ct. App. 2018) (GoFundMe shut down Sandy Hook shooting conspiracy campaign); Paul Oommen, *Fake Fundraising Campaigns Tarnish Growing Crowdfunding Concept in India*, THE NEWS MINUTE, (Aug. 3, 2021, 2:29 PM), <https://www.thenewsminute.com/article/fake-fundraising-campaigns-tarnish-growing-crowdfunding-concept-india-153349> [<https://perma.cc/QW6E-B3MQ>] (reporting on anti-fraud measures taken by three Indian crowdfunding platforms).

225. *GoFundMe Trust and Safety*, GOFUNDME, <https://www.gofundme.com/c/safety> [<https://perma.cc/463U-Y292>].

226. *See GoFundMe Guarantee FAQs*, GOFUNDME, <https://pages.gofundme.com/guarantee-faq> [<https://perma.cc/5QFU-67UF>].

227. *See id.*

228. *See* Amanda Hoover, *GoFundMe Will Refund Donations to Family of N.J. Cop Now Accused of Killing Infant Daughter*, NJ.COM, <https://www.nj.com/mercer/2019/07/gofundme-will-refund-donations-to-family-of-nj-cop-now-accused-of-killing-his-infant-daughter.html> [<https://perma.cc/3VMX-W5F6>] (July 19, 2019, 3:25 PM).

229. Elvia Malagon & Laura Rodriguez, *After Viral Video of Family Sleeping on Blue Line, Donors May Get Money Back*, CHI. TRIBUNE (Nov. 2, 2018, 6:05 PM), <https://www.chicagotribune.com/news/breaking/ct-met-blue-line-family-viral-update-20181102-story.html> [<https://perma.cc/BYC8-YRJ3>].

campaign, it was actually GoFundMe that forced the organizer to set up a nonprofit to receive the funds raised—and receive permission from every donor to redirect their contributions to the nonprofit—when the campaign both failed to come close to its goal and GoFundMe learned that the federal government could not legally accept the funds raised.²³⁰

These efforts have not satisfied everyone, as illustrated by the GoFraudMe website that is critical of GoFundMe's policies.²³¹ Furthermore, not all platforms have similar policies. For example, Facebook, Fundly, and JustGiving lack donor guarantee or protection policies, although they may have internal review procedures in place to filter campaigns.²³² At least one platform that hosted campaigns to benefit charities is now under government investigation in the United States for allegedly failing to transfer donated funds to the identified beneficiaries.²³³ Finally, in addition to the self-regulatory activities of the platforms, at least one association of nonprofits in the United States has taken it upon itself to urge all platforms to follow certain best practices.²³⁴

Despite these self-regulatory efforts, several governments have enacted or have considered enacting laws specifically targeting crowdfunding for a charity.²³⁵ For example, in France, a regulation that imposes certain requirements on “crowdfunding intermediaries” applies to charitable crowdfunding platforms as well as other types of crowdfunding platforms.²³⁶ Spain, in contrast, has explicitly excluded charitable

230. See Mihir Zaveri, *GoFundMe to Refund Border Wall Donations After Fund-Raiser Falls Short*, N.Y. TIMES (Jan. 11, 2019), <https://www.nytimes.com/2019/01/11/us/gofundme-border-wall-refund.html> [<https://perma.cc/42ZR-W9TY>].

231. GOFRAUDME, <http://gofraudme.com/> [<https://perma.cc/RVK3-MYQZ>].

232. See *Comparing the Top Online Fundraising and Crowdfunding Platforms*, CROWDFUNDING, <https://www.crowdfunding.com/> [<https://perma.cc/466B-DABA>] (Nov. 23, 2021); *Facebook Fundraising*, FACEBOOK, <https://www.facebook.com/fundraisers/about/personal-fundraising/> [<https://perma.cc/YWA2-XWL7>] (unspecified review procedure for fundraisers for specific individuals or causes).

233. See Press Release, Letitia James, N.Y. Att'y Gen., Attorney General James Sues NYCharities.org for Missing Funds (Oct. 4, 2019), <https://ag.ny.gov/press-release/2019/attorney-general-james-sues-nycharitiesorg-missing-funds> [<https://perma.cc/2DY9-CAU3>]; Denis Slattery, *AG James Investigating Fundraising Website That Failed to Dole Out Thousands in Donations to New York Charities*, N.Y. DAILY NEWS (July 31, 2019, 5:56 PM), <https://www.nydailynews.com/news/politics/ny-attorney-general-james-charity-website-donations-20190731-ibfowk6hrfxlezjo3luc4ljii-story.html> [<https://perma.cc/3CZM-UVTZ>].

234. Letter from Jan Masaoka, CEO, Cal. Ass'n of Nonprofits, to Crowdfunding Companies (Nov. 14, 2018), <https://calnonprofits.org/images/CrowdfundingPrinciplesWebsite.pdf> [<https://perma.cc/Z8S2-6GV8>]. See generally Beth Breeze & Wendy Scaife, *Encouraging Generosity: The Practice and Organization of Fund-Raising Across Nations*, in PALGRAVE HANDBOOK, *supra* note 52, at 570, 581–83 (discussing professional organizations involved in fostering fund-raising, including by promulgating best practices, in a variety of countries and internationally).

235. See, e.g., NAT'L ASS'N OF STATE CHARITIES OFFS., *supra* note 202, at 26 (showing that charity regulators in some U.S. jurisdictions favor a new uniform law to address charitable crowdfunding).

236. ECNL, *supra* note 133, at 38.

crowdfunding from the reach of its crowdfunding rules,²³⁷ and the European Union has similarly only considered a code of conduct with respect to charitable crowdfunding while adopting rules for other forms of crowdfunding.²³⁸ In the wake of the wildfires in Australia, the government there is considering legislation to create a fund to collect and monitor money raised to aid affected individuals and animals, whether directly or through an intermediary charity or other organization.²³⁹ That legislation would only apply to this particular situation, not charitable crowdfunding more generally. In the United States, California recently enacted a law effective January 1, 2023, that will require both crowdfunding platforms that raise money for charities and charities, such as PayPal Giving Fund, that facilitate the activity of such a platform to register and file regular reports with the state's Registry of Charitable Trusts and to make certain public disclosures. It also will require such platforms to obtain a charity's written consent before soliciting funds for its benefit (with some exceptions).²⁴⁰ However, for the most part, it appears governments have yet to enact or even consider legal rules specifically designed for crowdfunding to benefit a charity.

2. Crowdfunding for an Individual

Charitable crowdfunding to benefit one or more specific individuals in need is, if anything, even less regulated than crowdfunding to benefit a charity. That is because, not only is it generally uncertain whether the organizer, platform, and third-party payment processor are covered by the most relevant laws for the reasons already discussed, but there is no beneficiary charity or intermediary charity that would be reached by charity or nonprofit laws. Indeed, many jurisdictions in the United States specifically exclude efforts to directly benefit specific individuals from the reach of their charitable solicitation laws, although often only if all proceeds are paid to the named individual and the organizers are not compensated for their services.²⁴¹ One U.S. jurisdiction has explicitly disclaimed regulatory authority over crowdfunding to benefit an individual based on such an exemption.²⁴² Another U.S. jurisdiction also

237. *Id.*

238. See *Crowdfunding*, EUR. COMM'N, https://ec.europa.eu/info/business-economy-euro/growth-and-investment/financing-investment/crowdfunding_en [<https://perma.cc/4AST-5GKZ>] (describing the Regulation on European Crowdfunding Service Providers for business); ECNL, *supra* note 133, at 18.

239. Rural Fires Amendment (NSW RFS and Brigades Donation Fund) Bill 2020 (NSW) (Austl.), <https://www.parliament.nsw.gov.au/bill/files/3757/First%20Print.pdf> [<https://perma.cc/T742-H2N4>].

240. A.B. 488, 2021–2022 Reg. Sess. (Cal. 2021).

241. See, e.g., KAN. STAT. ANN. § 17–1762(c) (2022) (providing an exemption if all fundraising functions are carried on by persons who are not paid for their services); MICH. COMP. LAWS § 400.283(a) (2022) (providing an exemption if contribution turned over to the named beneficiary after deduction of reasonable costs if fundraising done by unpaid persons); N.Y. EXEC. LAW § 172a(2)(c) (Consol. 2022) (providing an exemption if all proceeds are turned over to the specified individual beneficiary).

242. *Crowdfunding for Donations*, MICH. DEP'T OF ATT'Y GEN., https://www.michigan.gov/ag/0,4534,7-359-81903_20942-323428--,00.html [<https://perma.cc/VE9Q-MVVN>].

did so, but with the caveat that raising money for a general charitable purpose as opposed to a specific individual would make the organizer subject to state charitable giving laws even if they were not raising funds for a charitable organization.²⁴³

That said, a recent survey by the National Association of State Charity Officials (NASCO) found that of forty-one U.S. jurisdictions responding (out of fifty states and the District of Columbia), fourteen said they “regulate fundraising by individuals for individuals” even when the organizer does not benefit from the fundraising.²⁴⁴ Seven jurisdictions also stated that they regulate platforms hosting such campaigns, again presumably under their existing laws.²⁴⁵ However, it is unclear to what extent, if at all, those jurisdictions enforce their reporting and registration requirements against organizers or platforms.²⁴⁶

Other charity and nonprofit laws are usually not applicable to any parties involved with crowdfunding to directly benefit a specific individual, since typically none of those parties are nonprofits. Fraud, money laundering, and terrorism financing laws can apply to this activity. But again, the high burdens of proof and severe sanctions associated with these usually criminal laws may deter governments from applying them except in the most egregious situations.

