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U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution

"The Censorship-Industrial Complex"

March 25, 2025

Chairman Schmitt, Ranking Member Welch, and Members of the Subcommittee:

My name is Gabe Rottman, and I am the vice president of policy at the Reporters Committee for Freedom of the Press. Founded in 1970, the Reporters Committee is a nonprofit organization that provides pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

Thank you, Chairman Schmitt and Ranking Member Welch, for inviting me to appear today at this hearing on the "Censorship-Industrial Complex."

I. Introduction

My understanding is that the impetus behind this hearing is concern over a phenomenon commonly known as "jawboning," which, as a legal matter, is generally defined as improper pressure by the government on private parties to either censor themselves or change the content of their speech. The seminal U.S. Supreme Court case recognizing that to be a First Amendment violation is *Bantam Books v. Sullivan*, which established a crucial protection for the free press.[1]

In that case, a state commission, without independent law enforcement power, was found to have violated the First Amendment by notifying booksellers that it had deemed certain publications "obscene," asking for the sellers' "cooperation" with the commission in removing the publications from shelves, and reminding the sellers of the commission's obligation to recommend prosecution for the sale of the publications.[2] The commission's notices would also inform the recipient that lists of "objectionable" publications had been circulated to the police.[3] The Court held these notices to be unconstitutional prior restraints, emphasizing that, even though the commission had no enforcement authority, free speech is "vulnerable to gravely damaging yet barely visible encroachments."[4]

Notably, the Supreme Court unanimously affirmed the holding of that case just last term in *National Rifle Association v. Vullo*, stating that: "Government officials cannot attempt to coerce private parties in order to punish or suppress views that the government disfavors."[5] There, the Court held that the NRA had plausibly alleged a *Bantam Books* violation by the New York Department of Financial Services in its complaint that the superintendent of the department had threatened enforcement actions against entities that refused to disassociate from the NRA.[6]

That said, while the basic rule of *Bantam Books* is easily articulated, whether interactions between the government and private speakers are in fact coercive can be complicated. In another recent Supreme Court case involving allegations of unconstitutional coercion of social media platforms' content moderation decisions, the Reporters Committee filed a friend-of-the-court

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[1] 372 U.S. 58 (1963).
[2] *Id.* at 63–64.
[3] *Id.*
[4] *Id.* at 66.
[5] 602 U.S. 175, 180 (2024).
[6] *Id.* at 180–81.

brief in support of neither party, noting that a too-*sensitive* test for coercion could impair the free press because journalists are often subject to government pressure.[7] The brief quoted Max Frankel, the New York Times's Washington bureau chief during the *Pentagon Papers* case, who observed in a district court affidavit that the relationship between the government and the press in America is, by turns, "cooperative, competitive, antagonistic and arcane."[8]

Indeed, the government routinely puts pressure on news organizations and journalists to "cover one story and abandon another, or to frame an issue this way rather than that way."[9] In the context of national security reporting, presidents have warned publishers that if they publish certain government secrets, people could die.[10]

It is important that not all of these interactions be considered a violation of the First Amendment, lest *Bantam Books* actually chill the free flow of information by discouraging candid exchanges between government officials and reporters. In the national security example, even in the face of such dire warnings, journalists will invariably make their own decisions about whether to publish and there are benefits to that give-and-take for both press and public.[11]

There are, however, cases where the government threatens specific consequences for publication. During the Reagan administration, for instance, the director of the Central Intelligence Agency said he would recommend that the Washington Post be prosecuted under the Espionage Act were it to publish details about a secret submarine surveillance program.[12] Under those facts, there is likely a First Amendment violation.

And that is the rub. Whether an interaction between government officials and private speakers violates the First Amendment will be intensely fact specific. From weather alerts to

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[7] Br. of Amicus Curiae the Reporters Comm. for Freedom of the Press in Supp. of Neither Party, *Murthy v. Missouri*, 603 U.S. 43 (2024) (No. 23-411), https://www.rcfp.org/briefs-comments/murthy-v-missouri/.

