PRIVACY AND THE RIGHT TO ADVOCATE:

REMEMBERING *NAACP V. ALABAMA* AND ITS FIRST AMENDMENT LEGACY ON THE 60TH ANNIVERSARY OF THE CASE

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Executive Summary

This year marks the 60th Anniversary of *NAACP v. Alabama*, a landmark U.S. Supreme Court decision that upheld the constitutional right to donate anonymously to non-profit groups. The decision was essential to efforts by the National Association for the Advancement of Colored People to end segregation in the South because it allowed their supporters to keep giving without having to fear violent retaliation. Today, however, the case's protection of donor privacy is in danger of being undermined. A recent string of campaign-finance cases involving groups that support or oppose candidates for office has weakened protections for donors' right to remain anonymous. And the reasoning of those cases has been used by lower federal courts to undermine anonymity in a very different context—non-profit speech that educates the public about significant issues, such as ballot initiatives.

Largely forgotten is the reasoning of the original case, which recognized that anonymity and privacy are vital because they allow people to support causes they believe in without fear of reprisal by people who disagree with their beliefs. This need for privacy is all the more vital today, where the internet makes it easy to publish lists of donors—and easy to harass and intimidate them. The stakes may be different today than they were in the 1950s, but those stakes are still real for people who have been harassed online and in person, and even lost their jobs, just because they held unpopular beliefs. As cities and states across the country continue to adopt laws requiring non-profits to disclose the identities of their supporters, the question of donor privacy will eventually return to the Supreme Court. When it does, *NAACP v. Alabama* will be front and center as the Court decides whether to uphold—or ignore—its legacy.

Introduction

Sixty years ago, on January 15, 1958, the U.S. Supreme Court heard oral argument in *National Association for the Advancement of Colored People v. Alabama*. The case was just one of several that arose from efforts by Southern states to force the NAACP to turn over the names of its donors to government inspectors. That was a dangerous prospect for the NAACP—then in the midst of its epochal battle against segregation. In fact, the state's demands had already cost the NAACP more than half its Southern membership over the previous three years, as donors feared that the Association might comply and that their identities might be publicized, leading to ostracism or even violent retaliation.

Legendary civil-rights lawyer Robert L. Carter served as the Association's general counsel. Using a legal theory he developed while he was a graduate student, Carter convinced the Court to issue a unanimous decision—one that clearly acknowledges the First Amendment right of non-profit groups and their supporters to keep donors' identities private.

Today, that decision stands as both a landmark Supreme Court decision and a highlight of Carter's storied career, but it left several ancillary issues undecided. Many of these issues have been slowly sorted out by subsequent cases in the Supreme Court and federal courts of appeal, particularly in cases challenging campaign-finance regulations. However, one issue was not resolved

by the decision because the state's argument was so weak that the Court dismissed it out of hand. Alabama claimed that it needed a list of the Association's donors in order to determine whether the group was conducting business in the state—something the Association freely admitted it was doing. This argument was so transparently false that the Court did not need to decide how strong the government's asserted interest in obtaining a list of donors needs to be in order to overcome the First Amendment's default presumption of privacy.

But what about the public's "right to know" who donates to non-profit groups that are speaking about ballot issues? Does that interest trump the First Amendment rights of non-profits and their donors? The answer to this question matters a great deal today. States and cities across the country are enacting laws that require non-profit groups to disclose their donors' names, addresses, and other information any time those groups spend even modest amounts of money to communicate with voters about a question on the ballot. Government claims an "informational interest" in seizing this personal information—arguing that disclosure will help voters make informed decisions when considering a particular group's message. Federal courts of appeal are divided on whether this "informational interest" trumps the privacy and free-speech rights of non-profits and their donors. That makes the 60th anniversary of the decision a good time to reflect on the case, and to look for clues about how the inevitable Supreme Court case is likely to be decided.

