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Publius, Inc.: Corporate Abuse of Privacy Protections for Electoral Speech

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Thank you. I'll hold off the emolument discussion until the end as incentive for people to hang out. I know, it's Friday at four and I know many of you are missing your March Madness games. So I'll attempt to be concise. Thank you to *Penn State Law Review* for inviting me to speak today. It's an honor to be here, and what I want to talk about today is going to be a shift of focus from what we talked about earlier and that is the tool of transparency and disclosure in combating corruption.

In light of cases like *Citizens United*,[1] in light of *McDonnell*,[2] disclosure is really one of the few tools that we have left that enjoys the endorsement of the Supreme Court. However, even though the Supreme Court has always upheld disclosure when the question has come before it, more than 800 million dollars in funds from nontransparent sources have been spent in federal elections due to lax enforcement and [regulatory] loopholes. And that so-called "dark money" is fighting any attempts to bring disclosure. One of its tools in that fight is an unlikely source, a decision from 1950s Alabama protecting the NAACP from lynch mobs. Dark money groups comparing themselves to civil rights heroes in Alabama under Jim Crow are arguing that that case, the *NAACP* case,[3] grants them the right to spend limitless amounts of money in campaigns without any disclosure. Now, others have pointed to the incongruity of

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1. Citizens United v. FEC, 558 U.S. 310 (2010).
2. McDonnell v. United States, 136 S. Ct. 2355 (2016).
3. NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449 (1958).

comparing dark money groups to the NAACP,[4] but I want to look at the actual specifics of the case and the specifics about dark money groups to show why that case does not support the dark money groups' arguments.

My talk today will be in three parts. First, I'm going to talk about dark money. What it is, how it's grown, and what it's like today. Second, I'm going to talk about the *NAACP* case and its progeny. Third, I'm going to talk about why that case does not actually support dark money organizations' arguments.

I. DARK MONEY: WHAT IS IT?

So let's talk about dark money. What is it? And for a little bit of show don't tell, let's see if this works.

[As an example, a 2010 ad by the dark money organization American Action Network targetting congressional candidate Mike Oliverio was shown.[5]]

So that is basically dark money incarnate. That was an ad that ran in 2010 in a race featuring Michael Oliviero, who wasn't a congressman at the time.[6] He was running to become a congressman, and you can see from the ad it's run by a group called the American Action Network, but that's all we know. American Action Network is a group that doesn't disclose its donors. We don't know where that money comes from. We don't know who funded that ad. Full disclosure, American Action Network is a group that [my organization, Citizens for Responsibility and Ethics in Washington ("CREW")] is suing to get disclosure about. Even today—now this is seven years later—we still don't know where the money came from for that ad. We don't know what favors it could have

4. *See, e.g.*, Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections and How 2012 Became the "Dark Money" Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 383, 397 (2013) ("The frequent citation to *NAACP v. Alabama* by campaign disclosure opponents, inferring that the Chamber of Commerce, anti-abortion, or anti-equal marriage activists face harassment and intimidation on par with what the NAACP faced in Alabama in the 1950s, is historically incorrect, and has likely done more to undermine their arguments than advance them."); Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557, 559 (2012) ("[M]uch of the anti-disclosure rhetoric of the Chamber and others as overblown and unsupported—offered disingenuously with the intention to create a fully deregulated campaign finance system, in which large amounts of secret money flow in an attempt to curry favor with politicians, but avoid public scrutiny.").

5. American Action Network, *American Action Network TVAD WV01*, YOUTUBE (July 11, 2012), https://youtu.be/F4YT4BTeIvU.

6. *See* American Action Network, FEC Form 9, 24 Hour Notice of Disbursements/Obligations for Electioneering Communications (Oct. 20, 2010), http://docquery.fec.gov/pdf/919/10931636919/10931636 919.pdf.

bought. We don't know what influence could have been used to try to gain for the money, the funders behind that ad.

So what is dark money? Dark money is money spent on elections, like the ad you just saw, without any transparency to the source of the money. Often it's through 501(c) groups—a name referring to a tax status—or LLCs because those kinds of groups prevent you from learning the source of the money. They can act as shells and pass-throughs. It's not necessarily PAC money though. Sometimes that gets confused. PACs do have to disclose who their contributors are. You do get dead-end disclosure, also called gray money, and that is where a dark money organization will pass money to a PAC, who will then run the ad. You'll learn that the PAC's contributor was a dark money organization but you won't know any more beyond that.

A. A Brief History of Dark Money

So let's talk about the history of dark money. I have here an abbreviated chart of dark money spending in the early 2000s.[7] You can see there really wasn't very much. Now there were clearly problems in our elections back then, but there really wasn't dark money, and that's because before 2006 or so there were a lot of rules in place. Certain rules said you can spend money on ads and engage in campaigning if you are a person, if you are a PAC, if you are a candidate or party, but only certain kinds of corporations could spend money on election ads. Those corporations had to be small ideological groups that took money from persons; think your rotary club, think your small [pro-life] organization, that was the [type of group involved in the case from Massachusetts that created this exemption.][8] If the ideological group takes money from individuals to further its ideological cause, those groups could spend money on political ads. But that changed in 2007 with a case called *FEC v. Wisconsin Right to Life*.[9] The case is not as well-known as some of the other campaign finance cases, but it's an important one because in that case the Court heard a challenge from an organization, a corporation, that took money from other corporations, and it wanted to take that money and spend it on ads. That [conduct] was illegal under the law at the time. In considering the challenge, the Court was mostly focused on whether

7. The full chart is available online. *See Dark Money Basics*, OPENSECRETS.ORG, https://www.opensecrets.org/dark-money/basics (last visited Apr. 30, 2017).

8. FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263 (1986) (holding bar on corporate electioneering was unconstitutional as applied to nonprofit organizations that do not take money from corporations). These organizations, called "qualified nonprofit corporations," were exempted from the bar on corporate electioneering. *See* 11 C.F.R. § 114.10(c), *repealed by* 79 Fed. Reg. 62797-02 (Nov. 20, 2014).