As was the case for crowdfunding to benefit a charity, in the absence of coverage by existing laws, some governments have turned to voluntary guidelines or procedures. For example, in the United States, the New York Attorney General has used her existing authority to create a voluntary alternate beneficiary form for charitable crowdfunding, or any other type of fundraising, that benefits a particular individual or set of individuals in need.²⁴⁷ On its face, the purpose of the form is to ensure that if the individual to be benefitted is not able for whatever reason to accept the donated funds, there is an alternate beneficiary in place.²⁴⁸ However, one almost certainly desired additional consequence of the form is to provide the Attorney General’s office with information regarding efforts to raise funds to benefit an individual so that, if any questions arise relating to a particular effort, the office already has certain information, including the identity and contact information of the organizer. That said, it is unclear to what extent crowdfunders are voluntarily submitting this form.

As was the case with crowdfunding to benefit a charity, in a few jurisdictions, legal groups and governments have considered enacting laws specifically regulating crowdfunding to benefit an individual. For example, the Uniform Law Conference of Canada produced a Uniform Informal Public Appeals Act in 2012 that provided every informal public appeal, excluding appeals by registered charities, results in the constitution of a trust and also provided detailed rules governing the trust’s

243. *You Might Be a “Charity”—Yes, You!*, OFFICE OF MINN. ATT’Y GEN. KEITH ELLISON, <https://www.ag.state.mn.us/Consumer/Publications/RaisingMoney.asp> [https://perma.cc/GZ6B-NS9G].

244. NAT’L ASS’N OF STATE CHARITIES OFFS., *supra* note 202, at 6.

245. *Id.* at 9.

246. *See id.* at 23 (showing that only seventeen out of forty-one jurisdictions responding reported any enforcement action relating to crowdfunding).

247. STATE OF N.Y. DEP’T OF LAW, CHARITABLE SOLICITATIONS FOR THE RELIEF OF AN INDIVIDUAL, <http://www.charitiesnys.com/pdfs/char017.pdf> [https://perma.cc/FRD9-QATD].

248. *See id.*

administration and termination.²⁴⁹ The Commission recently updated this uniform law,²⁵⁰ and at least one Canadian province has enacted it.²⁵¹ The National Conference of Commissioners on Uniform State Laws in the United States is also considering a uniform law to address crowdfunding to benefit one or more individuals. The law takes a different approach as it would impose certain duties on the “fund manager” who manages a crowdfunded-appeal fund instead of creating a legal trust.²⁵² But as with crowdfunding for a charity, it appears most jurisdictions have yet to even consider if and how this activity should be regulated.

3. Personal Jurisdiction Issues

Charitable crowdfunding also magnifies a legal issue that often arises with respect to charitable fundraising, particularly in countries where regulation of charitable solicitation is primarily at the subnational government level. This is the issue of which government or governments have personal jurisdiction over the parties involved in a given charitable fundraising activity. For example, in the United States, this situation often arises because a charity may be located in one state but solicit donations from the residents of one or more other states.²⁵³

Soliciting donations over the internet, including through crowdfunding campaigns, magnifies this issue because in theory such soliciting could generate donations from anywhere in the country or even from other countries.²⁵⁴ Some governments have therefore begun considering how best to resolve this issue. For example, in England and Wales, the Charities Act 2006 defined charitable fundraising broadly enough for its charitable fundraising laws to reach charitable appeals made by entities based outside of those countries but that reach their residents, including presumably internet-based appeals.²⁵⁵

249. UNIF. L. CONF. OF CAN., SECOND REPORT OF THE WORKING GROUP ON A UNIFORM INFORMAL PUBLIC APPEALS ACT (2012), [https://www.ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Informal-Public-Appeals-Act-\(Second-Report-2012\)_1.pdf](https://www.ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Informal-Public-Appeals-Act-(Second-Report-2012)_1.pdf) [<https://perma.cc/A52D-5WGU>].

250. UNIF. L. CONF. OF CAN., UNIFORM BENEVOLENT AND COMMUNITY CROWDFUNDING ACT (2020), https://ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-2020/Uniform-Benevolent-and-Community-Crowdfunding-Act_1.pdf [<https://perma.cc/U9ML-TM7A>].

251. See Phillips, *supra* note 110.

252. NAT'L CONF. OF COMM'RS ON UNIF. STATE L., FUNDRAISING THROUGH PUBLIC APPEALS ACT (draft) (Mar. 2020) [hereinafter NCCUSL], <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=1cd03194-11b9-c28d-7a00-af3b84c991bd&forceDialog=0> [<https://perma.cc/Q788-AX9M>].

253. See Hammond, *supra* note 44, at 11; Charles Nave, *Charitable State Registration and the Dormant Commerce Clause*, 31 WM. MITCHELL L. REV. 227, 227–34 (2004).

254. See generally Michael P. Maloney & David S. Rosenthal, *Charitable Organization Internet Fundraising and State Registration Requirements—Part II*, INTELL. PROP. & TECH. L.J., July 2017, at 10; Melissa G. Liazos, Comment, *Can States Impose Registration Requirements on Online Charitable Solicitors?*, 67 U. CHI. L. REV. 1379 (2000).

255. See Oonagh B. Breen, Patrick Ford & Gareth G. Morgan, *Cross-Border Issues in the Regulation of Charities: Experiences from the UK and Ireland*, 11 INT'L J. NOT-FOR-PROFIT L., May 2009, at 5, 12–13, <https://mk0rofifiqa2w3u89nud.kinstacdn.com/wp->

Almost twenty years ago, NASCO issued suggested guidelines for regulating online charitable solicitation (the “Charleston Principles”).²⁵⁶ While the Charleston Principles do not specifically address crowdfunding, they do provide that an entity domiciled outside a given state should still be required to register in that state solely based on its solicitation of contributions through a website if the entity either “[s]pecifically targets persons physically located in the state for solicitation” or “[r]eceives contributions from the state on a repeated and ongoing basis or a substantial basis through its Web site.”²⁵⁷ This guidance is consistent with more general U.S. case law, which requires “minimum contacts” with a given jurisdiction before its laws can apply to an individual or entity, including when the activity at issue is over the internet.²⁵⁸ But the Charleston Principles are non-binding, except in the few states that have officially adopted them, so in the United States, resolution of this jurisdictional issue usually is based on more general statutes and case law.²⁵⁹

The challenge of applying general personal jurisdiction principles to online activity, and particularly charitable crowdfunding, is that they tend to be based on physical location. For charitable fundraising, the location of the donors or potential donors is usually controlling, with governments asserting jurisdiction when, in some way, the fundraising is targeted at donors who physically reside within that government’s geographic jurisdiction.²⁶⁰ But charitable crowdfunding campaigns by their very nature tend to be “bread on the water” efforts, where the campaign website is promoted as widely as possible by the organizer without much consideration of where the recipients are physically located, especially since such promotion is often through online means such as social media.²⁶¹ At least under some personal jurisdiction precedents, merely making the website available to their residents is not enough to grant regulating authorities personal jurisdiction; some type of additional

content/uploads/ijnl_vol11iss3.pdf?_ga=2.32774971.425948158.1597324112-1010871861.1597324112 [https://perma.cc/32X6-DZVV].

256. *The Charleston Principles: Guidelines on Charitable Solicitations Using the Internet*, NASCO (March 14, 2001), <http://www.nasconet.org/wp-content/uploads/2018/04/Charleston-Principles.pdf> [https://perma.cc/A3RR-RDYL] [hereinafter *Charleston Principles*]; see also Tracy L. Boak, *Navigating the Maze of State Charitable Fundraising Regulation*, 27 TAX’N EXEMPTIONS 38, 40 (2015) (discussing the Charleston Principles).

257. *Charleston Principles*, *supra* note 256, § III.B.1.b.

258. See, e.g., *Nutramarks, Inc. v. Life Basics, LLC*, No. 2:15-cv-00571-DN, 2017 WL 2178422, at *2–3 (D. Utah May 17, 2017); *Christian Sci. Bd. of Dirs. of the First Church of Christ, Sci. v. Robinson*, 123 F. Supp. 2d 965, 974–76 (D.C. W.D.N.C. 2000) (applying the minimum contacts requirement to a website); *Heroes, Inc. v. Heroes Found.*, 958 F. Supp. 1, 4–5 (D.D.C. 1996) (same). See generally Yasmin R. Tavakoli & David R. Yohannan, *Personal Jurisdiction in Cyberspace: Where Does It Begin, and Where Does It End?*, INTELL. PROP. & TECH. L.J., Jan. 2011, at 3; Liazos, *supra* note 254, at 1391–93.