I. A Crucial Decision in a Turbulent Age

The national mood in 1958 was tense. Southern states—led by Alabama—were losing their battle to maintain public segregation. Four years earlier, the Supreme Court had declared "separate-but-equal" unconstitutional.[1] Three years earlier, Rosa Parks had inspired a 381-day boycott of the Montgomery, Alabama bus system, which ended only after the Court declared bus segregation unconstitutional in November 1956.[2]

The NAACP was methodically and successfully dismantling segregation in the South, both in court and in the court of public opinion. In response, Southern states started working to weaken the group. South Carolina passed a law prohibiting members of the Association from working in public schools, declaring that they were "fomenting and nurturing … a bitter feeling of unrest, unhappiness and resentment among members of the Negro race with their status in the social and economic structure of the South."[3] Virginia tried to make it illegal for the Association's lawyers to advise people to challenge segregation in court.[4]

After a string of high-profile legal losses, Southern states decided to try a new strategy: Attack the NAACP by going after its donors and supporters. If they could learn who was donating to the group, they could weaken the Association's support and undermine its mission of desegregation.

In Florida, a committee of the state legislature demanded the Association's donor lists and ultimately held the group in contempt when it refused to produce them.[5] When the Association declined to provide donor lists to Georgia, the state issued a $25,000 fine and sentenced the group's state leadership to jail.[6] Texas retaliated against the Association's refusal to turn over its donor lists by ordering it to stop doing business in the state,[7] and the Texas Rangers seized the Association's records. Alabama, Arkansas, Louisiana, North Carolina, and Tennessee employed similar strategies.[8]

Initially, the donor-intimidation strategy worked. The Association's Southern membership declined steeply during this period, from about 90,000 members in 1955 to less than half that, or 40,000 members, just two years later in 1957.[9] This drama would culminate in January 1958, when lawyers for the NAACP and an assistant attorney general from Alabama asked the Court to determine a simple, but pivotal question: Do non-profits and their donors have a First Amendment right to keep donors' identities private?

Robert L. ("Bob") Carter argued the case for the NAACP. Born in 1917, he was the youngest of nine children.[10] He earned his law degree from Howard University in 1940 and an L.L.M. at Columbia in 1941.[11] During his time at Columbia, Carter wrote a thesis, "The Three Freedoms," that would serve as something of a blueprint for the NAACP's legal strategy in the decades to come.[12] After earning his degrees, Carter served in the Army Air Corps during World War II, after which he joined the legal arm of the NAACP, where he served as Thurgood Marshall's assistant until 1956.[13] "He was brilliant," Marshall recalled later. "One of the best legal minds I've ever run across."[14]

Do non-profits and their donors have a First Amendment right to keep donors' identities private?

Carter argued twenty-two cases before the Supreme Court and won twenty-one of them.[15] He presented part of *Brown v. Board of Education* in 1954.[16] But *NAACP v. Alabama* was the first major case he argued after succeeding Marshall as the organization's general counsel. It would be remembered as one of the most important of his career.[17]

Arguing for Alabama was Edmon Rinehart.[18] Rinehart also had impeccable credentials, having graduated from Princeton and Harvard Law.[19] He came to the case by way of the Alabama Attorney General's office, where he had served as assistant attorney general since 1955.

Carter and Rinehart argued the case during one of the Court's most transformative periods. Presiding over the Court was Chief Justice Earl Warren, and alongside him were justices Felix Frankfurter, Hugo Black, and William Douglas, who had been on the Court since the 1930s. Justices Harold Burton and Tom Clark had served since the 1940s. But Carter and Rinehart were also arguing before three relative newcomers to the Court. President Eisenhower had appointed Justice William Brennan in 1956 and Justice Charles Whittaker in 1957. Justice John Marshall Harlan, who would ultimately write the opinion in the case, was appointed by Eisenhower in 1955.