9. FEC v. Wis. Right to Life, 551 U.S. 449 (2007).

corporate spending was more corrupt than non-corporate spending. It didn't really engage with the question of what problems are presented when a corporation takes another corporation's money.[10] Once you open that door, however, you then can just create a daisy chain where a corporation [passes money to] another corporation, and it to another corporation, to a shell company through a 501(c), etc., and it becomes nearly impossible to find out where the money's coming from. So when that case was decided, [you can see a notable uptick in] dark money spending.[11]

And of course, in 2010 we all know what happens: *Citizens United.* We see an explosion of dark money after that when another restraint is removed.[12] Now, I'm going to close this chart out and I want to say a couple things about the last numbers there. First, 2014 was not a presidential election year, less money was spent so you see less dark money too.[13] Then, we have 2016.[14] Now, people have pointed to 2016 and say that because it was nowhere near 2012, apparently, this dark money problem isn't really a problem, that all the fears that we're going to be swamped in dark money just never really materialized. But there are a couple of things to say about that. First, it's still a lot of money. You have about 180 million dollars of undisclosed spending.[15]

The second thing to say is 2016 was a weird election year. I don't think that requires a lot of proof, and I think we all know the reason it's weird was Trump. To prove that, I want to show you another chart here, and this is a chart showing dark money spending between 2012 and 2016 comparing the two year election cycles.[16] 2012 is shown in blue, 2016 is in orange, and you can see for most of the election cycle 2016 was

10. Justice Souter, in a dissent joined by Justice Stevens, Justice Ginsburg, and Justice Breyer, noted a problem with allowing a group like Wisconsin Right to Life to "act[] as conduits from the campaign war chests of business corporations." *Id.* at 533 (Souter, J., dissenting). Nonetheless, he conceived of only a single layer of obfuscation: the group would funnel money directly from a for-profit company's war chest and use it to run ads. What they did not foresee is the current network of dark money groups, funneling money back and forth in ever greater webs to avoid disclosure obligations.

11. *See Dark Money Basics, supra* note 7 (noting $102.43 million in dark money spending in the 2008 election cycle, vs. $5.17 million in the 2006 election cycle).

12. *See id.* (noting $308.69 million in dark money spending in the 2012 election cycle).

13. *See id.* (noting $177.72 million in dark money spending in the 2014 election cycle).

14. *See id.* (noting $183.83 million in dark money spending in the 2016 election cycle).

15. *Id.*

16. The chart is available online. *See* Soo Rin Kim, *Super Pac Spending Hits $500 Million, while 501(c)s hit the brakes*, OPENSECRETS.ORG (Sept. 1, 2016), https://www.opensecrets.org/news/2016/09/super-pac-spending-reaches-500m/. The chart shows only 501(c) political spending, not all dark money spending.

outpacing 2012 by quite a bit: about three times as much. As you can see it sort of narrows and closes and right at the end of the chart there the blue line overtakes the orange line. That's around August, still a little bit before the election. Between August and the election, the blue line kept going up and the orange line not so much. So, 2012 outpaced 2016 in the end. Why did that happen? You can see from the chart a bulge that narrows. Well in that time period, [between February and June, a number of events happen. First, Jeb Bush drops out in February.] Then, there is Super Tuesday on March 1, where a lot of delegates are assigned and you know who could win. Then, Marco Rubio drops out. Then, finally, Ted Cruz dropped out in May, and at that point Trump was the nominee for the Republican Party. The dark money groups did not like Trump and didn't spend a lot of money in his favor. So the dark money spent on the presidential election trails off.

Another way to show that this was an issue unique to the presidential race is to break down the numbers between the presidential race and other races. You can see the drop off is due to the presidential race.[17] Between 2012 and 2016, 2016 spending represents about a third of the amount spent in 2012 in the presidential race. It's a significant drop. But if you look at other races, for example, if you look at an average competitive Senate race—this is using numbers from races the *New York Times* identified as competitive—you can see there's actually about a 20 percent increase in dark money spending in Senate races.[18] If that had held true for the

17. Based on numbers reported by the Center for Responsive Politics, themselves based on public reports by the Federal Election Commission, the amount of 501(c) organizations on the Presidential election dropped from $140.2 million in the 2012 election cycle to $43.09 million in the 2016 election cycle. *Compare* Center for Responsive Politics, *2016 Outside Spending, by Race*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/summ.php?disp=R, *with* Center for Responsive Politics, *2012 Outside Spending, by Race*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=R&pty=A&type=A.

18. Based on the numbers reported by the Center for Responsive Politics, themselves based on public reports by the Federal Election Commission, the average amount of 501(c) organization spending in the 2016 election cycle on competitive Senate races was $7.38 million. Center for Responsive Politics, *2016 Outside Spending, by Race*, *supra* note 17. In the 2012 election cycle, the average for a competitive Senate race was $5.75 million. Center for Responsive Politics, *2012 Outside Spending, by Race*, *supra* note 17. For competitive races, I relied on reporting by *The New York Times* about which states were considered toss-ups. For 2016, those were Pennsylvania, Florida, Nevada, North Carolina, Indiana, New Hampshire, Wisconsin, and Missouri. *See* Josh Katz, *2016 Election Forecast*, N.Y. TIMES, Nov. 8, 2016, https://www.nytimes.com/interactive/2016/upshot/senate-election-forecast.html (listing Senate races as "competitive"). For 2012, those were Virginia, Wisconsin, Ohio, Nevada, Montana, Indiana, Florida, New Mexico, North Dakota, Arizona, Maine, Massachusetts, Nebraska, Missouri, Connecticut, Pennsylvania, Hawaii, and Michigan. *Battle for the Senate*, N.Y. TIMES (2012), https://www.nytimes.com/elections/2012/ratings/senate.html. If one rather looks only at those races in which more than $1 million was spent to identify competitive races, there

presidential race and all other races, you'd actually have about 400 million dollars in dark money spent in 2016.

B. Dissecting Dark Money

So what are these dark money groups we talk about? Is it a rotary club? Is it a civic association of like-minded citizens? Often not. This is a schematic of one dark money group, a dark money network. This is Freedom Partners, the Koch brothers' network.[19] As you can see, it's not as if there's one organization with a view that everybody gets behind and that rallies citizens behind its message. Rather, they become these complex business networks. You can see money starts from the Freedom Partners— from the Koch brothers—and then gets passed through LLCs and other 501(c) groups, passed around before it finally ends up in the group that spends money on the ad. There are tax reasons this happens. There are reasons this happens to avoid disclosure. But when we talk about dark money spending, don't think about your civic association with citizens getting together and spending money. Think about the networks of groups, networks of corporations being used as shells to funnel money around.