259. See NAT’L ASS’N OF STATE CHARITIES OFFS., *supra* note 202, at 22. Only five jurisdictions reported using the Charleston Principles to address jurisdictional requirements relating to regulation of third-party websites. *Id.*

260. See *Charleston Principles*, *supra* note 256, § III.B.1.b; Liazos, *supra* note 254, at 1387.

261. See *supra* note 48 and accompanying text.

targeting of those residents or interaction with them is required.²⁶² While governments could instead try to base jurisdiction on the physical location of the servers hosting the campaign or of the organizer, the first may be changed easily to avoid high regulation jurisdictions and the latter may be difficult to ascertain given the general lack of current registration and reporting requirements for organizers.

III. FUTURE REGULATION OF CHARITABLE CROWDFUNDING

Part I demonstrated that charitable crowdfunding is a quickly growing, global method for individuals to financially support both charities and needy individuals. However, the exact extent of this new activity and its positive and negative effects are obscured by the limited availability of relevant data. Part II showed that the laws upon which most countries rely to regulate charitable fundraising have limited applicability to charitable crowdfunding, and particularly efforts to directly benefit needy individuals. While some jurisdictions have taken initial steps to address this lack of coverage, those efforts have been relatively few.²⁶³

The emergence of charitable crowdfunding therefore presents questions of if and how to regulate in the face of uncertainty. This is not a new situation even if it arises here in a new context, as governments often face this question when considering an emerging trend, particularly one driven by new technology. This Part therefore first considers the theory of regulating in the face of uncertainty. It then applies this theory to what we do know about charitable crowdfunding, including the limited reach of existing laws.

The result is a set of recommendations for modest requirements designed to increase the flow of information relating to such efforts so that beneficiaries, and, to a limited extent, regulators, receive information needed to prevent likely abuses, without unduly inhibiting this new avenue for charitable giving. More specifically, I recommend requiring platforms to notify beneficiaries of all campaigns that receive donations for their benefit to limit potential harm to those beneficiaries and to help ensure donated funds reach them. I also recommend requiring platforms to notify regulators of the fairly few campaigns, whether to benefit a charity or an individual, that reach a relatively high threshold to help inform regulators about the scale and growth of charitable crowdfunding and to allow those regulators to resolve problems from arising with these largest campaigns. I recommend against stricter consent and administration requirements, as have been adopted or are under consideration by some jurisdictions, as they are unnecessarily burdensome. Finally, this Part considers several legal limits on regulation that may be relevant in many jurisdictions, including data privacy laws, free speech protections, and internet platform liability limitations. I conclude that none of these limits should bar the adoption of the recommendations made here, although they may prevent more burdensome requirements.

262. See, e.g., *Nutramarks*, 2017 WL 2178422, at *5.

263. See *supra* notes 235–240, 249–252 and accompanying text.

A. Regulating in the Face of Uncertainty

The pervasive but not sole theoretical framework used by governments, especially in the United States, to determine if and how to regulate various activities is some form of cost-benefit analysis.²⁶⁴ This is particularly true with respect to environmental, economic, and financial activity, although the use of cost-benefit analysis has critics even in those contexts.²⁶⁵ Even if a cost-benefit analysis framework is accepted as appropriate, it requires significant data to yield meaningful results, with respect to the upsides and downsides of the activity, their monetary value, and the effect of different regulatory approaches on those upsides and downsides.²⁶⁶ A threshold problem with applying this analysis to a new activity that has a limited track record, including one driven by new technology, is therefore the lack of such data.

Oversimplifying, there are two approaches to regulating in the face of such uncertainty that mark the end points of a continuum of responses. One approach is the precautionary approach, sometimes referred to as the precautionary principle or the “better safe than sorry” approach, which scholars and regulators developed in the

264. See, e.g., Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (U.S. federal government, requiring a cost-benefit analysis for any “significant” proposed regulation); Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1489 (2002) (“At least in a formal sense, cost-benefit balancing is now the official creed of the [United States] executive branch”); Michael A. Livermore, *Can Cost-Benefit Analysis of Environmental Policy Go Global?*, 19 N.Y.U. ENV’T L.J. 146, 148 (2011) (“[c]ost-benefit analysis of environmental policy is widespread within advanced industrial economies” and “use of cost-benefit analysis as an aid to environmental decisionmaking has expanded in recent years in countries throughout Latin America, Asia, and Africa”), 150–59 (providing details); Elizabeth Goldberg, *‘Better Regulation’: European Union Style* 24, 32 (M-RCBG Assoc. Working Paper Series, Paper No. 98, 2018), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/98_final2.pdf.pdf [<https://perma.cc/R9VC-RZCK>] (cost/benefit analysis is generally but not always one element of the European Union’s impact assessment for proposed rules); THE PEW CHARITABLE TRUSTS & MACARTHUR FOUND., *STATES’ USE OF COST-BENEFIT ANALYSIS: IMPROVING RESULTS FOR TAXPAYERS* 2 (2013), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes_assets/2013/pewresultsfirst50statereportpdf.pdf [<https://perma.cc/47RQ-DAHA>] (“[S]tates [in the United States] are increasingly using cost-benefit analysis”).

265. See, e.g., Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1553 (2002); John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 886–87 (2015).

266. See, e.g., Ackerman & Heinzerling, *supra* note 265, at 1557–60 (also including setting a discount rate for future costs and benefits); Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 177–87 (1999) (noting complexities of applying cost-benefit analysis).

environmental law area²⁶⁷ but has implications for many other legal areas.²⁶⁸ It calls for action at an early stage in response to a perceived threat, including situations where the exact nature and magnitude of the threat is uncertain, so rigorous cost-benefit analysis is not practical.²⁶⁹ (Scholars also sometimes invoke it as an alternative to a cost-benefit approach, although arguably it is really a variation of this approach used in the face of uncertainty.²⁷⁰) Not surprisingly, this approach is controversial,²⁷¹ even in the environmental area where it originated and where the potential downsides of a failure to regulate could be catastrophic and irreversible.²⁷²

The other approach is a laissez-faire one, where regulation waits on the accumulation of significantly more data (and may never occur, absent strong evidence that regulation is needed).²⁷³ This is often the approach taken with new technology, usually justified by a desire not to unduly inhibit the development and spread of that technology.²⁷⁴ It also reflects a concern that regulatory choices are “sticky,” in that once made they may be difficult to change even if subsequent developments reveal they are problematic.²⁷⁵

There are of course many options along the continuum between enacting a comprehensive regulatory scheme and doing nothing. These options include

267. See generally James Cameron & Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for Protection of the Global Environment*, 14 B.C. INT'L & COMP. L. REV. 1 (1991); Armin Rosencranz, Shubham Janghu & Pratheek Reddy, Comment, *The Evolution and Influence of International Environmental Norms*, 49 ENV'T L. REP. NEWS & ANALYSIS 10125, 10130–31 (2019).

268. See, e.g., Ignacio N. Cofone, *Antidiscriminatory Privacy*, 72 SMU L. REV. 139, 166–72 (2019) (employment discrimination law); Jennifer Huddleston, *Preserving Permissionless Innovation in Federal Data Privacy Policy*, 22 J. INTERNET L. 17, 18 (2019) (data protection law); Sarah E. Light, *Precautionary Federalism and the Sharing Economy*, 66 EMORY L.J. 333 (2017) (ride sharing regulation); Troy A. Paredes, *On the Decision to Regulate Hedge Funds: The SEC's Regulatory Philosophy, Style, and Mission*, 2006 U. ILL. L. REV. 975, 1006–10 (2006) (securities law); Catherine M. Sharkey, *Direct-to-Consumer Genetic Testing: The FDA's Dual Role as Safety and Health Information Regulator*, 68 DEPAUL L. REV. 343, 351–54 (2019) (genetic testing regulation); Cass R. Sunstein, *Beyond Cheneyism and Snowdenism*, 83 U. CHI. L. REV. 271 (2016) (national security law).

269. See Arie Trouwborst, *Prevention, Precaution, Logic and Law: The Relationship Between the Precautionary Principle and the Preventative Principle in International Law and Associated Questions*, 2 ERASMUS L. REV. 105, 108 (2009).

270. See Hahn & Sunstein, *supra* note 264, at 1500–02.

271. See, e.g., Frank B. Cross, *Paradoxical Perils of the Precautionary Principle*, 53 WASH. & LEE L. REV. 851 (1996); Rosencranz et al., *supra* note 267, at 10130; Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003 (2003).

272. See generally Daniel A. Farber, *Uncertainty*, 99 GEO. L.J. 901 (2011); Cass R. Sunstein, *Irreversible and Catastrophic*, 91 CORNELL L. REV. 841 (2006).

273. See Mark Fenwick, Wulf A. Kaal & Erik P.M. Vermeulen, *Regulation Tomorrow: What Happens When Technology Is Faster than the Law?*, 6 AM. U. BUS. L. REV. 561, 582 (2017); Jeremy A. Carp, *Autonomous Vehicles: Problems and Principles for Future Regulation*, 4 U. PA. J.L. & PUB. AFFS. 81, 114–15 (2018).