[8] *Id.* at 2 (citing Aff. of Max Frankel ¶ 3, *United States v. N.Y. Times Co.*, 328 F. Supp. 324 (S.D.N.Y. 1971) (No. 71 Civ. 2662), 1971 WL 224067). Mr. Frankel just passed away on Sunday. *See* Robert D. McFadden, *Max Frankel, Top Times Editor Who Led a Newspaper in Transition, Dies at 94*, N.Y. Times (Mar. 23, 2025), https://www.nytimes.com/2025/03/23/obituaries/max-frankel-dead.html.

[9] Br. of Amicus Curiae at 2, *Murthy v. Missouri*, *supra* note 7.

[10] *Interview with Bill Keller*, Frontline (Feb. 13, 2007), https://www.pbs.org/wgbh/pages/frontline/newswar/interviews/keller.html (describing discussions at the White House on post-9/11 warrantless wiretapping where president warned newspaper would be responsible for another attack if it published the story).

[11] *See* Dean Baquet & Bill Keller, *When Do We Publish a Secret?*, N.Y. Times (July 1, 2006), https://perma.cc/RB7E-6NFS ("No article on a classified program gets published until the responsible officials have been given a fair opportunity to comment.").

[12] *See* Jay Peterzell, *Can the CIA Spook the Press?*, Colum. Journalism Rev., Sept.–Oct. 1986, at 29; Lucas A. Powe, Jr., The Fourth Estate and the Constitution 155 (1992) (quoting Washington Post editor Ben Bradlee explaining the decision to hold back certain information and calling the threat of prosecution a "red light you go through very slowly").

school board press releases, the news media routinely agrees to publish government information, at the government's request. And, as in the example above, national security reporters will also carefully consider warnings from the government that publication could cause harm and will withhold certain details if they deem it appropriate. Ultimately what matters is which party – the government or the private speaker – makes the decision. If the former, the government violates the First Amendment by using its power to inject itself into public debate. If the latter, that interaction can be a valuable addition to public debate.

The discussion above is helpful in unpacking an acute threat to a press freedom today. That is, the original sin in the *Bantam Books* case is not just that the commission sought to turn the screws to remove books from shelves. It is, as the Court in *Vullo* noted, that the commission did so to promote the government's preferred viewpoint. It targeted books that were "objectionable" to the *state*.[13] Such "viewpoint discrimination" is "poison" to a free society because it can give the government the ability to shade public discourse to its own benefit.[14]

Accordingly, I discuss below certain other government actions that present the specter of viewpoint discrimination, which should be considered within the scope of the hearing.

II. FCC interference with news organizations' editorial independence.

The history of the now-defunct fairness doctrine at the Federal Communications Commission offers an important case study in how the FCC's authorities to regulate broadcast licensees have been used, by administrations of both parties, to suppress viewpoints perceived as unfavorable to government officials. The fairness doctrine required licensees to cover controversial issues, to air multiple perspectives on those issues, and, under the "personal attack" rule, to permit individuals or entities criticized in a broadcast an opportunity to respond.[15]

The Supreme Court upheld the constitutionality of the doctrine in 1969.[16] But, unbeknownst to the Justices, the *Red Lion* case originated in a "politically motivated campaign to use the fairness doctrine to harass stations airing right-wing commentary, an effort inspired and managed by the White House and the Democratic National Committee and financed in large measure with political contributions."[17] The Nixon administration and its allies then used the same playbook by targeting complaints against news coverage perceived as unfavorable.[18] The danger to a free press posed by such harassment campaigns was one reason the FCC abandoned

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[13] 372 U.S. at 67.
[14] *See Frederick Douglass Found., Inc. v. Dist. of Columbia*, 82 F.4th 1122, 1141 (D.C. Cir. 2023) (citation omitted).
[15] *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 370–71 (1969).
[16] *Id.*
[17] Fred W. Friendly, *What's Fair on the Air?*, N.Y. Times (Mar. 30, 1975), https://perma.cc/V6EE-E3R4.
[18] *Id.* ("[*Red Lion*] would later embolden the Nixon Administration in its attempts to lean on broadcasters unfriendly to the President.").