The group you see at the end—remember we saw an ad by the American Action Network—it's really just a brand. Here's an email from the John Doe proceedings—the John Doe investigation is in Wisconsin—and you can see there are two political operatives talking and one talks about how the current ad, [this "Currently Bad Call"] ad, was running under the "AFC brand."[20] That's the American Federation of Children—I think. They say they're going to have to change the brand on it. That's the group you see at the end, just like a corporation uses a brand name on a product. They'll pick a group because it carries a certain ethos. It could be a group working on behalf of children. It could be an elderly group for retirees. It could be a group of vets. But, really, that's often not what the group is at all. That's just a brand name they can put on the ad, so what you see you associate with the group and judge it accordingly.

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was a small drop in 501(c) spending between 2016 and 2012: dropping from $6.4 million per race in 2012 to $6.26 million in 2016. *See* Center for Responsive Politics, *2016 Outside Spending, by Race*, *supra* note 17; Center for Responsive Politics, *2012 Outside Spending, by Race*, *supra* note 17.

19. *See The Koch Network: A Cartological Guide*, OPENSECRETS.ORG (Jan. 7, 2014), https://www.opensecrets.org/news/2014/01/koch-network-a-cartological-guide/.

20. *See* Ed Pilkington and the Guardian US Interactive Team, *Because Scott Walker Asked*, GUARDIAN (Sept. 14, 2016), https://www.theguardian.com/us-news/ng-interactive/2016/sep/14/john-doe-files-scott-walker-corporate-cash-american-politics; *Ad Coordination* 54, DOCUMENT CLOUD (Oct. 23, 20120), https://www.documentcloud.org/documents/3105981-Ad-Coordination.html.

C. *Case Study: CHGO*

So let's go through some case studies here. First, is CHGO. This is a group again that CREW, my organization, is suing over to get access to its donors. This group started in 2010. It told the IRS that it was a public welfare organization—that's a 501(c) group—and really a think tank.[21] It said it was going to give you research about sustaining economic growth. What it really did, however, was run political ads. Here are a couple stills on the left side there of the ads they ran.[22] The FEC investigation that was launched after CREW filed a complaint found that the group spent $4 million of its $4.7 million budget on political ads.[23] That's about 90 percent of its money going to political ads.

What is also interesting about this group is that it didn't really exist. If you look at the website of the group, its claimed address is 1900 M Street, but there isn't any CHGO office there.[24] The office at 1900 M Street is the office of its lawyer. That's a law firm. There's no one from CHGO working at this location, there are just lawyers there. CHGO also told the IRS that its president was a guy by the name of Steven Powell, but according to the FEC investigation, Mr. Powell actually worked in creative.[25] He created ads. He had no leadership or managerial role in the organization at all. He actually worked for the vendor that [CHGO] was apparently paying to create the ads. We'll talk about that vendor more later. The real leader of [CHGO] was a guy named Scott Reed who appeared nowhere on CHGO's paperwork. And this is a [particularly salient] example: when the FEC tried to serve a subpoena on the vendor who [CHGO] was claiming to pay to create these ads, they went to its supposed office space, a business address, and a service agent of the FEC attempted service but there was nothing there. They go in and there's one guy in the office and he has never heard of this organization before. They don't have offices there. The agent talks to the building manager and she confirms that this organization has never had offices in this space but a guy by the name of Scott Reed had an office there. He used to collect mail for the vendor.

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21. Stuart McPhail, *New Disclosed Internal Documents Reveal Group's Lies to IRS, FEC*, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASH. (Apr. 20, 2016), http://www.citizensforethics.org/newly-disclosed-internal-documents-reveal-groups-lies-irs-fec/.

22. In particular, CHGO's "Song and Dance" ad supporting the election of Mike Mulvaney to Congress.

23. Federal Election Commission Office of General Counsel, Third General Counsel's Report (MURs 6391 and 6471) 18 (Sept. 24, 2015), http://eqs.fec.gov/eqsdocsMUR/15044381195.pdf.

24. *See* CHGO Motion to Dismiss (MUR 6391) Ex. C (Nov. 30, 2010), http://eqs.fec.gov/eqsdocsMUR/15044380054.pdf.

25. *See supra* note 23, at 3.

So you can see this organization, while it's the name that you would see on an ad to make you think it's a think tank with employees, a history, and a view, it's just a piece of paper they can slap on the ad at the end to give you an false impression of what's behind the ad.

D. Case Study: CPPR

I'll give you another case study. CPPR, the Center to Protect Patient Rights, let me get that right. This is another group that revealed some information after a CREW complaint. On the screen is a chart from OpenSecrets showing CPPR is a big player in dark money.[26] Over here on the left side we have all [anonymous] spending in 2010, and you can see that thick gray band is the amount of money flowing into CPPR, but also notice the money doesn't just flow out into ads, into [the end] there. It flows through a number of other [intermediary] groups.

So, to give you an example of that, in 2010 again, viewers would have seen a number of ads on TV, and here's three.[27] One of the ads is from a group called 60 Plus Association, one from American Future Fund, and one for Americans for Job Security. Viewers at the time would have thought these ads were expressions of these three groups. One perhaps is a group of retirees who have a certain view on a couple particular candidates. American Job Security, perhaps that's a group of American workers who have a view they're trying to express and that's all anyone would have ever known at the time. If not for the fact that one guy couldn't keep his mouth shut.

Sean Noble of CPPR liked to brag. He went on the news and he bragged to reporters that he was actually the mastermind behind those ads.[28] He was the brain trust behind them and he figured out what ads to create and where to run them and his group's money was the one funding the ads, not the group names that appeared on the ads you saw. So, this

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26. *The Growing Dark Money Churn*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/nonprof_growth_about.php (last visited May 23, 2017) (focusing on the third chart labeled "January 2010").

27. Specifically, stills from ads run under the names "60 Plus Association." *See* 60 Plus Association, FEC Form 5, Report of Independent Expenditures Made and Contributions Received (filed November 10, 2016), http://docquery.fec.gov/pdf/805/201611109037139805/201611109037139805.pdf; "American Future Fund"; American Future Fund, FEC Form 5, Report of Independent Expenditures Made and Contributions Received (filed Sept. 29, 2016), http://docquery.fec.gov/pdf/191/201607299021961191/201607299021961191.pdf; "Americans for Job Security"; Americans for Job Security, Schedule 5-A, http://docquery.fec.gov/ cgi-bin/forms/C30001135/1149249/f92.