274. See, e.g., Carp, *supra* note 273; Adam Thierer, *Privacy Law's Precautionary Principle Problem*, 66 ME. L. REV. 467, 471 (2014).

275. See Carp, *supra* note 273, at 103–11 (limited ability of government branches to react and adapt quickly to new technologies).

requiring the use of the best available technology to limit costs, trying to create some type of private market to sort out the relative costs and benefits of an activity, or requiring disclosures to aid private actors to make better judgments with respect to an activity.²⁷⁶ Choosing among those options is a complex process, but several factors tend to be considered.

First and perhaps most important is the outer range of possible harm of either regulating or not regulating, including whether that harm relates to public health and safety or only finances.²⁷⁷ For example, and as noted above, supporters of a strong application of the precautionary approach in the environmental context rely on the potentially catastrophic health consequences and even existential threat level of the worst environmental outcomes absent such regulation.²⁷⁸ Another factor is how quickly relevant data may accumulate in comparison to how quickly the activity may spread or grow.²⁷⁹ For example, supporters of a laissez-faire approach to new technology often emphasize that it takes time for new technology to gain adherents, and regulators can use the time during which new technology has limited effects to gather additional data before deciding if and how to regulate the new technology.²⁸⁰ A third factor is the ease with which harms that actually occur can be ameliorated after the fact, if regulations to prevent them from occurring are not in place.²⁸¹ A fourth important factor is the extent to which there may be unexpected developments that could render any regulation enacted ineffective or even detrimental based on limited data.²⁸²

As these factors indicate, any decision regarding how to regulate in the face of uncertainty is context sensitive. The next two Sections therefore consider how these factors and related considerations apply in the context of charitable crowdfunding, first for charities and then for one or more needy individuals.

B. Regulating Crowdfunding for Charities

1. Beneficiary Charity as Organizer

The easiest case for regulating is when a charity uses crowdfunding to benefit itself. This is because many, perhaps most, jurisdictions that have charitable solicitation laws do not differentiate when applying them based on the means by which the solicitation is communicated.²⁸³ When this is the case, those rules apply with equal force to online solicitation, including crowdfunding, and, most importantly, impose on the charity engaged in soliciting the same registration,

276. See, e.g., Ackerman & Heinzerling, *supra* note 265, at 1581–83 (options in the environmental area).

277. See generally Sunstein, *supra* note 272.

278. See *id.* at 843–44.

279. See Fenwick et al., *supra* note 273, at 573–74.

280. See, e.g., Alan Z. Rozenshtein, *Wicked Crypto*, 9 U.C. IRVINE L. REV. 1181, 1205 (2019) (recommending this approach to regulating encryption).

281. See Sunstein, *supra* note 272, at 860.

282. See, e.g., Huddleston, *supra* note 268, at 19.

283. See *supra* note 198 and accompanying text.

reporting, and other requirements that apply in any other solicitation context.²⁸⁴ The same concerns that support the application of those laws to charities in other contexts (ensuring accurate information for potential donors, use of the funds collected consistent with those representations, and so on) also apply with equal force to charitable crowdfunding.

Platforms and third-party payment processors may also be reached by those rules if they apply to for-profit participants in charitable solicitation and the activities engaged in by these parties trigger those rules.²⁸⁵ However, such reach—which is uncertain²⁸⁶—is likely not particularly important. This is both because a charity that organizes and receives the vast majority of the funds raised will be subject to the relevant rules and because there is no evidence that the for-profit participants try or are able to capture a large portion of the funds raised, which is the primary concern underlying requirements for for-profit participants.²⁸⁷ Indeed, to the extent it is unclear whether the for-profit participant rules include crowdfunding platforms and third-party processors, the rules should be clarified to exclude them because there is little if any evidence that they are in a position to overcharge charities given the number of platforms to choose among.²⁸⁸ The lower cost, greater speed, and greater reach that crowdfunding provides to a charity should not affect the application of these laws to the charity for two reasons. First, they generally require registration before any solicitation occurs through the filing of a form with information about the charity's finances and governance.²⁸⁹ Second, they can be quickly enforced in situations where a charity fails to comply with them once regulators become aware of the charity's failure, as tends to happen with the high-profile crowdfunding efforts that attract the largest amount of donations.²⁹⁰

The one difficult legal issue that can arise when a charity engages in crowdfunding to benefit itself is personal jurisdiction. However, charities almost always send follow-up solicitations to donors, which is usually sufficient to trigger personal jurisdiction over the charity for purposes of the charitable solicitation rules imposed by the government where those specific donors reside.²⁹¹ So, in practice it seems unlikely that personal jurisdiction will be a serious barrier to governments being able to apply their charitable solicitation laws to charities soliciting donations from their residents through crowdfunding.

284. See *supra* notes 198–199 and accompanying text.

285. See *supra* notes 136, 155 and accompanying text.

286. See *supra* notes 210–214 and accompanying text.

287. See Barber & Farwell, *supra* note 141, at 314–15; see *supra* note 57 and accompanying text (high fundraising fees charged by for-profit companies).

288. See Carp, *supra* note 273, at 123 (discussing how new technologies may expose ambiguous terms and concepts in existing laws); see *supra* notes 204–06 and accompanying text (discussing how platforms and payment processors charge relatively modest fees).

289. See Fishman, *supra* note 54, at 14.

290. See, e.g., Press Release, New York Att'y Gen., Att'y Gen. James Orders Black Lives Matter Found. to Cease Solicitation of New York Donations (July 6, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-orders-black-lives-matter-foundation-cease-solicitation> [<https://perma.cc/C7NW-REEW>]; see *supra* note 111 and accompanying text (Pulse Nightclub shooting).

291. See *supra* notes 257–260 and accompanying text.

2. Unaffiliated Individual as Organizer

The more difficult situation is when an individual who is unaffiliated with a charity organizes a campaign to benefit that charity. It is unclear how much additional giving is generated by such efforts, as opposed to simply shifting giving from other fundraising channels—that is, the benefit from this type of crowdfunding for charities is not known.²⁹² It is also unclear to what extent this form of crowdfunding can lead to donor confusion, including with respect to whether tax benefits are available, or to appropriation of a charity's name by an individual with whom the charity does not want to be associated.²⁹³ Finally, it is unclear to what extent funds given do not actually reach the designated charity because of fraud. Examples of fraud include diversion by the organizer (when a platform pays funds directly to the organizer²⁹⁴), by the platform as allegedly occurred with NYCharities.org,²⁹⁵ by the third-party payment processor as allegedly occurred with the PayPal Giving Fund,²⁹⁶ or even by the beneficiary charity if it is in fact a false charity or a front for criminal or terrorist activity.²⁹⁷ Relatedly, it is unclear how different forms of regulation—mandatory registration and reporting by one or more of the parties involved, other forms of disclosure to potential donors or regulators, or other requirements—may either unduly inhibit this new method of fundraising (imposing costs) or prevent fraud and similar bad results (providing benefits).²⁹⁸ For example, compliance with regulatory requirements may take time and money that could deter some organizers from launching legitimate campaigns or cause platforms and payment processors to increase their fees, reducing the flow of funds to beneficiaries. At the same time, regulatory requirements could reduce opportunities for donor confusion and prevent diversion of donated funds.

As noted previously, existing laws relating to charitable solicitation likely do not reach this type of fundraising and other charity and nonprofit laws are only applicable to the charity beneficiary or, if it exists, intermediary charity, which limit their effectiveness.²⁹⁹ Broader fraud, money laundering, and terrorism financing laws do apply but only to intentional diversion scenarios, and enforcement may be limited

292. See Crittal & Herbst, *supra* note 36, at 217; NAT'L ASS'N OF STATE CHARITIES OFFS., *supra* note 202, at 24 (benefits of crowdfunding), 25 (unclear if crowdfunding for individuals is affecting traditional charities, negatively or positively, in United States); see *supra* notes 87–89 and accompanying text.

293. See, e.g., NAT'L ASS'N OF STATE CHARITIES OFFS., *supra* note 202, at 24 (problems of crowdfunding).

294. See, e.g., *supra* note 207 and accompanying text (GoFundMe).

295. See *supra* note 233 and accompanying text.

296. See *supra* notes 130–131 and accompanying text.

297. See *supra* notes 125, 196–197 and accompanying text.

298. See ECNL, *supra* note 133, at 64 (“Regulation should encourage the use of new fundraising methods rather than creating additional administrative burden . . . , which can limit their use.”); Renée A. Irvin, *State Regulation of Nonprofit Organizations: Accountability Regardless of Outcome*, 34 NONPROFIT & VOLUNTARY SECTOR Q., Jun. 2005, at 161 (indicating that jurisdictions with lack of registration and reporting regimes did not exhibit greater fraudulent activity or higher fundraising costs).