Carter argued for the NAACP in the same chamber where, just 20 years earlier, Justice James McReynolds—an avowed racist—had turned his chair and kept his back to the NAACP lawyer who was arguing[20] the case of *Gaines v. Canada*.[21] But the Court had now signaled a new era of civil rights protections with its decisions in Brown and other cases invalidating racial segregation. In the years to come, the Court would increasingly defend the rights of civil rights protestors who were prosecuted for participating in marches[22] and sit-ins.[23]

The Argument

The facts of the Alabama case were straightforward. State law required any out-of-state corporation to file its corporate charter with the Secretary of State and to designate a place of business where it could be served with papers if it was sued.[24] The NAACP was incorporated in New York. It opened its first regional office in Alabama in 1951—in order to promote desegregation—and it was this act that triggered the case before the Court.[25]

The NAACP considered itself exempt from the out-of-state corporation requirements and declined to comply.[26] In 1956, the Alabama Attorney General sued to oust the group from the state until it filed the necessary paperwork.[27] Among the activities that the NAACP was accused of conducting without the state's permission were "giv[ing] financial support and furnish[ing] legal assistance to Negro students seeking admission to the state university" and "support[ing] a Negro boycott of the bus line in Montgomery."[28]

On June 1, 1956, a state court issued an injunction that barred the Association from raising funds or soliciting new members—an order that would block the NAACP's operations to one degree or another for almost a decade.[29]

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>
> *- Robert L. Carter*

During the legal battle that followed, state officials demanded that the NAACP turn over "records containing the names and addresses of all Alabama 'members' and 'agents.'"[30] The Association agreed to file the out-of-state corporation paperwork, but flatly refused to disclose the names and addresses of its members.[31] This refusal ultimately led the Alabama trial court to hold the NAACP in contempt and impose a $100,000 fine.[32] The Alabama Supreme Court refused to hear the Association's appeal, which led the group to turn to the U.S. Supreme Court.[33]

The underlying issue in the case was the constitutionality of Alabama's demand for the Association's donor list. The Association argued that the state's attempt to compel disclosure of its donors' names and addresses violated their members' First Amendment rights "to engage in lawful association in support of their common beliefs."[34]

Alabama made two arguments in response to this claim. First, it argued that if NAACP members suffered as a consequence of their identities becoming known, that would result "not from state action but from private community pressures."[35] In other words, harassment and intimidation weren't the government's fault, and should not factor into the question of whether the state could

demand the information. Alabama's second argument was that the government had a legitimate interest in obtaining the information because it needed "to determine whether the Association was conducting intrastate business in violation of the Alabama foreign corporation registration statute[.]"[36]

Carter rejected both claims. He told the justices that the state bore the burden of proof to justify demanding the information, but that "no necessity, no need…has been shown as to why the Attorney General desires to know who our members are. No purpose would be served by it."[37] And ordering the NAACP to disclose its members forced the Association to choose between two unacceptable outcomes. "Either we have to comply with the order to disclose and therefore submit to a violation of our right of free speech and right of free association, or we risk contempt and we are ousted from the State… and never get an opportunity to test" whether the disclosure order was in fact unconstitutional.[38] It was a stark choice: expose the group's donors, or shut down its Alabama operations.

In his response, Attorney General Rinehart avoided the First Amendment questions entirely. Instead, he advanced a convoluted procedural argument for why the U.S. Supreme Court should not be hearing the case at all. The justices showed little interest in entertaining this theory.[39] Instead, they focused on the state's justification for its demands. Rinehart reiterated that Alabama needed the donor list in order to determine whether the Association was doing business in the state.[40] Justice Frankfurter scoffed; wasn't the Association "notoriously doing business in the State?"[41] Rinehart agreed.[42] Given that the Association made no secret of doing business in Alabama, Frankfurter then questioned "whether overnight you need to put [them] out of business by a restraining order."[43] Rinehart had no answer.

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A Landmark Victory for Privacy

Four-and-a-half months later, the Court handed down its unanimous decision. It made three crucial points: just as people have a First Amendment right to express messages to the public, so they have the right to join together in groups to amplify their messages. They also have a right to support causes they believe in anonymously, in order to avoid harassment and intimidation. Finally, the government may only penetrate this veil of privacy if it has a compelling justification.