28. *Koch Brothers Groups Hit With Massive Fines from CREW Complaint*, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASH. (July 13, 2016), https://www.citizensforethics.org/press-release/koch-brothers-groups-hit-massive-fines-crew-complaint/ (noting Sean Nobel's comments to National Review).

led to a CREW complaint and an FEC investigation, and the FEC was able to confirm that, yes indeed, the money that was being spent on these ads, the money these three groups spent on the ads actually came from Noble and CPPR.[29] But also, not only did that money come from CPPR without being disclosed, it actually went back to Noble and CPPR because it went back to him so he could decide what ads to create and where to air them.[30] They were actually his ads and CPPR's ads. AJS, AFF, they had nothing to do with them. They were just pass-throughs, used so Nobel and CPPR could slap a name, a "brand," on the ads you saw. This results in a world where what's reported and what you see is actually little of the full operation going on. [Even with this hard-won disclosure, we] still today don't know who CPPR's donors were.

E. Recap

Dark money today: A bit of recap, there's millions of dollars of it and it's likely to keep growing even if there's no change in law. 2016 was a weird year, but dark money is likely to keep going up. It hides behind brand names. The names you see on TV are just brands to associate with the argument that the real author wants to make. It often consists of webs of funding; it's not a single group collecting money to spend on ads. That group is part of a web [through which] money is channeled and flows and [that group often has no brick and mortar]; there's no actual organization there. It's just a brand name to put on the ad. But you can be sure the candidates know full well where that money is coming from. Candidates are being helped by it, and contributors make sure they know where that money's coming from so they know who to return the favor to.

Dark money tomorrow: Dark money groups are pushing back against attempts to regulate them on the state level and against any regulations we can get from the federal government—which is these days very little, but they are pushing back on that. One of the tools they have to push back with has an unlikely source: *NAACP vs. Alabama.* There are a couple examples here [on the slide]: there's a case from California where the court cited *NAACP* to grant a group anonymity and allow it to avoid disclosure to the Attorney General of California,[31] and an article where the

29. *See* Federal Election Commission Office of General Counsel, Second General Counsel's Report (MUR 6816) (Feb. 12, 2016), http://eqs.fec.gov/eqsdocsMUR/16044397329.pdf.

30. *See supra* note 28.

31. Ams. for Prosperity Found. v. Harris, 182 F. Supp. 3d 1049, 1056 (C.D. Cal. 2016) (relying on *NAACP* to decide in favor of dark money organization).

Chamber of Commerce was citing *NAACP* to avoid disclosure of its corporate members.[32] So let's talk about that case.

II. *NAACP V. ALABAMA* AND ITS PROGENY

The case started in 1956 in Alabama, which was a contentious year for civil rights. It's the year Autherine Lucy was admitted to the University of Alabama, the first black student there, admitted with the help of the NAACP, which resulted in riots and eventually in her expulsion because of the riots that ensued.[33] It's also the year of the bus boycotts, the Montgomery bus boycotts, which of course started with Rosa Parks being arrested in December the year before.[34] The bus boycotts led to shootings and bombings. People were killed.

And it was the year Alabama came up with a plan to kick the NAACP out of its state. The scheme involved accusing the NAACP of violating a ministerial statute—actually a lot of states will have this—that required foreign corporations to register with the state, file its charter, and declare a service agent.[35] The state alleged that NAACP had not done that, but the real kicker was they also wanted to use this case for discovery.[36] In discovery they sought the names and addresses of all Alabama members and agents of the association.[37] Of course this is at a time where the government of Alabama is complicit in murders, lynching, and oppression of anyone involved in the civil rights [struggle] in Alabama.[38] Everyone knew what the State was planning to do with that information. The NAACP refused to comply and, unfortunately, the state courts found the NAACP in contempt for refusing to give that information.[39] So it went to the Supreme Court.

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32. *Chamber of Commerce: The White House Wants Our Donor Lists So Its Allies Can Intimidate Our Donors*, ABCNEWS.COM (Oct. 13, 2010), http://blogs.abcnews.com/politicalpunch/2010/10/chamber-of-commerce-the-white-house-wants-our-donor-lists-so-its-allies-can-intimidate-our-donors.html (quoting Chamber's spokesperson citing "*NAACP v. state of Alabama*" to support argument that Chamber did not need to disclose its donors).

33. Dale E. Ho, *NAACP v. Alabama and False Symmetry in the Disclosure Debate*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 409 (2012).

34. *Id.* at 410.

35. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 451 (1958).

36. *Id.* at 453.

37. *Id.*

38. *See* Ho, *supra* note 33, at 410 ("At the time, local government officials in the South often tacitly approved of or even worked in conjunction with the White Citizens' Council or with the Ku Klux Klan to persecute civil rights activists."); *see also Lynching in America: Confronting the Legacy of Racial Terror* 16, 22, EQUAL JUSTICE INITIATIVE (2d ed. 2015), https://eji.org/sites/default/files/lynching-in-america-second-edition-summary.pdf (noting prevalence of lynching in Alabama & states' complicity in lynching).

39. *NAACP*, 357 U.S. at 453–54.

The Supreme Court found for the NAACP.[40] They first ruled that disclosure of the group's members violated the group's First Amendment rights.[41] It recognized that disclosing them could chill speech and chill association. It then found out that chill justified a heightened review; though it didn't specify exactly what the review was, it justified some sort of heightened review.[42] Conducting that review, it found, first, that Alabama could not actually justify the disclosure.[43] Remember the claim being litigated was that the NAACP was a foreign corporation doing business in the State. Membership lists had nothing to do with that claim. Secondly, it found that the NAACP and its members faced real harm if their identities were disclosed.[44] What kind of harm? Well this is from the brief the NAACP submitted and you can see they cite shootings, bombings, real violence that would actually very likely happen to these individuals if their identities were made known.[45] So there the Court granted the NAACP anonymity in a subpoena case.

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40. *Id.* at 466.

41. *Id.* at 459–60.

42. *See id.* at 464 (examining the State's justification of the order).

43. *Id.* ("[W]e are unable to perceive that the disclosure of the names of petitioner's rank-and-file members has a substantial bearing on either of [the purported justifications].").

44. *Id.* at 462–63 ("Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.").