299. See *supra* Section II.B.1.

because of the criminal nature of those laws.³⁰⁰ The potential for diversion, including of relatively significant amounts, is amplified by the low cost, high speed, and broad reach of these crowdfunding efforts—start a campaign, quickly collect what funds you can, and then disappear with the donations. Initial due diligence regarding organizers appears to often be minimal; for example, GoFundMe states that for campaigns based in the United States, it only requires a Social Security number, mailing address, phone number, bank account, and being at least eighteen years of age, although it may request more identifying information and documentation in some instances.³⁰¹

All that said, the factors identified earlier argue against a high level of regulation. First, the potential harm is both relatively modest and primarily if not almost exclusively financial. It appears most such campaigns are relatively small and so unlikely to result in much harm to donors or the purportedly beneficiary charities, although again data are very incomplete on this point.³⁰² The fact that charitable crowdfunding is still a relatively small part of giving to charities, even if growing rapidly, also indicates the potential harm is modest (and that there is time to gather more data before it grows to become a large part of that giving, if it ever does).³⁰³ The financial harm to donors may also be alleviated by the platforms themselves, as some of them will repay donors in cases of fraud.³⁰⁴ Finally, the possible negative effects of regulation, including to what extent it might hurt efforts to use this new method of fundraising, argue against imposing significant regulation at this time. This contrasts with regulating charities that launch charitable crowdfunding campaigns for their own benefit, as they are already subject to both charitable solicitation and other charity laws because of their non-internet fundraising and charitable nature.

However, this analysis suggests several gaps that regulators should consider addressing. One gap is the potential for confusion on the part of donors regarding how funds actually flow to the designated charity, including possibly through the organizer (which may affect available tax benefits) or a charitable intermediary (with the potential for diversion), and how they actually will be used by the recipient charity. Another gap is the harm to donors who contribute to campaigns hosted by platforms that do not always repay donors if there is apparent fraud. A third gap is the lack of a remedy for a charity that never receives funds given for its benefit, assuming it is capable of satisfying whatever reasonable due diligence requirements the platform or an intermediary may require to ensure the charity is legitimate, which may cause both financial and reputational harm to the charity. Finally, there is currently no easy means of determining how often actual illegitimate diversion occurs and in what amounts.

As for the first gap, most donors could probably not care less how exactly the funds flow as long as all or almost all the funds given ultimately reach the designated

300. See *supra* notes 218–220 and accompanying text.

301. See *Creating a GoFundMe from Start to Finish*, GoFUNDME, <https://support.gofundme.com/hc/en-us/articles/360001992627-Creating-a-GoFundMe-from-start-to-finish-> [<https://perma.cc/KX6U-MTWS>] (Dec. 7, 2021).

302. See *supra* notes 87–89 and accompanying text.

303. See *supra* notes 64–65 and accompanying text.

304. See *supra* notes 224–229 and accompanying text.

charity. For example, the problem in the PayPal Giving Fund situation was not that the Fund was collecting a modest fee for its services but that it was actually giving donated funds to other charities without informing the donors (or the designated charities).³⁰⁵ And existing receipting and similar substantiation requirements that most taxing authorities require should clear up any confusion about the tax benefits from donations, at least after the fact, for those donors who may be eligible for such tax benefits.³⁰⁶

Confusion can also arise with respect to the use of the donations. This might happen because of restrictions faced by the charity, as occurred with the Australian wildfire crowdfunding campaign mentioned earlier.³⁰⁷ Confusion can also arise if the funds raised are much greater than anticipated or the recipient charity is used to receiving, although usually both the appeal and the charity's mission are broad enough to eventually allow for appropriate spending of the raised funds. For example, in the wake of protests relating to the police killing of George Floyd, the Minnesota Freedom Fund received \$30 million or 200 times its usual annual revenues and much more than needed to provide needed bail for protesters in Minneapolis; nevertheless, the nonprofit appears to have found other, appropriate uses for the funds, including bail-related advocacy efforts.³⁰⁸ So, in both these types of situations the donations still went to charitable purposes because the recipient was a charity, although either narrower or broader ones than some donors may have anticipated. More importantly, this type of confusion is not unique to the crowdfunding context, which argues against adopting new regulations to address it absent a showing it is significantly more likely or more egregious in this context.

As for harm to donors, if there is apparent fraud, the vast majority of donors appear to give relatively small amounts and so the harm to any particular donor is usually limited.³⁰⁹ In addition, platforms use their donor-repayment policies as a selling point; if they are correct that such policies give them a market advantage—and one of the most successful platforms, GoFundMe, appears to believe they do—³¹⁰ then those platforms will, all other things being equal, come to dominate. This appears to be the trend even though, at least in some jurisdictions, platforms may be protected from civil liability to donors for such diversions in most instances.³¹¹ In other words, market pressures may cause platforms to adopt sufficient remedies for donors. These facts, therefore, argue against a need for regulators to address this gap.

The failure of a legitimate charity to receive funds designated for it is a more significant issue, even though the extent to which this happens (including for arguably non-fraudulent reasons, such as communication failures) is unclear. In

305. See *supra* note 130 and accompanying text.

306. See, e.g., 26 U.S.C. § 170(f)(8) (U.S. requirements); Income Tax Act, R.S.C. 1985, c. E-118.1(2) (Can.).

307. See *supra* notes 116–117 and accompanying text.

308. See Angelina Chapin, *The Bail-Fund Windfall: The Minnesota Freedom Fund Raised Too Much Money*, N.Y. MAG INTELLIGENCER (May 25, 2021), <https://nymag.com/intelligencer/2021/05/minnesota-freedom-fund-bail-fund.html> [https://perma.cc/9BC7-BDWE]; Smith, *supra* note 18.

309. See *supra* note 88 and accompanying text.

310. See *supra* notes 225–226 and accompanying text.

311. See *infra* Section III.D.3.

many, perhaps most, cases the harm to the charity is limited because it is not relying on the donated funds and the amounts raised are relatively small and from relatively few donors. But it is certainly possible that some of the donations would have been sent via other avenues absent the crowdfunding campaign (and so are now lost to the charity), and of course some campaigns can result in a large amount of funds being diverted and involve many donors. In addition, at least some platforms do not offer to make the charity whole in this situation.³¹² Yet the lack of information regarding the extent of both these situations and the magnitude of the harm caused by them suggests caution in imposing new rules that would burden all crowdfunding for charities. This is particularly true given that the harm here is primarily financial and not to life or health.

A requirement that is already in existence in at least some U.S. jurisdictions that could address this gap is the obligation to receive the consent of the designated charity before raising funds for it.³¹³ There are several problems with this requirement, however. First, because it generally predated crowdfunding, it may be unclear who—the organizer, the platform, or the third-party payment processor—has this obligation.³¹⁴ Second, it is unclear if and even how this requirement is enforced in the crowdfunding context,³¹⁵ especially if it currently falls on the individual organizer who likely does not know about the requirement or feel particularly inclined to satisfy it for what probably is anticipated to be a small campaign. Third, it undermines one of the primary benefits of crowdfunding—the ability of a motivated individual to launch a campaign almost instantaneously.³¹⁶ While most such campaigns will yield small amounts for the charity, it is often unknown which of them will go viral and turn out to be wildly successful. At the same time, the main advantage of this requirement is it makes the private party with the strongest reasons to ensure the funds go to the beneficiary—the designated charity—aware of the campaign, thereby creating a motivated monitor to prevent that diversion or any other harm to the charity without taxing limited regulator resources.

These considerations suggest that instead of a consent requirement, regulators should impose a written (including electronically) notification requirement with a relatively short deadline after a campaign is launched, and with the crowdfunding platform obliged to provide the notice not the individual organizer. Notification instead of consent means that a campaign's launch would not be delayed, but the beneficiary charity would still be informed and could even request that the campaign be ended if for some reason the charity objects, perhaps because the organizer is nefarious in some way. Having the platform obliged to provide the notification would remove the burden from the millions of organizers that launch such campaigns and instead leave it with the hundreds of platforms, which could more easily create an efficient process for such notifications. The platform could even shift this responsibility to the third-party payment processor contractually if that turns out to be more efficient, which it very well could be given the processor will eventually

312. See *supra* notes 224–229 and accompanying text.

313. See *supra* notes 202, 240 and accompanying text.

314. California resolved this issue by placing this obligation on the platform. See A.B. 488, *supra* note 240, § 17 (amending CAL. GOV'T CODE § 12599.9(f)).

315. See *supra* note 203 and accompanying text.

316. See *supra* note 49 and accompanying text.

have to arrange to have the funds transferred to the designated charity under any conditions (unless the platform permits transfer to the organizer). Finally, the beneficiary should have the right to opt-out by informing the platform in writing (including electronically) that they do not want the campaign to proceed on their behalf.³¹⁷

A notification requirement with an opt-out option will not fully prevent possible harm to charity beneficiaries. If an organizer receives the funds and then absconds with them, they may be long gone before the designated charity realizes what has happened and acts in response. But notification will make such frauds significantly riskier, likely deterring intentional fraud of this type. If the platform itself is fraudulent, as allegedly has happened at least once, then it presumably will use a fraudulent third-party payment processor or handle funds itself to avoid sending the required notifications in the first place.³¹⁸ The failure to provide required notifications may lead to discovery, if a designated charity learns about a campaign on that platform through another channel—such as a communication directly from a donor—it has a clear ground for a complaint to the relevant regulator (and the regulator has a clear ground for an investigation).