First, freedom of speech includes the right to join with others in order to more effectively communicate with the general public about important issues. "[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," the Court noted. This was not a new principle—the court had long held that "freedom to engage in association for the advancement of beliefs or ideas is an inseparable aspect of … freedom of speech."[44]

Second, there is a "vital relationship between freedom to associate and privacy in one's associations."[45] The reason for this is simple: if supporters' names are made public, those supporters are at increased risk for harassment and intimidation, "particularly where a group espouses dissident beliefs."[46] The Court pointed to other instances in which minority groups had been forced to identify themselves in public, as a means of intimidating them or encouraging reprisals against them. "A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature."[47] The Court considered it obvious that:

> [C]ompelled disclosure of [the Association's] Alabama membership [would] affect adversely the ability of [the Association] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs … and of the consequences of this exposure.[48]

Finally, the justices ruled that this right to confidentiality is so strong that the government can overcome it only if it demonstrates a compelling need to see an organization's membership lists. Alabama's demands fell far short. The Court contrasted Alabama's argument ("we need the list to determine whether the NAACP is doing business in our state") to the facts of *Bryant v. Zimmerman*,[49] a 1928 case which upheld New York's request for a list of members in the Ku Klux Klan. In *Zimmerman*, the state wanted the list of supporters because the Klan was engaged in "acts of unlawful intimidation and violence," and "made no effort" to comply with the law.[50] The NAACP, by contrast, admitted it was doing business in Alabama and had agreed to provide relevant information to the state—but not the confidential information about its supporters.

The decision was a resounding victory for Bob Carter and the NAACP and is notable for its insightful recognition of the interplay between government action (demanding the donor lists) and private action (intimidation and harassment). The fact that private actors would ultimately be the ones engaging in retaliation against NAACP members was beside the point. "It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure…may have upon participation [in the Association] follows not from state action but from private community pressures," wrote Justice Harlan. "The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the [demand for donor lists] that private action takes hold."[51]

Alabama seems not to have immediately grasped the scope of its defeat, and instead decided to press its luck. Rather than admit that the Supreme Court had clearly resolved the case in the NAACP's favor, the Alabama Supreme Court ordered that the $100,000 fine (over $850,000 today) would still be levied against the Association.[52] Carter therefore had to make yet another trip to the U.S. Supreme Court, which swiftly reversed the fine and told the Alabama court, in no uncertain terms, that the case was over and the NAACP had won.[53]

II. Privacy is Essential to Public Participation

Why is privacy important, especially today? In Dave Eggers's near-future dystopian novel, *The Circle*, the world's largest technology company preaches that:

> ALL THAT HAPPENS MUST BE KNOWN
> SECRETS ARE LIES
> SHARING IS CARING
> PRIVACY IS THEFT.[54]

Most readers recoil from these slogans, even as—or perhaps because—they recognize that privacy has become a scarce commodity in our heavily interconnected world. Yet those who advocate for mandatory disclosure speak in similar language that the public has a need to know the identities of individuals who support particular causes. They've even come up with a sinister phrase, "dark money," to "refer[] to political spending meant to influence the decision of a voter, where the donor is not disclosed and the source of the money is unknown."[55] This kind of language flips the very idea of privacy on its head. Rather than being a good that people value and protect, privacy becomes something sinister and people's motives for wanting to maintain their privacy are suspect.

But why? When we consider our own privacy, we recognize its value. Yet when it comes to other people's privacy, many people reflexively feel that they have a "right to know."

Institute for Justice scholar Dick Carpenter documented this phenomenon in his report on donor-disclosure laws.[56] While surveys found broad public support for disclosure in the abstract, that support fell by over half (from 82.3 percent to 40.3 percent) once people were asked if they believed that their own information should be published by the government simply because they supported a ballot issue campaign.[57] And only 24.1 percent of respondents agreed that their employer's name should be posted on the internet as a result of their donation.[58]

Notably, Carpenter's polling only sought people's views about government-mandated disclosure in the context of direct donations to groups whose sole purpose was supporting or opposing ballot measures. In all likelihood, support rates would be even lower for laws that require disclosure of all of a non-profit's donors simply because that non-profit chose—at some point—to speak about a ballot measure.