45. Brief for Petitioner at 16 n.12, NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 451 (1958) (No. 91) ("Year-long series of bombings and shootings of Negro leaders in bus segregation issue. Southern School News, Feb., 1957, Vol. III, No. 8, p. 15. In Montgomery, 19 major acts of violence—9 bombings and 10 shootings—were directed against buses, or the homes of Negro leaders. Southern School News, March, 1957, Vol. III, No. 9, p. 12. In Montgomery, Dec., 1956, one Negro woman was hit in both legs by bullet during firing on buses. Southern School News, Jan., 1957, Vol. III, No. 7, p. 14. In Birmingham, the home of Rev. F. L. Shuttlesworth, a Negro leader of the bus boycott, was bombed. Southern School News, Jan., 1957, Vol. III, No. 7, p. 14. In Montgomery, four Negro churches were bombed. Also the homes of two ministers, both leaders in bus boycott, one leader white and one Negro. A Negro cab stand was blasted. An attempt was made to bomb home of Rev. M. L. King. Southern School News, Feb., 1957, Vol. III, No. 8, p. 15. Ku Klux Klan activity, demonstrations, and cross burnings, were reported in Opelika, Montgomery, Mobile, Birmingham, Prattville and other Alabama communities. Southern School News, Jan. 1957, Vol. III, No. 7, p. 15; Feb., 1957, Vol. III, No. 8, p. 15; March, 1957, Vol. III, No. 9, p. 13; June, 1957, Vol. III, No. 12, p. 13; Dec., 1956, Vol. III, No. 6, p. 13. In Birmingham, Rev. F. L. Shuttlesworth was physically attacked when he attempted to enroll Negro students in an all-white school. N. Y. Times, Sept., 10, 1957, p. 1, col. 3. In Birmingham, two false bombing reports at Phillips High School and student demonstrations at Woodland High School followed reports that Negro students would attempt to enroll at these schools. N. Y. Times, Sept. 11, 1957, p. 23, col. 3.").

This case first became used [in campaign] finance in a case called *Buckley v. Valeo*[46] in the 1970's.[47] *Buckley v. Valeo* is a major case in campaign finance. It has a lot of important holdings for campaign finance law. I'm not going to go through them all here, but I just want to focus on the case's treatment of *NAACP* and what it used *NAACP* to decide. And first, pointing to *NAACP*, the case said campaign disclosures—federal law requires disclosures of donors to groups—that also chilled speech and association, just like the disclosure of membership in the NAACP could.[48] The Court said therefore disclosure was subject to ["exacting"] scrutiny, this time giving a name.[49] Later courts have specified that that requires a substantial relation to a sufficiently important government interest.[50] Something less than strict scrutiny, but more than rational basis. And then the Court in *Buckley* found that campaign finance disclosure survived that scrutiny.[51] Unlike the identities sought by the state of Alabama, the information sought by campaign finance disclosure serves important government interests. It helps us combat corruption and the appearance of corruption.[52] It provides voters with useful information to judge candidates. You know, who was financially backing them, who their supporters are.[53] It also assists with enforcement of other campaign finance rules.[54] And then the Court turned to an argument from the plaintiffs citing *NAACP* saying that, well regardless of whether these laws are generally okay, they shouldn't be applied to small groups because who cares about small groups, no one needs to know, and the Court said that argument wouldn't fly.[55] It said small groups, disclosures from small groups, also serve those important interests just like disclosure from large groups.

It did say, however, that in certain situations a group could bring an as-applied challenge.[56] [The Court said a party may warrant an exception from disclosure if it could show a] "reasonable probability" that identity and disclosure would cause their members and donors harm.[57] The Court said groups could do that by showing specific evidence of past or present harassment, patterns or threats of specific manifestations of public

46. Buckley v. Valeo, 424 U.S. 1, 1 (1976).
47. *Id.* at 1.
48. *Id.* at 64–66.
49. *Id.* at 64.
50. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 366–67 (2010).
51. *Buckley*, 424 U.S. at 68.
52. *Id.* at 67.
53. *Id.* at 66–67.
54. *Id.* at 68.
55. *Id.* at 72–74.
56. *Id.* at 69, 71–72.
57. *Id.* at 74.

hostility, and a new group that had no history could point to other groups, similar groups facing this problem.[58]

The first time that as-applied challenge works in the Supreme Court is a case involving Socialist Workers.[59] There the Court granted them the right to anonymity and pointed to a number of harms this group identified—and you can see here a list—it involves threats, destruction of property, police harassment, firing shots at an office, FBI surveillance program, and intimidation, and there the Court said that's enough.[60] In that situation you can't force Socialist Workers to disclose their members and distributors. Side note, that's actually up for review right now from the FEC and its likely this is going to be removed soon. They're debating some advisory opinions on it.[61]

So we know what's enough, but what's not enough? A couple of cases are helpful. This one from the D.C. Circuit involved the National Association of Manufacturers, a lobbying group.[62] Lobbying laws require a similar kind of disclosure as campaign finance laws.[63] There, the D.C. Circuit said the lobbying group did not show a sufficient amount of harm to warrant exemption from disclosure.[64] That is because the harm the group pointed to was, first, hypothetical boycotts and harassment.[65] They couldn't actually identify if harassment had happened. They only feared

58. *Id.*

59. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 87 (1982).

60. *Id.* at 99 ("These incidents, many of which occurred in Ohio and neighboring States, included threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office. There was also evidence that in the 12-month period before trial 22 SWP members, including four in Ohio, were fired because of their party membership. Although appellants contend that two of the Ohio firings were not politically motivated, the evidence amply supports the District Court's conclusion that 'private hostility and harassment toward SWP members make it difficult for them to maintain employment.' The District Court also found a past history of Government harassment of the SWP. FBI surveillance of the SWP was 'massive' and continued until at least 1976. The FBI also conducted a counterintelligence program against the SWP and the Young Socialist Alliance (YSA), the SWP's youth organization. One of the aims of the 'SWP Disruption Program' was the dissemination of information designed to impair the ability of the SWP and YSA to function. This program included 'disclosing to the press the criminal records of SWP candidates, and sending anonymous letters to SWP members, supporters, spouses, and employers.'").

61. *See, e.g.*, Kenneth Doyle, *Socialist Workers Exemption from FEC Rules Debated*, BLOOMBERG BNA (Mar. 8, 2017), https://www.bna.com/socialist-workers-exemption-n57982084924/.