Instead of imposing notification requirements, California has chosen, in its recent legislation, to require platforms to provide conspicuous disclosures to inform organizers and donors.³¹⁹ The required disclosures relate to who is actually receiving the donations (e.g., the platform, the designated charity, or the organizer), under what circumstances the designated charity may not receive a donation, how long it will take for the designated charity to receive a donation, any fees that will be subtracted from donations, and a statement about the tax deductibility of donations.³²⁰ The problem with relying on this approach is that it assumes most donors will read and understand such disclosures, which is questionable at best.³²¹

Finally, if the charity is a false one, including if it is a front for criminal or terrorist activity, a legitimate platform likely would not discover this through notification, but only if it engages in some type of due diligence process. In fact, it appears that, as a

317. California provides an opt-out option when written consent is not required but does not require notification, so it is unclear how most charities would learn they are beneficiaries of campaigns organized by others until the first donations are transferred to the charity. See A.B. 488, *supra* note 240, § 17 (amending CAL. GOV'T CODE § 12599.9(f)(2)(C)).

318. See *supra* note 233 and accompanying text.

319. See A.B. 488, *supra* note 240, § 17 (amending CAL. GOV'T CODE § 12599.9(e)).

320. *Id.*

321. For consideration of the limited effects on donors of mandatory disclosures relating to charities, see Putnam Barber, Megan M. Farwell & Brian Galle, *Does Mandatory Disclosure Matter? The Case of Nonprofit Fundraising*, 51 NONPROFIT & VOLUNTARY SECTOR Q. 31 (2022) (mandatory disclosures tend to reduce donations for charities with above-average fundraising cost ratio); Barber & Farwell, *supra* note 141, at 318–23 (likely limited effects on donor behavior from government mandated disclosures regarding charities). See generally ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 11 (for a targeted transparency policy to be successful, it must be both user-centered and sustainable), 55 (arguing that the extent to which available information is used by decisionmakers depends on how much they value the information, the degree to which the information is compatible with their decision-making routines, and how comprehensible it is to them) (2007).

matter of good customer relations, most platforms have internal processes to flag potentially fraudulent campaigns and stop them.³²² So, absent evidence that such diversions are common or involve relatively large amounts, it appears a regulator response beyond a notification requirement would be premature, especially if it might inhibit the legitimate campaigns that may make up almost all existing campaigns.

However, required notification of the designated charity will not fully address the last gap—the lack of information regarding the extent of fraud and other diversions. Despite prosecutions in some high-profile cases,³²³ it is certainly possible that many other fraudulent campaigns exist, but for a variety of reasons either never come to their attention or, when they do, are too difficult and costly to pursue given the lack of readily available information regarding these campaigns. There will also be some, perhaps many charities, that will not inform a platform or regulator even if they never receive funds from a campaign that has been brought to their attention because of other demands on their time and attention.

One possible response to this lack of information would be to require platforms (or third-party payment processors) to report suspected fraudulent campaigns to regulators. Such a requirement could easily have the perverse effect of causing these parties to reduce their fraud-prevention efforts and the number of fraudulent campaigns they report, which could especially be the case if these reports were subject to public disclosure and so could tarnish the reputation of a platform if it had to report a significant number of suspected frauds. A better alternative would therefore be to require platforms to report all campaigns over a certain threshold in terms of amounts raised—say around \$10,000, which is both a significant amount absolutely and likely at or above the average campaign size³²⁴—leaving it to regulators to then follow up with these significant campaigns as they deem necessary to detect possible fraud or other impropriety. This would limit the burden on platforms, and therefore legitimate campaigns, while bringing the largest campaigns to the attention of regulators. The platforms could also be required to notify organizers that they are providing this notification, which would likely encourage more care on the organizer's part (and less actual fraud). While fraudulent organizers or fake charities might then try to keep their campaigns below the reporting threshold, if they did so, that would be beneficial because it would limit the potential harm from any given fraudulent campaign. This requirement would also have the added benefit of providing more data generally about this type of crowdfunding, which in turn would help regulators learn whether its apparent high rate of growth is continuing such that it is worth their time and effort to consider further regulation.³²⁵

In countries where regulation of charitable fundraising is usually done at the subnational level, such as in the United States, the additional question arises of whether these recommendations be implemented at the subnational level. The advantages of doing so include that they could be coordinated more easily with

322. See, e.g., cases cited in *supra* note 224. But see Fishman, *supra* note 54, at 37–39 (limits of self-regulation).

323. See, e.g., *supra* note 124 and accompanying text (build the wall campaign).

324. See *supra* note 87 and accompanying text.

325. See Carp, *supra* note 273, at 141 (labelling this type of approach as a “planned adaptive” one).

existing charitable fundraising regulation and that variations in the adoption of rules along the lines recommended here could provide useful information regarding the effects of different regulatory options. The disadvantages, including the lack of uniformity, could create confusion among organizers, donors, beneficiaries, platforms, and third-party payment processors and arbitrage opportunities for wrongdoers, who might seek the least regulated environment from which to operate. But if the charity notification and regulator reporting obligations rest with the platforms, it should be possible for these relatively sophisticated parties—after all, they program and operate software that tracks thousands if not millions of separate campaigns—to comply with the requirements of a variety of jurisdictions at low cost.³²⁶

Relatedly, there would also be the question of which governments have jurisdiction over which campaigns, particularly if subnational governments set the rules and so they vary within a given country. Donors may not be known to the charity beneficiary, especially because of the data privacy laws discussed below,³²⁷ so there will be no follow-up appeals to solidify personal jurisdiction over the charity, the platform, and the third-party payment processor. Yet the identification of the charity may be sufficient to grant personal jurisdiction over these parties to the government or governments that already have personal jurisdiction over the charity, either because of where the charity is legally formed or because of where it holds assets. Those governments should therefore have personal jurisdiction over the campaign and the parties involved with it. Since it appears that any harm to donors is likely to be small for each donor and is usually remedied by the platform, it also makes sense to focus on where the charity is organized and located as the jurisdiction with the most interest in imposing notification and reporting requirements to help ensure funds given to a particular charity in fact reach it. Finally, in the apparently rare situation of a fake charity that somehow evades the platform's filters and still manages to attract a significant amount of funds, regulators still have the option of pursuing criminal fraud charges.

C. Regulating Crowdfunding for Individuals

Many jurisdictions do not currently regulate individuals who ask for donations to benefit themselves or other individuals.³²⁸ For those governments that have charitable solicitation laws written broadly enough to cover such activity, there is little evidence of enforcement or other indications of a willingness on the part of government officials to devote resources to applying them in this area.³²⁹ These decisions made sense in a world where such appeals almost always were limited to people who already knew the beneficiary. Such people had social or other nonlegal means of sanction if the appeals were deceptive in some way or the funds given were

326. Third-party vendors may also arise to assist with any notification requirements, as has occurred for charitable solicitation registration and reporting requirements. *See supra* note 163 and accompanying text.

327. *See infra* Section III.D.1.

328. *See supra* notes 241–245 and accompanying text.

329. *See supra* note 246 and accompanying text.

not used for the claimed need, with fraud laws as a backstop in the rare situation where intentional deceit led to a significant number of contributions.

Crowdfunding changes this calculus because of its differences with respect to cost, speed, and particularly breadth. Now, an individual can establish and publicize a campaign to benefit themselves or another individual at almost no cost, virtually instantaneously, and with the ability to reach any person in their nation and other countries covered by the platform they use. That said, the limited data available indicate most of these campaigns raise a modest amount from a relatively few donors who likely already knew the beneficiary.³³⁰ In other words, crowdfunding merely provides a more efficient way of accomplishing what the organizer could have done without the aid of a platform and many, if not most, jurisdictions have decided either not to regulate or to only enforce any applicable regulations lightly for good reason.

However, it appears likely that the chance of hitting the jackpot in the form of significant donations in the aggregate from many donors, including some who have no previous connection to the beneficiary, is markedly greater for a crowdfunding campaign. This success may be predictable, for example, where the beneficiary's need arises because of a well-publicized terrorist attack or natural disaster. For example, one individual managed to raise almost \$10,000 through a GoFundMe campaign ("Joanna Leigh Boston Hero") based on her fraudulent claim of injuries arising from the Boston Marathon bombing.³³¹ Or it may come as a surprise to everyone involved, triggered by the campaign unexpectedly hitting a chord with the public or media, as what happened with the Chauncey's Chance campaign mentioned earlier that started with a goal of \$250 and ultimately raised almost \$350,000.³³²

This greater potential for fundraising success raises the stakes with respect to many of the same issues that can arise with crowdfunding for a charity: donor confusion, including with respect to the tax benefits from donating and how funds will be used if they exceed the beneficiary's need; and diversion of funds from their stated use, whether inadvertently or intentionally. At the same time, there is even less data regarding the costs and benefits of imposing new regulatory requirements than there are with respect to crowdfunding for charities. For example, very little is known regarding how much the availability of crowdfunding increases individuals helping other individuals financially, as opposed to simply providing a more efficient route for assistance that would have occurred anyway.³³³ There are stories of situations where people who never would have been able to receive the funds they needed through their existing family and social networks but were able to do so through

330. See NP SOURCE, *supra* note 17 (an average of eight people donate to an individual crowdfunding campaign); *supra* notes 88–89, 96 and accompanying text.