Why might people choose to withdraw support for a cause if they cannot remain anonymous? For some, it comes down to simple modesty or religious conviction. "I do not think it is anybody's business what I donate and who I give it to," one respondent told Carpenter. Another told him, "I would not want my name to be associated with any effort."[59] These are good enough reasons, alone, to remain anonymous.

But many people also fear the repercussions of winding up on a government list. "I am a female and [it's] risky to have that info out there," said a respondent to Carpenter's poll. "I wouldn't donate money because with all the crazy people out there," answered another, "I would be frightened if my name and address were put out there to the public."[60]

What happened in the South in the late 1950s stands as an extreme example of harassment as a form of ideological opposition. But harassment does not have to involve physical violence to take a heavy toll on its victims. For example:

- In New Hampshire, Gigi Brienza's name was put on a "target list" by a radical animal-rights group, just because she worked for a pharmaceutical company that tested some products on animals. Even though she herself did not work on animal testing, the group targeted her after it found her name based on government report that listed her as a $500 donor to Democratic presidential candidate John Edwards.[61]
- In Texas, Catherine Engelbrecht was twice audited by the Internal Revenue Service; Federal Bureau of Investigation; Bureau of Alcohol, Tobacco, Firearms, and Explosives; and Occupational Safety and Health Administration showed up at her business and home demanding records, after she attempted to start a small organization to educate the public about voter fraud.[62]
- In Oregon, Erious Johnson, an attorney who heads the state Department of Justice Civil Rights Division, was put on a government watch list of potential threats to police after he was identified as supporting Black Lives Matter.[63]

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- In California, Margie Christofferson was a waitress who gave $100 to a group that supported a proposal to ban gay marriage. After her name was made public, the restaurant where she worked was boycotted and picketed and she ultimately lost her job.[64]
- Also in California, anti-abortion protestors, who were involved in litigation against an abortion clinic, sought the identities of clinic staff and volunteers who were not parties to the lawsuit. There was no legal reason to seek the workers' identities. But the group seeking the information was known to picket the homes of clinic workers, and they almost certainly wanted the information for this purpose.[65]
- Indeed, stopping people from doing or saying things you disagree with is one of the primary

motivations of pro-disclosure advocates. One U.S. Senator even lauded the idea of forcing nonprofit organizations to disclose the identities of their donors because it would have "a deterrent effect."[66]

Today, the internet exacerbates the problem of ideological harassment. Lists are easier to publish and far easier to access. Information that gets published remains on the internet years after it would have been relevant to voters. As one researcher notes, "watchdog groups have created websites that use government-gathered data to organize [donor] information easily for online users, sometimes in provocative ways."[67] He then gives the example of a site operated by the Huffington Post, which produced "maps [that] locate the address of individuals who gave money … One click on the dot reveals the donor's name, amount of contribution, and political committee that received it."[68]

That non-profits feel the need to comment on important public issues is neither surprising nor nefarious.

Thankfully, modern harassment of ideological opponents rarely takes the form of outright physical violence. But it remains widespread, easy to conduct, and difficult to police. Ironically, in this context, the internet also makes it easy to harass someone anonymously. Public harassment still has real—sometimes life-changing—consequences for people who support unpopular causes.

For all of these reasons, protecting donor privacy is the default position for—and a responsibility taken seriously by—almost all of America's non-profit organizations. Charity Navigator is a non-partisan, non-profit organization that provides quality ratings for over 9,000 U.S. charities.[69] It is an easy—and extremely useful—way for anyone thinking of making a donation to see whether their money is likely to be spent carefully. Charity Navigator uses many metrics in assessing its overall quality ranking, from fiscal responsibility to program effectiveness.[70] One of the most important metrics looks at a charity's donor privacy policies.[71] Charities that honor and protect donor privacy receive a higher rating on this metric than those that do not. The Better Business Bureau also likewise incorporates a group's donor-protection measures into its charity rankings.[72]