the doctrine during the Reagan administration.[19]

We cite this history in light of recent actions at the FCC that raise similar concerns. Arguably the most notable is the decision to reopen the complaint against CBS under the fairness doctrine's cousin, the news distortion policy, in connection with a 60 Minutes interview in 2024 with former Vice President Kamala Harris.[20] Because the FCC is "not the national arbiter of the truth," the news distortion policy requires that a complainant meet a high evidentiary bar before any enforcement action would be appropriate.[21] Specifically, a complainant must present evidence beyond the broadcast – such as a directive from station management – of *deliberate* distortion.[22] In the CBS complaint, however, the only "evidence" presented is that CBS edited an interview to use certain footage in a promotional spot and other footage in the ultimate broadcast, an entirely routine and unexceptional news reporting technique.[23]

Compounding the concern with the FCC's pursuit of the CBS complaint is the FCC's demand from CBS of the raw footage and transcript of the interview pursuant to its merger review authority.[24] The FCC then publicly released this material and opened a comment cycle, again without any extrinsic evidence of deliberate distortion.[25] Both actions raise concerns about the FCC improperly interceding in protected editorial choices by CBS.

While the 60 Minutes complaint is the most high-profile instance of FCC enforcement activity raising concerns of viewpoint discrimination, there are several others. In recent weeks, the FCC reopened inquiries in connection with a news distortion complaint against ABC for its moderation of the 2024 presidential debate, as well as an equal time complaint against NBC over

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[19] *See generally* Reagan Library Topic Guide – Fairness Doctrine (last visited Mar. 23, 2025), https://www.reaganlibrary.gov/public/2020-09/fairdoct.pdf.

[20] *See* Comments of Reporters Comm. for Freedom of the Press in MB Docket No. 25-73 (Mar. 7, 2025), https://www.rcfp.org/wp-content/uploads/2025/03/3-7-25-RCFP-FCC-CBS-comments.pdf (hereinafter "RCFP Comments").

[21] *See In re Complaints Covering CBS Program 'Hunger in America'*, 20 F.C.C. 2d 143, 151 (1969).

[22] *See In re Complaint Concerning the CBS Program 'The Selling of the Pentagon'*, 30 F.C.C. 2d 150, 152–53 (1971) ("[I]n the absence of extrinsic evidence . . . that a licensee has engaged in deliberate distortion, for the Commission to review [the] editing process would be to enter an impenetrable thicket."); *Galloway v. FCC*, 778 F.2d 16, 23 (D.C. Cir. 1985) (explaining that the news distortion policy "requir[es] a substantial prima facie case before proceeding against a broadcaster").

[23] RCFP Comments, *supra* note 20.

[24] *See* Jessica Toonkel & Joe Flint, *FCC Requests '60 Minutes' Harris Interview Material as It Reviews Paramount-Skydance Merger*, Wall St. J. (Jan. 31, 2025), https://www.wsj.com/business/media/fcc-requests-60-minutes-harris-interview-material-as-it-reviews-paramount-skydance-merger-c5dd8cff.

[25] Public Notice, Fed. Commc'ns Comm'n, *FCC Includes Additional Video Material in its Request for Comment on News Distortion Complaint Involving CBS Broadcasting Inc., Licensee of WCBS, New York, NY*, MB Docket No. 25-73 (Feb. 7, 2025), https://docs.fcc.gov/public/attachments/DA-25-113A1.pdf.

an appearance by former Vice President Kamala Harris on Saturday Night Live.[26] Reportedly, the FCC also launched an investigation into San Francisco radio station KCBS over its coverage of immigration enforcement actions.[27] And FCC Chairman Brendan Carr recently ordered an inquiry into National Public Radio and the Public Broadcasting Service over sponsorship acknowledgments.[28] Finally, Chairman Carr has demanded information from and threatened to block mergers involving media companies with "invidious" diversity policies, without articulating what constitutes invidiousness, whether such policies are unlawful, and how these policies implicate licensees' public interest obligations.[29]

While these actions implicate an array of First Amendment questions, what lurks behind all is the possibility – illustrated in the misuse of the fairness doctrine during the Kennedy, Johnson, and Nixon administrations – that the FCC's authority to engage in content-based regulation of licensees can be used to suppress editorial viewpoints perceived as unfavorable. As the FCC put it in the first case articulating the news distortion policy, the commission must "eschew the censor's role."[30] It should take great care to do so.