62. *See* Nat'l Ass'n of Mfrs. v. Taylor, 582 F.3d 1, 8 (D.C. Cir. 2009).

63. *See id.* at 7 (noting legal requirement to disclose "the name, address, and principal place of business of any organization, other than the client, that . . . contributes more than $10,000 toward the lobbying activities of the registrant in a semiannual period" to the lobbyist); *id.* at 9 (discussing *Buckley* and campaign finance disclosures).

64. *Id.* at 21–22.

65. *Id.* at 22 (noting taking public stands "may" lead to boycotts).

it might happen and the court said that's not enough. Second, the harm they did identify was not associated with any kind of linking to NAM.[66] If a corporation took a contentious public stance, then it might face harassment, but it couldn't show anything about disclosure of association with NAM would cause that kind of harassment. And frankly, the court said look, the harm they're claiming here, the possible fear of harassment, any group could claim that and if any group could claim that as a harm then the exception will swallow the rule, every group could get out of disclosure.[67]

Another insufficient case, this is the Prop 8 case in California, which you may be familiar with, about gay marriage in California.[68] There, California law requires disclosure about ballot supporters, again like federal campaign finance law.[69] And the groups there claimed a number of harms—this is a long list of harms they claimed—but the court found them all insufficient.[70] First, a lot of the harms groups claimed were that people were criticizing them.[71] That they faced protest, people would send them letters disagreeing with their views. And the court said that's not a harm, that's people exercising their First Amendment rights.[72] You can't claim, because someone else will rebut you and argue against you, that you have suffered a harm to get out of disclosure.

Other harms again were not connected to the disclosure itself. No one could show that being associated with this proposition is actually what caused the harm being identified.[73] Moreover, while there was actual evidence of some violence, which is also obviously regrettable, it was sporadic and there again unconnected with disclosure and so there was no clear indication that disclosure would cause more of this harm.[74] And

66. *Id.*

67. *Id.* ("If that kind of risk rendered amended § 1603(b)(3) unconstitutional, it would invalidate most compelled lobbying disclosures in contravention of *Harriss*, and most compelled campaign finance disclosures in contravention of *Buckley*.").

68. *See* ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1199 (E.D. Cal. 2009).

69. *Id.* at 1199–1200.

70. *Id.* at 1200–04.

71. *Id.* (alleging "[a]pproximately 30–40 people have frequented [one contributor's] business to express their displeasure with his support of the ballot initiative," that "protesters conducted a demonstration at the entrance to [another contributor's] community and attempted to hand flyers to guests as they passed through the gate to the neighborhood," a contributor received "an email suggesting that his company's image would be damaged as a result of his support of Proposition 8," and another received "a postcard insulting him for supporting the ballot measure").

72. *Id.* at 1219 ("The fact that Plaintiffs' opponents may use publicly available information as the basis for exercising their own First Amendment rights does not in any way diminish the State's interest.").

73. *Id.* at 1216–17.

74. *Id.* ("Only random acts of violence directed at a very small segment of the supporters of the initiative are alleged.")

importantly the court recognized there's no evidence here, unlike say in *NAACP* and *Socialist Workers*, of government involvement.[75] The government wasn't complicit in the harm and the government was capable of preventing the harm when it did arise. So, the court said that wasn't enough.

So again, just to recap this case law then. First, it's saying that if the law chills, if disclosure chills, then you apply [exacting] scrutiny, i.e., ask whether there is a substantial relation to a sufficiently important government interest.[76] And then even if [a law] survives that scrutiny it can be subject to an as-applied challenge, but the harm has to be real, not hypothetical. It has to be substantial, and not merely sporadic. Others exercising their own First Amendment rights is not a harm and, while it's unclear that government involvement is required, it's definitely helpful in proving an as-applied case.

III. DARK MONEY'S MISAPPLICATION OF *NAACP*

So does this case protect dark money groups' right to anonymity? They argue it does, but let's walk through *NAACP*'s test. First, we know campaign finance law, [campaign finance] disclosure does chill, *Buckley* told us that. But we also know that chill is justified. Again, *Buckley* and other cases like *Citizens United* actually told us that. So, what it comes down to is whether there is a unique harm; is there some kind of harm that the groups face to justify as-applied challenges? Well, let's walk through the various harms they claim and see how they match up.

A. Violence

One claimed harm is violence. Now clearly the Court in *NAACP* was motivated by a concern about violence and worried about violence. And there's the case from California where the court actually cited threats of violence against the Koch brothers and Art Pope, another big funder, to justify granting anonymity to this organization.[77] But as I showed before, with dark money groups, often their donors aren't natural persons. The money goes through a number of layers. And the court uncritically just assumed that if anywhere along the line some natural person could face

75. *Id.* at 1217 ("Moreover, while Plaintiffs are quite correct that under *Buckley* evidence of harassment 'from *either* Government officials or private parties' could suffice to establish the requisite proof of reprisals, the facts of subsequent cases evidence not only the existence of some governmental hostility, but quite pervasive governmental hostility at that . . . . Proposition 8 supporters promoted a concept entirely devoid of governmental hostility." (emphasis in original)).

76. Citizens United v. FEC, 558 U.S. 310, 366–67 (2010).

77. *See* Ams. for Prosperity Found. v. Harris, 182 F. Supp. 3d 1049, 1056 (C.D. Cal. 2016).

violence, that that would justify anonymity for all donors. Corporations can't suffer violence, however, and violence against natural persons shouldn't be able to justify anonymity for a corporate body.[78]

B. Property Damage

Another claimed harm is property damage. In *Socialist Workers*, the Court cited property damage to justify an exemption from disclosure,[79] and a corporation of course can have property. But a lot of times these dark money groups, again, they have no property. They don't exist. They're paper companies. There's no property to damage if you wanted to.[80] Accordingly, even if there were a reasonable probability of property damage to some donor, that would not justify refusing to disclose donors that have no such property to damage.