In fact, nonprofit groups typically consider it an ethical obligation to keep their donors' identities confidential. "Confidentiality is indispensable to the trust relationship that must exist between a nonprofit organization and its constituents," declares one leading guidebook on non-profit fundraising.[73] "It is extremely important to develop ethical rules and guidelines surrounding information and confidentiality," declares another, because "donors count on nonprofits to respect their privacy."[74]

Yet in recent years, advocates of disclosure mandates have started to repackage the issue:

tough laws are now needed to combat the influence of "dark money" in elections. For instance, one pro-disclosure group has declared that all 501(c)s should be required to disclose the identities their donors if those groups speak about ballot measures at all, because one of the "benefits of being a non-profit" is the "ability to disguise the true nature of a highly political organization through non-disclosure."[75]

This characterization sounds sinister, but most non-profits are not "fronts" for "disguising" political activity—they are groups of people coming together to support causes or activities they believe in—from a local animal rescue to the Tea Party or Black Lives Matter. That those groups feel the need to comment on important public issues is neither surprising nor nefarious. True, the 501(c) legal form can be misused by bad actors to escape liability, but it makes no sense to punish the innocent out of fear that the guilty might misbehave.

Anonymous speech is not inherently bad. Most of the time, people speak anonymously either to avoid retaliation or because they would prefer that public debate focus on the merits of their arguments rather than being distracted by *ad hominem* disputes over who is saying what. As the Supreme Court has recognized, anonymity "provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent."[76] That is why James Madison, Alexander Hamilton, and John Jay chose to use a pen name when they published *The Federalist*.

Even assuming that there is something inherently wrong about people exercising their First Amendment rights anonymously, there is an easy solution: people can simply ignore groups that refuse to divulge that information. For some groups, it might be worth publishing their donor lists in order to enhance their perceived credibility with those listeners. Others can make a different choice—and the public can make up its own mind. That is how the marketplace of ideas is supposed to work.

III. Sixty Years Later, an Unresolved Legacy

Today, *NAACP v. Alabama* ranks among the more influential Supreme Court decisions of all time. In addition to its immediate effect of speeding desegregation efforts in the South, the case recognized the vital role that privacy and anonymity play in facilitating free speech and freedom of association. The case has been cited nearly 2,000 times by other courts and over 3,000 times in scholarly articles. It is widely recognized that the right to associate freely, while not expressly recognized by the First Amendment, "has its modern roots in *NAACP v. Alabama*."[77] And the legal test articulated in the case is still used today in cases involving donor-privacy questions. Whenever the government seeks to invade the privacy of a group of people who have come together to support a particular cause, the government must show a "compelling" interest in obtaining the information.[78]

Since *NAACP v. Alabama* was decided, the Supreme Court has developed a rich body of case law in the related area of campaign-finance law, while leaving the question of donor disclosure in the ballot-issue context unresolved. Understanding what the Court has—and has not—done in the past 60 years is key to predicting what happens next.

Campaign-Finance Cases Take Center Stage Before the Court

When most people talk about "campaign-finance law," they are referring to individuals or groups who give financial support to candidates for public office. That support—which is just another form of self-expression protected by the First Amendment—includes speech by Political Action Committees and 501(c)(4)s.[79] Yet the Supreme Court has rarely used the *NAACP v. Alabama* precedent in cases involving this kind of traditional campaign-finance regulation. That's because it has held that the government may restrict an organization's freedom to engage in such speech in order to prevent *quid-pro-quo* corruption or the appearance of such corruption—issues that simply were not involved in the *NAACP* case.

The contours of modern campaign-finance law have been crafted by a string of major Supreme Court decisions. *Buckley v. Valeo* in 1976 struck down spending caps for candidates but upheld contribution limits for their donors.[80] (*Buckley* also held that certain disclosure rules were permissible only as a narrow exception to *NAACP v. Alabama*.) In 2010, *Citizens United v. Federal Election Commission* struck down spending limits on corporations that were engaged in independent speech (not coordinated with the candidate) about candidates.[81] Later that same year, *SpeechNow.org v. Federal Election Commission* established that there could be no contribution limits on PACs or Super PACs that were making independent expenditures.[82] And in 2014, the Court in *McCutcheon v. Federal Election Commission* held that aggregate limits on individuals who sought to donate to multiple candidates were likewise unconstitutional.[83]

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>
> *- McIntyre v. Ohio Elections Commission*

But campaign finance regulations extend beyond PACs and 501(c)(4)s. Federal law even prohibits non-profits—including 501(c)(3) groups and most traditional charities—from discussing candidates for office. And in recent years, several states have begun demanding that these traditional non-profits turn over the identities of their supporters regardless of the fact that they do not endorse political candidates.