331. JD Alois, *Women Pleads Guilty on Boston Marathon Scam. Used GoFundMe to Raise Donations*, CROWDFUND INSIDER (Nov. 14, 2015, 10:35 AM), <https://www.crowdfundinsider.com/2015/11/77322-women-pleads-guilty-on-boston-marathon-scam-used-gofundme-to-raise-donations/> [<https://perma.cc/FLE6-429G>].

332. Monroe, *supra* note 51.

333. See CHARITABLE CROWDFUNDING: WHO GIVES, TO WHAT, AND WHY? 17 (2021) (most crowdfunding donations to individuals are to family members or to close friends, and the average total donation to family members and close friends is almost eight times the average total donation to strangers), <https://scholarworks.iupui.edu/bitstream/handle/1805/25515/crowdfunding210331-1.pdf> [<https://perma.cc/X9VM-PXTT>].

crowdfunding, although how widespread those situations are is unknown.³³⁴ Similarly, there is very little known about the extent of donor confusion, including confusion arising from overly successful campaigns, or diversions of funds, although again anecdotes exist.³³⁵

Nevertheless, the fact that there is little evidence that the potential harms here are widespread, and the fact that they are primarily if not almost exclusively financial, as opposed to relating to life or health, caution against a precautionary approach. While less is known about the relative size of such crowdfunding compared to other avenues for supporting individuals in need, the limited data for giving to charities also indicates it may still be a relatively modest proportion, leaving time for regulators to gather more data.³³⁶ As for curing potential harms, platform policies that favor repaying donors when issues arise with a campaign generally apply equally to campaigns for individuals as to campaigns for charities.³³⁷ Finally, imposing significant requirements on such campaigns may significantly deter the many well-meaning individuals who organize them, whether to help themselves or others.

As with crowdfunding for a charity, there are several gaps in the limited to non-existent coverage of existing laws that need to be discussed. These include possible donor confusion, harm to donors if funds are diverted, the lack of a remedy for an individual beneficiary who never receives the funds given for their benefit, and lack of information about illegitimate diversions. However, when it comes to donor confusion, there appears to be little need to impose requirements on organizers, platforms, or third-party payment processors. This includes consideration of tax consequences of donations, as taxpayer confusion about deductions is nothing new and tax authorities already have in place requirements to counter this concern.³³⁸

That said, the excess donations problem may be of greater concern in this context than when a charity is a beneficiary. Both appeals to benefit a charity and the mission of the beneficiary charity are generally broad enough to absorb almost any level of funds once staffing and accounting shortfalls are addressed.³³⁹ That is not necessarily true for a campaign to benefit the specific need of an individual, such as the common appeal for funds to cover the medical costs associated with a particular condition.³⁴⁰ There also is likely a significantly greater chance that the needy individual may die,³⁴¹ as compared to a charity beneficiary going out of existence.

Finally, the diversion issue is also a concern in this context, both because of the possible harm to the beneficiary and the lack of knowledge regarding the extent to which it occurs.³⁴² For example, as noted above, the Boston Marathon bombing campaign to benefit a specific individual turned out to be fraudulent.³⁴³ However, in that case, the fraudulent organizer was also the beneficiary (and did not limit her

334. See, e.g., Monroe, *supra* note 51.

335. See Alois, *supra* note 331; *supra* notes 112–115 and accompanying text.

336. See *supra* notes 64–65 and accompanying text.

337. See *supra* notes 224–226 and accompanying text.

338. See *supra* note 306 and accompanying text.

339. See *supra* note 308 and accompanying text.

340. See *supra* note 92 and accompanying text.

341. See, e.g., *supra* note 114 and accompanying text.

342. See *supra* notes 121–124 and accompanying text.

343. See *supra* note 331 and accompanying text.

fraud to the GoFundMe campaign but also extended it to successful applications for assistance to a variety of funds set up for victims of the bombing).³⁴⁴

A couple of jurisdictions have adopted or considered proposals to address crowdfunding for individuals to address this confusion, the use of excess amounts raised, and any diversions.³⁴⁵ The problem with these proposals is that they impose a detailed set of legal requirements on all crowdfunding for individuals, which it is unrealistic for most organizers to know or to take the time to get to know, especially given that most campaigns are relatively small in size.³⁴⁶ It may be that the laws are only supposed to be applied in the breach—such as was the case with the Humboldt Broncos bus crash campaign that raised millions of dollars³⁴⁷—but that is not how they are written. They therefore risk inhibiting the numerous small campaigns that up until now regulators have wisely chosen not to specifically regulate.

Given the modest extent of any potential harm at this point, the willingness of many if not most platforms to make harmed donors financially whole, and the unknown negative effect of imposing such requirements on all campaigns, a better approach would be to apply the same notification (with opt-out option) and reporting requirements recommended for crowdfunding for charities. As for notifying regulators, this notification requirement should be limited to campaigns that exceed a significant threshold—again, say something along the lines of \$10,000—to limit the burdens on platforms while still bringing campaigns involving significant amounts to the attention of regulators. In addition, such a threshold would limit notification not only to campaigns where substantial funds are at stake but likely would be a reasonably good proxy for the involvement of donors who do not know the beneficiary and so lack nonlegal means of addressing either excess or diversion of funds situations. Doing so will again help regulators get a sense of the amount of crowdfunding for individuals and help them identify the campaigns where the most dollars are at stake, while keeping the burden on platforms (and through them on organizers and beneficiaries) relatively light. And requiring platforms to also inform organizers that platforms are providing this notification would encourage care on their part and discourage fraud.

One objection to this proposal is that it leaves the legal rules ambiguous for campaigns, particularly if the excess funds situation arises. That suggests for those countries where laws do not already exist to address excess fund situations there should be a channel created by which an organizer, if facing this situation, could legally resolve it. Certainly, voluntary efforts, such as those adopted in New York, to encourage the identification of alternate beneficiaries could be proposed.³⁴⁸ That is a far cry from requiring such formal identification by all campaigns even though the vast majority—as best as can be known at this time—do not face this issue or

344. See *supra* note 331 and accompanying text.

345. See NCCUSL, *supra* note 252; UNIF. L. CONF. OF CAN., *supra* note 249; UNIF. L. CONF. OF CAN., *supra* note 250; see also *Doyle v. Att’y Gen.* [1995] 408, 411 (H. Ct.) (Ir.) (applying an “as near as possible to the original purpose” rule to determine permissible uses for funds raised to benefit an individual that exceeded that individual’s financial need).

346. See *supra* notes 87–89 and accompanying text.

347. See *supra* note 110 and accompanying text.

348. See *supra* notes 247–248 and accompanying text.

from imposing detailed administration requirements as Canada's uniform law and the draft United States uniform law recommend.³⁴⁹

Finally, personal jurisdiction issues also arise in this context. The draft United States uniform law resolves these issues by making the organizer of the campaign—that is, the person who actually solicits donations—the focus, using their residence, place of legal formation, and principal place of business as the basis for the act applying.³⁵⁰ The problem with this resolution is the potential for regulatory arbitrage—an organizer seeking to avoid certain rules could move to or from a jurisdiction that chooses not to adopt them. This would be particularly easy in countries, such as the United States, where the rules in this area are primarily adopted at the subnational level.³⁵¹ A better solution would be to focus on the residence of the beneficiary, as they are the party who ultimately is harmed by any failure to deliver funds, and their identity and location should be readily ascertainable by the platform.

D. Legal Limits on Regulating Charitable Crowdfunding

This discussion would not be complete without considering whether these recommendations are consistent with the limits on regulation of charitable fundraising, including charitable crowdfunding, imposed by other laws in the relevant jurisdictions. The most common such restrictions are data privacy laws, free speech protections, and internet platform liability protections. For the reasons detailed below, none of these restrictions should interfere with the ability of a jurisdiction to establish modest notification (with opt-out) and reporting requirements. However, they may restrict the ability of regulators to enact stronger measures relating to charitable crowdfunding.

1. Data Privacy Laws

Many, perhaps most, countries have data privacy laws that apply to internet platforms, including crowdfunding websites.³⁵² For example, in the European Union, the General Data Protection Regulation, among other rules, “requires individuals to give explicit consent before a company or charity can process their personal data” and “requires a charity to receive prior consent from a donor to be contacted.”³⁵³ In the United States, the Stored Communications Act may protect crowdfunding-related information, including the identities of donors and transaction details.³⁵⁴

349. See *supra* notes 249–252 and accompanying text.

350. NCCUSL, *supra* note 252, § 3(a) and Reporter's Note.

351. See *supra* note 152 and accompanying text.

352. See generally Jules Polonetsky, Omer Tene & Evan Selinger, *Consumer Privacy and the Future of Society*, in THE CAMBRIDGE HANDBOOK OF CONSUMER PRIVACY 3, 4–5 (Evan Selinger, Jules Polonetsky & Omer Tene eds., 2018).