C. Chill on Association

Another harm dark money groups will claim is chill on their members' right of association: "if you force us to disclose, then we can't fundraise as well." Again, the *AFP* case cited to someone reconsidering his support as a harm.[81] But again, go back and remember the chill on association is what justifies exacting scrutiny in the first place.[82] By finding a law survives exacting scrutiny, what you're saying is that law is justified notwithstanding the fact that it chills association. By claiming chill as an applied harm you're boot-strapping. You're double counting

78. In addition, others have pointed out that the actual risk of violence from disclosure is exceedingly low. *See* Hasen, *supra* note 4, at 559 ("Even in the Internet age, in which the costs of obtaining campaign finance data about small-scale contributions by individual donors often have fallen to near zero, there is virtually no record of harassment of donors outside the context of the most hot-button social issue, gay marriage, and even there, much of the evidence is weak."). Even in *Americans for Prosperity*, the court did not distinguish between threats stemming from disclosure versus threats that exist merely as a fact of an individual being a well-known public figure who has publicly advocated contentions policy positions, or threats stemming from an individual's physical presence at a protest or event likely to draw counter-protestors. *See Ams. for Prosperity Found.*, 182 F. Supp. 3d at 1056.

79. *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 99 (1982) (noting that incidents included "the burning of SWP literature [and] the destruction of SWP members' property").

80. *See supra* notes 24–25 and accompanying text.

81. *See Ams. for Prosperity Found.*, 182 F. Supp. 3d at 1056 ("Mr. Pope testified that he considered stopping funding or providing support to AFP.").

82. *See* Buckley v. Valeo, 424 U.S. 1, 64 (1976) ("But we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment .... We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since NAACP v. Alabama we have required that the subordinating interests of the State must survive exacting scrutiny.").

that same harm. And again, it's also overly broad and every group could claim it. Every group could say that someone out there that we fundraise from is a little bit harder to solicit if disclosure is the law. You would have the exception swallow the rule, chill is not sufficient.[83]

D. Boycotts

Another harm groups could claim is the possibility of a boycott. This again was cited in the *AFP* case: Art Pope worried about boycotts.[84] Boycotts, as the courts told us, are protected by the First Amendment, however.[85] They're First Amendment protected activity. It's just like speech, and just like the Prop 8 case told us, when other people speak that's not a harm you can claim to get out of disclosure.[86]

E. Exposure to Criticism

This takes us to another harm dark money groups claim to support their evasion of disclosure: that their donors will be exposed to criticism. If people knew who they supported, if people knew what groups they were behind, they might be criticized. You can see here from the *AFP* case again they're saying they had protesters who shouted things at them and from the Prop 8 case on the right that people sent emails condemning support and 30 to 40 people showed up and expressed displeasure.[87] But that again is the exercise of other people's First Amendment rights. It's not a harm.

A short aside: not only is exposure to criticism not a harm, but this is how the First Amendment is meant to work. The First Amendment protects us from the chill of *government* regulation. It doesn't protect us from the chill of the judgment of our peers. We want people to worry about what other people think about them when they say things. You

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83. *See* Nat'l Ass'n of Mfrs. v. Taylor, 582 F.3d 1, 22 (D.C. Cir. 2009).

84. *See Ams. for Prosperity Found.*, 182 F. Supp. 3d at 1056 ("Mr. Pope . . . has even encountered boycotts of his nationwide stores . . . .").

85. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982).

86. *See* ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1219 (E.D. Cal. 2009); *see also* Thomas Lee, *Democratizing the Economic Sphere: A Case for the Political Boycott*, 115 W. VA. L. REV. 531 (2012) (arguing that boycotts cannot count among *NAACP*'s harms); Elian Dashev, Note, *Economic Boycotts as Harassment: The Threat to First Amendment Protected Speech in the Aftermath of Doe v. Reed*, 45 LOY. L.A. L. REV. 207 (2011) (arguing that boycotts are protected by the First Amendment).

87. *See Ams. for Prosperity Found.*, 182 F. Supp. 3d at 1056 ("Once they finally exited the building, they still had to go through a hostile crowd that was shouting, yelling and pushing."); *ProtectMarriage.com*, 599 F. Supp. 2d at 1201 (noting plaintiffs alleged a donor "received numerous letters and hundreds of emails condemning his support of the Proposition" and "[a]pproximately 30-40 people have frequented his business to express displeasure with his support of the ballot initiative").

should worry about whether you'd be called an idiot. You should worry about whether people will think you're immoral. Those concerns are what cause us to be cautious and ensure that what we're saying has some strong arguments behind it and good proof; that what we're saying is really well thought out and that we can defend it. We want people to be able to criticize and rebuke. And we've all seen from anonymous chatboards what can happen when people are protected from the social stigma of their arguments.

F. Loss of Persuasion

Another harm dark money groups will claim is lost persuasion. That if you knew who was behind the ad you might not be persuaded by it.[88] And that's probably true for a lot of groups. If a group runs an ad saying, you know, "Candidate *X* is really good for the environment," and that ad is actually funded by a petroleum company, you might second guess the ad. Indeed, there is First Amendment case law holding that you do have a right to control your message. The government can't force you to include opposing viewpoints.[89] It can't force you to concede facts that go against your argument. You have the right to control your message.

Dark money groups, however, are confusing control of the *message* with control of the *audience*. Remember how disclosure works. Disclosure works by the government disclosing to you some facts that you

88. *See, e.g.*, Benjamin Barr & Stephen R. Klein, *Publius Was Not a PAC: Reconciling Anonymous Political Speech, the First Amendment, and Campaign Finance Disclosure*, 14 WYO. L. REV. 253, 254 (2014) ("Even if [disclosure] were not burdensome in itself, disclosure would reveal the identities of Alexander Hamilton, James Madison and John Jay as the organization, and risk diminishing Publius's effectiveness."). Barr and Klein rely heavily on *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), to ground their supposed right to spend money on elections anonymously. *See* Barr & Klein, *supra*, at 275. In that case, the Court struck a provision prohibiting the distribution of any anonymous campaign literature. *See McIntyre*, 514 U.S. at 336. The Court found that the law was not related to any legitimate government interest. *See id.* at 348–49 (noting the interest in preventing false statements close to the election was covered by a separate Ohio statute). Indeed the Court stressed the "modest resources" the speaker employed—resources that would fall well below federal campaign law disclosure triggers—highlighting that the law was not targeted at any reasonable risk of corruption or its appearance. *See id.* at 350 (noting law applied to activity that did not create a risk of the "potential appearance of corrupt advantage"); *see also* 52 U.S.C. § 30104 (2012). The Court also stressed that its decision could not apply to corporations. *See McIntyre*, 514 U.S. at 353–56. The statute at issue in *McIntyre* thus failed the first step required by *NAACP*: it failed to show the disclosure was substantially related to an important government interest. The case thus says nothing about whether a group can seek exemption from a law serving such interests simply because of the harm that would result from the speaker being subject to criticism, or that their message would be less persuasive if the audience were aware of who the speaker was.