III. Misuse of consumer protection laws against perceived "bias."

Just last year, in *Moody v. NetChoice*, a Supreme Court majority of Chief Justice John Roberts and Justices Elena Kagan, Brett Kavanaugh, Sonia Sotomayor, and Amy Coney Barrett reaffirmed a key insight of the First Amendment. That is, on "the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana."[31]

Exactly that danger is present in the misuse of state consumer protection laws to target news and other speech that is perceived as "biased." While these laws indisputably serve important state interests, when they are used outside of the purely commercial context, they can be deployed in attempts to suppress news and other speech.

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[26] David Shepardson, *FCC Reinstates Complaints Over ABC Presidential Debate, Harris TV Appearances*, Reuters (Jan. 23, 2025), https://www.reuters.com/business/media-telecom/fcc-reinstates-complaints-over-abc-presidential-debate-harris-tv-appearances-2025-01-22/.
[27] Aja Seldon, *KCBS Under Investigation for Alleged Broadcast of ICE Agent Locations in San Jose*, KTVU Fox 2 (Feb. 7, 2025), https://www.ktvu.com/news/kcbs-fcc-investigation-live-broadcast-ice-activity-san-jose.
[28] Benjamin Mullin & David McCabe, *F.C.C. Chair Orders Investigation Into NPR and PBS Sponsorships*, N.Y. Times (Jan. 30, 2025), https://www.nytimes.com/2025/01/30/business/media/npr-pbs-fcc-investigation.html.
[29] Taylor Telford, *FCC Chair Threatens to Block Mergers of Media Companies Engaged in DEI*, Wash. Post (Mar. 21, 2025), https://www.washingtonpost.com/business/2025/03/21/fcc-dei-diversity-mergers-acquisitions-ma/.
[30] *Hunger in America*, 20 F.C.C.2d at 151. The FCC emphasized that it would avoid "efforts to establish news distortion in situations where Government intervention would constitute a worse danger than the possible rigging itself." *Id.*
[31] 603 U.S. 707, 741–42 (2024).

For instance, in April 2020, a small Washington state nonprofit called the Washington League for Increased Transparency and Ethics, or WASHLITE, filed a lawsuit against Fox News under the state's consumer protection law for allegedly downplaying the threat posed by COVID-19.[32] Noting that the government may not "prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," the court granted Fox's motion to dismiss on First Amendment grounds.[33]

More recently, Texas Attorney General Ken Paxton initiated several investigations and lawsuits under the state's Deceptive Trade Practices Act based on similarly non-commercial speech. The Reporters Committee has filed numerous friend-of-the-court briefs highlighting the danger in the state's theory that non-commercial speech can somehow be legally "deceptive" under consumer protection laws.[34] As we noted in one brief, "repackag[ing] ideological fairness as consumer fairness" can "chill the publication of information and the expression of views" with which a public official or litigant disagrees.[35]

Similarly, prior to taking office, President Donald Trump brought a consumer protection case in federal court in Texas based on the same 60 Minutes interview discussed in Part II above.[36] President Trump sued CBS in October 2024, arguing that the alleged editing of the interview in a manner he considered beneficial to the former vice president misled voters in Texas, in violation of the Texas deceptive practices law.[37] President Trump is currently seeking $20 billion in damages.[38]

CBS's motion to dismiss the case is pending, but were such a claim to survive, the implications and chilling effect would be staggering. Any news report on any election would be subject to potentially ruinous lawsuits by any candidate who felt that the coverage was unfair. As the Supreme Court cautioned in a case upholding the application of a city ordinance barring gender-designated employment advertising to a newspaper's classified section, a too-loose

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[32] *See* Gabe Rottman, *Fox News Lawsuit Would Strip First Amendment Protection from Cable News and the Internet*, Reporters Comm. for Freedom of the Press (May 18, 2020), https://www.rcfp.org/fox-news-washlite-lawsuit-analysis/.