Importantly, neither *Buckley* nor its progeny say anything about 501(c)(3) groups. On the question of when the government can demand donor lists from non-profits that are simply discussing public issues or ballot measures, *NAACP v. Alabama* remains the last word.

Although *Buckley* and other campaign finance decisions don't directly address the constitutional protections for confidentiality in cases involving non-political organizations, it and other cases consistently reiterate the importance of anonymous speech. In 1982, the Court in *Brown v. Socialist Workers' 74 Campaign Committee* examined an Ohio law that required a minor political party to disclose its donors' identities.[84] In holding the law unconstitutional, the Court echoed the reasoning of *NAACP v. Alabama*: the government's informational interest in the donor list did not trump the associational and privacy rights of donors, who feared intimidation and harassment if their names were released.

Again in 1997, the Court in *McIntyre v. Ohio Elections Commission* struck down a state law that prohibited anonymous distribution of political pamphlets.[85] Ohio asserted two governmental interests in the anonymity ban: "preventing fraudulent and libelous statements" and "providing the electorate with relevant information."[86] The Court dismissed the "informational" interest out of hand. "The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit," it declared.[87] As for the interest in preventing fraud and libel, the Court agreed that that was legitimate, but pointed out that the state had other, more carefully designed laws in place to combat these problems.[88] Ultimately, neither of these interests outweighed the First Amendment interest of the speaker in remaining anonymous.

The Strength of the Government's "Informational Interest" in the Identities of Non-Profit Donors Remains Unresolved by the Supreme Court

Another curiosity about *NAACP v. Alabama* is that, while the case still serves as the last word about the importance of privacy to non-profits and their donors, it is silent about how courts should analyze the government's asserted interest in donor information. The reason is simple: Alabama was asserting an interest so preposterous (to determine whether the NAACP was doing business in the state) that it made the case an easy call. A follow-on case, *Bates v. City of Little Rock,* involved a similarly flimsy justification, that the government needed the list in order to accurately impose an occupational license tax on the Association.[89] The Court easily rejected this argument, noting that the government must do more than make a "mere assertion in the preamble of an ordinance" in order to demonstrate a need for the information.[90]

Phony reasons to demand a donor list are easy to reject. But, as mandatory disclosure advocates assert today, is there a public "informational interest" in a group's donor lists when that group speaks about a ballot measure? This question is currently unresolved by the Supreme Court. Lower federal appeals courts are divided on the question.

On the pro-privacy side of the circuit split is the Tenth Circuit. In 2016, it held the government's interest in knowing the identities of a group's contributors to be "legitimate but minimal."[91] In *Coalition for Secular Government v. Williams*, the appeals court was asked to determine the constitutionality of a Colorado law requiring disclosure of the identity of anyone who donated $20 or more to an issue committee, meaning a non-profit group that has a "major purpose" of supporting or opposing a ballot question, if that group spent more than $3,500 supporting or opposing a ballot measure.[92]

The court struck down the requirement using a case it had decided six years earlier, *Sampson v. Buescher*.[93] It acknowledged that the government's informational interest in disclosure was "legitimate," but said that "this interest is significantly attenuated when the organization is concerned with only a single ballot issue and when the contributions and expenditures are slight."[94] In this case, as in *Sampson*, the informational interest in $20 donations and $3,500 expenditures did not come close to being high enough to justify forced disclosure of donors' identities.[95]