89. *See, e.g.*, Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n, 475 U.S. 1 (1986); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

can then use to judge a campaign message. It does not impact what the speaker says. It simply requires disclosure so that others may then communicate that fact, generating their own speech, so the audience may weigh those facts however they decide in evaluating the discloser's speech. It is no different than the government issuing a report providing facts which counter propositions put forth by a private speaker. The speaker may prefer those facts not be made public, but the disclosure of those facts does not impact the speaker's right to speak.

While the speaker has a right to control their message, that is not a right to prevent the audience learning facts the audience will use to discount their message. If the speaker in fact had a right to bar the audience from learning unhelpful facts, absurd results would follow. You could imagine a politician saying, "I have a law and order message, but I don't want people finding out that I have a criminal conviction, so I'm going to bar anyone from finding that out. I want that concealed and no one to find out about that." I don't think anyone says that the politician would have a First Amendment right to censor what you could learn; that their speaking rights can prevent you from learning those facts just because those facts will cause you to discredit their argument. But that is the argument dark money groups effectively make by asserting a harm from loss of persuasion: that your learning certain facts about them will make you likely to not agree with their message, and that therefore they have a right to prevent you from learning those facts. That is not a concept of free speech contemplated by *NAACP* or any other case law.

G. NAACP*: A Heckler's Veto for Listeners*

And I'll end on a final point here. We've gone through a number of harms and you have seen how they don't actually support claimed anonymity for these organizations. But I would like to make a larger point: and that is that the way to think about the *NAACP* case is that it works as the listener's heckler's veto.

A heckler's veto in First Amendment law is the idea that the government can stop you from speaking because it fears that a heckler listening to your view will cause violence.[90] Courts are very skeptical of this argument when it comes up because what it basically means is it gives the government the right to stop you from speaking when it really wants to just because what you're saying is contentious and people might not like

90. *See* Brett G. Johnson, *The Heckler's Veto: Using First Amendment Theory and Jurisprudence to Understand Current Audience Reactions Against Controversial Speech*, 21 COMM. L. & POL'Y 175, 180 (2016) ("A heckler's veto is the suppression of speech by the government[] because of the possibility of a violent reaction by hecklers." (internal quotation marks omitted)).

it. Of course you don't want that. Speech is meant to be contentious. Your right to speak shouldn't depend on what some other person does. If that person engages in violence, then the correct response is to arrest that person, not to prevent you from speaking.

There was a case actually in the 6th Circuit recently, testing this theory where a group of Christian protesters went to a Muslim event.[91] This was a small group of Christian protesters and a large group of Muslim audience members.[92] They were going to protest in a pretty inflammatory way: hanging a pig's head and you know, saying offensive things, trying to rile the crowd up.[93] They, of course, have a First Amendment right to do that, to express themselves including in offensive ways. Problem was they were doing it in the crowd, I think in this sort of convention center or something. And the crowd of course was getting riled up, that's what the whole point was, and it started to get violent.[94] The police first tried to protect the protesters, but at some point they just couldn't.[95] They had to pull them out. So they pulled out the protesters and they got sued. The protesters said the police violated their First Amendment rights because they were speaking and the police stopped them from speaking.[96] And the court split, I think actually held with the police and said this situation, there are very narrow situations where the threat of harm is imminent, it's real, and really the police can't do anything else.[97] When there is a clear and present danger of imminent violence and the police cannot stop the violence except by removing the speaker, then that's the very narrow situation in which the government can come in and stop speech.

Well that's basically what happens in the *NAACP* situation. Because what it's saying is that you as a listener—you have a listener right under

91. *See* Bible Believers v. Wayne Cty., 805 F.3d 228 (6th Cir. 2015) (en banc).

92. *See id.* at 234–36.

93. *See id.* at 238.

94. *See id.* at 238–40.

95. *See id.* at 239. The Christian protest group alleged that the police made minimal efforts to arrest the rioters and, as the procedural posture of the case required the court to view the facts in the light most favorable to the Christian protest group, the court assumed the same. *See id.*

96. *See id.* at 241–42.

97. Correction: While the court of appeals originally held for the police, see *Bible Believers v. Wayne Cty.*, 765 F.3d 578, 590 (6th Cir. 2014) (holding, in a two-to-one decision, that police officer's actions were reasonable), that decision was reversed by the Sixth Circuit sitting *en banc*, see *Bible Believers*, 805 F.3d at 233, though the *en banc* decision itself was badly split. Four judges found that the police violated the Christian protesters' First Amendment rights and denied qualified immunity. *See id.* at 261. Two additional judges found the protesters' First Amendment rights were violated, but would have granted qualified immunity. *See id.* at 264–67 (Boggs, J., concurring). Five judges found no violation of the protestors' constitutional rights. *See id.* at 274–78 (Rogers, J., dissenting).

the First Amendment as well[98]—you can't hear facts because someone else will take that fact and use it to commit violence. It censors your right to learn something because of what some other third person will do. And just like courts are skeptical about this claim when it's offered to veto speakers, we should similarly be very skeptical when it's used as a heckler's veto for listeners.

That is why government involvement and complicity are relevant. Just like with the speaker, the government can only censor when it can't prevent violence any other way. And here the right to anonymity under *NAACP* should apply only when the government cannot—or in the case of Alabama, when the government was not—going to stop violence against a speaker.

IV. CONCLUSION

And so I'll leave you with this quote from *Tinker*, which admittedly is neither a campaign finance case nor an *NAACP* case:

> [U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[99]

I still think it is on point in reminding us that the First Amendment does not grant us a right to express our views without contention. That the First Amendment contemplates the idea of contentious debate, of disruption. That holds true for the speakers, who have the right to speak even if they're going to cause disruption. So too should it hold true for listeners, who have the right to listen and hear facts even if it's going to cause disruption. And our First Amendment and our democratic government depend on that.

98. *See* Lamont v. Postmaster General, 381 U.S. 301, 305 (1965); *see also* Stuart McPhail, *A Million Corporations with a Million Campaign Ads: Citizens United, the People's Rights Amendment, and the Speech of Non-Persons*, SSRN.COM, June 3, 2013, at 5–15, https://papers.ssrn.com/sol3/papers.cfm? abstract_id=2273795.

99. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–09 (1969).

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