[33] Order Granting Mot. to Dismiss at 5, *Wash. League for Increased Transparency & Ethics v. Fox Corp.*, No. 20-2-07428-4 (Wash. Super. Ct., King Cnty. May 27, 2020) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

[34] Gabe Rottman, *Another Texas Consumer-Protection Inquiry Threatens First Amendment Rights*, Reporters Comm. for Freedom of the Press (July 22, 2024), https://www.rcfp.org/mmfa-v-paxton/ (collecting briefs).

[35] Br. of Amicus Curiae Reporters Comm. for Freedom of the Press in Supp. of Appellees at 1, *Media Matters for Am. v. Paxton*, No. 24-7059 (D.C. Cir. July 17, 2024), https://www.rcfp.org/briefs-comments/media-matters-v-paxton/.

[36] *See* Complaint, *Trump v. CBS Broad. Inc.*, No. 24-cv-00236 (N.D. Tex. Oct. 31, 2024).

[37] *Id.*

[38] *See* Gene Maddaus, *Trump Doubles Down on CBS '60 Minutes' Lawsuit, Now Wants $20 Billion*, Variety (Feb. 7, 2025), https://variety.com/2025/tv/news/trump-doubles-down-cbs-60-minutes-20-billion-lanham-act-1236301341/.

commercial speech standard could ensnare all aspects of a news organization's operations, "from the selection of news stories to the choice of editorial position."[39]

Importantly, the proliferation of such cases – the "repackaging" of consumer fairness claims to address perceived bias in news – is not limited to Texas or Washington. For instance, states like California and New York have sought to interfere in and influence First Amendment-protected decisions by technology platforms in how they moderate "hateful conduct" or enforce policies regarding "extremism or radicalization."[40]

Similarly, the Reporters Committee filed a friend-of-the-court brief in a challenge to subpoenas issued by San Francisco City Attorney David Chiu to U.S. News and World Report under the California Unfair Competition Law.[41] The subpoenas sought information related to core editorial choices, and cited concerns about perceived "bias" in the publication's hospital rankings, including failures to include "measures of health equity."[42] As we again argued in our brief in support of U.S. News, the use of state consumer protection laws to target certain viewpoints is dangerous and flatly violative of the First Amendment.

IV. The Associated Press case

One other recent example of retaliation against a news organization based on viewpoint is the ongoing access dispute at the White House involving the Associated Press.

There, the White House has been explicit in its desire to punish the AP for its editorial choice to continue to use the term Gulf of Mexico while acknowledging President Trump's executive order changing the name to the Gulf of America. For instance, in an email to the AP, Chief of Staff Susie Wiles expressly stated that the access restrictions were imposed in response to the AP's guidance vis-à-vis the gulf and that Wiles "remain[ed] hopeful that the name of the [gulf] will be appropriately reflected in the Stylebook where American audiences are concerned."[43] The Associated Press has explained that, due to its significant international audience, it would be confusing for readers were it to change the name of the body of water, as the gulf continues to be known as the Gulf of Mexico overseas.[44] In other words, this is a classic dispute over editorial viewpoint.