On the anti-privacy side of the circuit split are the Third and Ninth Circuits. In *Delaware Strong Families v. Delaware*, the Third Circuit upheld a law requiring a non-profit group to disclose its donors after publishing a non-partisan voter guide to an upcoming election.[96] The court found that the government had shown a sufficiently strong interest in obtaining the information because the voter guide—even though it was non-partisan and did not endorse or oppose any candidates—"mention[ed] candidates by name close to an election."[97]

> *"In my view, it is time for the Court to reconsider whether a State's interest in an informed electorate can ever justify the disclosure of otherwise anonymous donor rolls."*
>
> *- Justice Clarence Thomas*

The Supreme Court declined to review the decision. However, Justice Alito noted that he would have granted review, and Justice Thomas went so far as to write a rare dissent from the Court's denial of review. "In my view," wrote Thomas, "it is time for the Court to reconsider whether a State's interest in an informed electorate can ever justify the disclosure of otherwise anonymous donor rolls."[98]

It may be possible to harmonize *Delaware Strong Families* and *Coalition for Secular Government* by pointing out that the former applied to speech about candidates (albeit non-partisan speech) while the latter applied to speech about a ballot question. But the Ninth Circuit's decision in *Americans for Prosperity Foundation v. Harris*[99] cannot be read so generously. There, the State of California sought to a copy of a highly sensitive form—known as a "990 Schedule B"—that non-profit groups are required to file with the Internal Revenue Service. The form is sensitive because it lists the names and addresses of anyone who donated more than $5,000 to the charity during a given tax year.

Attorney General Kamala Harris sent similar Schedule B demands to dozens of 501(c)(3) organizations that had kept such information confidential while disclosing other legally required information to the IRS. AFP, like other 501(c)(3)s, does not endorse candidates or engage in politics, yet Harris claimed—just as the Alabama Attorney General did in *NAACP*—that she needed the

information in order to ensure that these non-profits were complying with state tax laws.[100] Yet AFP pointed out that disclosure risked exposing sensitive information to the public and exposing supporters to retaliation.

AFP asked a trial judge to bar the Attorney General's demands, and the trial court agreed.[101] But the Ninth Circuit reversed. There is "nothing to suggest donors have been or would be deterred by confidential disclosure of their identifying information to the Attorney General,"[102] it declared. And the "Foundation has offered no evidence that it has been subjected to government harassment or hostility."[103] Here the court ignored the fact that the *NAACP* precedent puts the burden of proof on the government, not the private party—and that it is impossible for an organization to prove a risk of harassment or intimidation, which could take place years or even decades after information is made public.

Even after the Ninth Circuit's decision, AFP resisted the state's demand for the form, pointing out that it had found the Schedule Bs of more than 1,400 non-profits that were publicly available on the California Attorney General's website.[104] The government claimed this was an innocent mistake, took down the Schedule Bs, and renewed its demand for AFP's information. Nevertheless, at the time of this writing, the district court has halted the state's request due to the "inadvertent" disclosure of so many other groups' Schedule Bs.[105] The state's appeal of this decision is pending.

Conclusion

The split in federal circuits about the ballot-initiative question is too deep for the Supreme Court to ignore forever. This is especially true since pro-disclosure laws are rapidly spreading across the country. Cities like Santa Fe, New Mexico[106] and Denver, Colorado[107] have recently adopted laws that require non-profits to disclose their donors any time the organization spends as little as $250 to communicate to the public about a issue on the ballot. The city of Tempe, Arizona, is asking voters to approve a similar measure in March 2018.[108] States like Montana[109] and New Mexico[110] have enacted laws requiring non-profit donor disclosure, and many others are set to consider such legislation in the coming years.

Legal challenges to these laws will continue to percolate up through the courts and eventually reach the Supreme Court. When they do, the reasoning of *NAACP v. Alabama* will be the touchstone for deciding whether the First Amendment protects donor privacy in the modern era. The well-established privacy interests of non-profits and their donors will be weighed against the government's best argument for the "informational interest" that reformers now invoke. And the voices of thousands of non-profits that wish to speak about thousands of public issues will hang in the balance.

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