353. ECNL, *supra* note 133, at 17, 38; see Council Regulation 2016/679, 2016 O.J. (L 119) 1; ECNL, *supra* note 133, at 20 (examples of nation-specific data privacy laws in Europe); Paul M. Schwartz, *Global Data Privacy: The EU Way*, 94 N.Y.U. L. REV. 771 (2019).

354. See *Gallagher v. United States*, No. 17-cv-00586-MEJ, 2017 WL 4390172, at *7–10 (N.D. Cal. Oct. 3, 2017) (applying Stored Communications Act, 18 U.S.C. §§ 2701–12, to

Since the identity of the beneficiary of a charitable crowdfunding campaign—whether a charity or individual—is stated on the publicly available campaign webpage, as is the aggregate amount raised, data privacy laws should generally not prevent governments from requiring notification of the beneficiary about the campaign or notification of a government agency when a campaign exceeds a certain threshold in funds raised. Those laws may limit the ability of governments to require disclosure of donor information either to the beneficiary or to a government agency if the platform permits donor anonymity, however.³⁵⁵ In fact, at least one platform interprets the EU’s General Data Protection Regulation as requiring it to give donors the option of being anonymous to a charity beneficiary if either the donor or the charity are in the European Economic Area.³⁵⁶

2. Free Speech Protections

Many countries also protect speech in ways that may include charitable fundraising. For example, the European Convention on Human Rights relating to human rights and applicable to European Union members provides that “[e]veryone has the right to freedom of expression.”³⁵⁷ The United States of course has the First Amendment to its Constitution (“Congress shall make no law . . . abridging the freedom of speech”)³⁵⁸ Based on that constitutional provision, the Supreme Court of the United States has prohibited states from placing limits on the proportion of donated funds used to pay for fundraising or administrative costs, requiring soliciting charities to provide that information to potential donors unless requested by the potential donors, restricting agreements between charities and professional fundraisers, or giving significant discretion to government officials when a charity

information collected by a charitable crowdfunding platform).

355. For charitable crowdfunding platform donor anonymity policies, see, e.g., *How Can We Help You?*, CHARIDY, <https://www.charidy.com/faq> [<https://perma.cc/M5ZV-LUTH>] (stating that donors can remain anonymous, apparently for all purposes); Missy Singh, *Can Donors Contribute Anonymously?*, FUNDLY, <https://support.fundly.com/hc/en-us/articles/206307918-Can-donors-contribute-anonymously-> [<https://perma.cc/4WX3-XWWP>] (requiring donor identifying information to be visible to the organizer); *Donating Anonymously*, GOFUNDME, <https://support.gofundme.com/hc/en-us/articles/203687114-Donating-Anonymously-> [<https://perma.cc/T2BE-7SM7>] (Dec. 1, 2021) (requiring donor names to be visible to organizers and beneficiaries); *Donating*, JUSTGIVING, <https://help.justgiving.com/hc/en-us/articles/200670401-How-can-I-donate-anonymously-or-hide-the-donation-amount-> [<https://perma.cc/4YNN-LVN5>] (permitting donors to remain anonymous unless the beneficiary is a charity, in which case their name is visible to the organizer).

356. See *Donations and Gift Aid*, JUSTGIVING, <https://justgiving-charity-support.zendesk.com/hc/en-us/articles/204663707-Anonymous-donations> [<https://perma.cc/97FP-TNQQ>]. The European Economic Area is a formal extension of the European Union’s free trade area. EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AREA (EEA), SWITZERLAND AND THE NORTH (2021), https://www.europarl.europa.eu/ftu/pdf/en/FTU_5.5.3.pdf [<https://perma.cc/BV36-VN2J>].

357. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

358. U.S. CONST. amend. I.

tries to register to solicit contributions.³⁵⁹ The First Amendment also limits the ability of states to access nonpublic donor information.³⁶⁰

Despite their strong language, these protections do not appear to prohibit requiring platforms to notify either beneficiaries or regulators about campaigns. For example, the European Convention also provides that freedom of expression “may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary . . . for the prevention of disorder or crime . . . [or] for the protection of the reputation or rights of others”³⁶¹ In the United States, this is evidenced by the fact that the Supreme Court has repeatedly upheld general registration and reporting requirements, as well as the ability of states to prosecute fraudulent speech in this context, in the face of First Amendment challenges.³⁶² However, more stringent requirements, such as requiring platforms or organizers to provide certain information to potential donors or to report donor information, could run afoul of such protections.

3. Internet Platform Liability Protections

Finally, many countries also limit or eliminate internet platform liability for certain activities of platform users. In Europe, these limitations are found in the Directive on electronic commerce, which protects platforms from liability in various situations, including when they are the “mere conduit” of transmissions by others, or automatically and temporarily store information provided by others.³⁶³ In the United States, section 230 of the United States Communications Decency Act (“CDA”) provides similar protection.³⁶⁴ For example, it has been found to protect a platform

359. See *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 784 (1988) (striking down restrictions on agreements with professional fundraisers, disclosure of percentage information, and discretion of government officials); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 950 (1984) (striking down percentage limit on fundraising expenses); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 622 (1980) (striking down percentage spending requirement on non-administrative expenses). See generally *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 611–17 (2003) (summarizing cases); *FREMONT-SMITH*, *supra* note 77, at 370–72 (same); Ellen Harris, Lynn S. Holley & Christopher J. McCaffrey, *Fundraising into the 1990s: State Regulation of Charitable Solicitation after Riley*, 24 U.S.F. L. REV. 571, 600–14 (1990) (same). The Supreme Court has also held that the First Amendment limits the ability of governments to require charities to disclose the identities of their donors to government authorities. *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021).

360. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2388–89 (2021); *Gallagher v. United States*, No. 17-cv-00586-MEJ, 2017 WL 4390172, at *14–15 (N.D. Cal. Oct. 3, 2017).

361. European Convention on Human Rights, *supra* note 356, art. 10(2).

362. See *Illinois ex rel. Madigan*, 538 U.S. at 617–18 (finding that fraudulent charitable solicitations not protected by the First Amendment).

363. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in *Particular Electronic Commerce*, in the Internal Market, arts. 12–15, 2000 O.J. (L 178) 12–14.

364. 47 U.S.C. § 230 (2020). See generally Chase J. Edwards, *Location-Based Marketing, Regulation of Home-Share Platforms, and Other Developments in Section 230 Immunity*, 75 BUS. LAW. 1667 (2020).

from liability from claims by a purported beneficiary arising out of an allegedly fraudulent charitable crowdfunding campaign the platform hosted.³⁶⁵ However, at the same time a crowdfunding platform “can be liable for independent actions it took distinct from the fraudulent text.”³⁶⁶

In theory, such protections might prevent a government from being able to penalize a platform for failing to comply with even the modest notification requirements recommended in this Article, based solely on hosting a request for funds to further a charitable purpose. In practice, this limitation can easily be avoided by having the first receipt of funds—whether by the platform or a third-party payment processor used by it—trigger any notification requirement. At least CDA Section 230, and likely similar protections in other countries, only limits liability relating to speech but not with respect to transactions.³⁶⁷ Again, more extensive regulation of charitable crowdfunding and particularly of the campaign speech itself, as opposed to the handling of funds, might be limited or prevented by such protections, unless they are modified.

CONCLUSION

Charitable crowdfunding provides a cheaper, faster, and more far-reaching way to raise money for charities and individuals in need than past charitable fundraising methods. Yet as is the often the case with new technology, both its benefits and its downsides are difficult to accurately measure and so tend to be identified through anecdotes instead of through comprehensive data. For donors, organizers, and beneficiaries, this can lead to confusion and unrealistic expectations. For government regulators who may be particularly sensitive to the potential downsides, it can lead to proposals that unnecessarily burden all campaigns to prevent what may be relatively modest and often curable harms caused by a few.

This Article identifies what we know and do not know about the emerging global trend of charitable crowdfunding, the extent to which current laws apply to it, and what considerations should guide regulation of it. I conclude that with much still unknown but the potential harm being both modest and primarily financial, stringent regulatory requirements are not advisable because they could unnecessarily inhibit the growth of this new fundraising method and its positive effects on giving. Instead, governments should consider, at this time, imposing only two requirements on charitable crowdfunding platforms to improve information flows and to enhance self-regulation and regulator knowledge: notification of beneficiaries with an opt-out option; and, for larger campaigns, notification of regulators.

These recommended, incremental steps may be all that is needed to manage the downsides of charitable crowdfunding while not unduly limiting its growth and positive upsides. Or these steps may reveal over time that charitable crowdfunding is both becoming a more significant part of charitable giving and more prone to creating confusion, misuse, and diversions than current data indicate. If the latter

365. *GiveForward, Inc. v. Hodges*, Civil No. JFM-13-1891, 2015 WL 4716046, at *6–7 (D. Md. Aug. 6, 2015).

366. *Id.* at *7.

367. Edwards, *supra* note 364, at 1670–71.

situation arises, regulators could then consider additional legal requirements based on this new and more complete information. But until such time as information along these lines emerges, regulators should limit their interventions in this new activity so as not to unnecessarily constrain this new avenue for generosity.