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[39] *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 385 (1973).
[40] *See, e.g.*, Br. of Amicus Curiae the Reporters Comm. for Freedom of the Press in Supp. of Pls.-Appellees, *Volokh v. James*, No. 23-356 (2d Cir. Sept. 26, 2023), https://www.rcfp.org/briefs-comments/volokh-v-james/; *9th Circuit: Provisions of California's Content-Moderation Law Violate First Amendment*, Reporters Comm. for Freedom of the Press (Sept. 11, 2024), https://www.rcfp.org/x-v-bonta-ninth-circuit-ruling/.
[41] *See* Br. of Amici Curiae Media Orgs. in Supp. of Pl.'s Mot. for Prelim. Inj. & in Opp'n to Def.'s Mot. to Dismiss & Strike, *U.S. News & World Report, L.P. v. Chiu*, No. 24-cv-00395 (N.D. Cal. Mar. 20, 2024), https://www.rcfp.org/briefs-comments/us-news-world-report-v-chiu/.
[42] *Id.* at 1, 8.
[43] Amended Complaint at 4, *Associated Press v. Budowich*, No. 25-cv-00532 (D.D.C. Mar. 3, 2025).
[44] *Id.* at 3–4.

Given the threat such retaliation poses to all news organizations, even outlets that disagree with the AP's editorial choice on this front have uniformly warned that the White House's actions broadly threaten the freedom of any outlet to report the news as it sees it. For instance, a Newsmax spokesperson said, "We can understand President Trump's frustration because the media has often been unfair to him, but Newsmax still supports the AP's right, as a private organization, to use the language it wants to use in its reporting."[45] And the spokesperson hit the nail on the head in terms of why this is – "a future administration may not like something Newsmax writes and seek to ban us."[46]

The broad support among the press corps for the AP recalls the quick response during the Obama administration to its attempt to exclude Fox News from a pool interview on the theory that Fox is "not a news network."[47] Backlash from Fox's peer organizations in the press room swiftly prompted the White House to reverse course in that case.

To be sure, certain legal and constitutional issues in the AP case are complicated. Key to the case is that the White House has opened its facilities up to press access and that, once it has done so, it may not restrict access based on the viewpoint of the restricted outlet.[48] What is not complicated, however, is the danger of permitting the state to retaliate against news organizations for making an editorial choice the government disagrees with.

And the nature of that danger is likewise simple. As Justice White put it in *Miami Herald v. Tornillo*, a foundational case refusing to recognize a legally enforceable right of access to a newspaper's editorial pages, "We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers."[49] In America, by contrast to those countries, we protect a free press, "whether fair or unfair."[50] Retaliation under the law against news organizations for their editorial viewpoint is therefore repugnant to the Constitution.

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[45] Ted Johnson, *Fox News and Newsmax Among News Outlets Urging White House to Lift Ban on Associated Press Over Continued References to "Gulf of Mexico"*, Deadline (Feb. 20, 2025), https://perma.cc/8NTU-TXFK.

[46] *Id.*

[47] *See* Jim Rutenberg, *Behind the War Between White House and Fox*, N.Y. Times (Oct. 22, 2009), https://bit.ly/3CZoRk2.

[48] *See* Br. of the Reporters Comm. for Freedom of the Press as Amicus Curiae in Supp. of Pl.'s Mots. for a Temporary Restraining Order & Prelim. Inj. at 11, *Associated Press v. Budowich*, No. 25-cv-00532 (D.D.C. Feb. 24, 2025), https://www.rcfp.org/briefs-comments/associated-press-v-budowich/ ("For the Government to change the nature of a forum in order to deny access to a particular speaker or point of view surely would violate the First Amendment." (quoting *Am. Freedom Def. Initiative v. WMATA*, 901 F.3d 356, 365 (D.C. Cir. 2018)).

[49] 418 U.S. 241, 259 (1974) (White, J., concurring).

[50] *Id.* at 258.

V. Conclusion

One First Amendment first principle is that the government must not be able to use its vast power to pick favorites or punish perceived enemies in public debate.[51] Official discrimination based on disfavored viewpoints is particularly dangerous because, if permitted, public officials can put their thumbs on the scale – in their own favor. For that reason, the government has no authority to, as Justice Antonin Scalia phrased it, "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."[52]

In addition to the concerns over jawboning that prompted this hearing, there are other developments at the federal and state level that pose a similar threat of viewpoint discrimination. We urge members of the subcommittee to consider these issues as part of today's hearing.

[51] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").
[52] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).