

BAD THINGS HAPPENED: METAPHORICAL FINGERPRINTS, CONSTELLATIONS OF EVIDENCE, AND “GUILT *FOR* ASSOCIATION”¹

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INTRODUCTION

In November 2014, the United States Supreme Court denied certiorari in *Blum v. Holder*,² a lawsuit brought by the Center for Constitutional

1. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 925 (1982). *See infra* note 92.

* I am both the author of this Article and was a defendant-appellant in the case it discusses.

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Rights (CCR) challenging the federal Animal Enterprise Terrorism Act (AETA) as a violation of the First Amendment. The plaintiffs were five animal rights activists with long histories of participating in peaceful protests and nonviolent civil disobedience. They argued that the AETA is overbroad, vague, and discriminatory on the basis of content and viewpoint.³

The first section of the AETA punishes “caus[ing] the loss of any real or personal property . . . used by an animal enterprise.”⁴ Plaintiffs argued that the statute makes no distinction between loss caused by unlawful or *unprotected* activity, such as arson and other property damage, and loss caused by boycotts and other constitutionally *protected* activity.⁵ The briefing throughout the case largely debated whether personal property includes profits, as distinguished from physical property.⁶ If it does, this lends credence to plaintiffs’ claim that the plain language of the AETA

2. *Blum v. Holder*, 744 F.3d 790, 792 (1st Cir. 2014), *cert. denied*, 135 S. Ct. 477 (2014).

3. A panel of the First Circuit Court of Appeals affirmed the dismissal of *Blum* for lack of standing, holding *sua sponte* that plaintiffs’ prosecution under the AETA was not “certainly impending.” *See generally* *Clapper v. Amnesty Int’l U.S.A.*, 133 S. Ct. 1138, 1148 (2013) (holding that a “threatened injury must be certainly impending” to establish Article III standing). The Supreme Court petition for certiorari in *Blum* sought to reverse, via a GVR order, this unprecedented and, according to plaintiff-appellants, erroneous, threshold for standing to bring a pre-enforcement challenge to a criminal law. (*Clapper* did not involve a challenge to a criminal statute.) *See also* *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2338, 2343 (2014) (determining that Article III standing was met when petitioners brought a pre-enforcement challenge to an Ohio law prohibiting “false statements” during a political campaign). The merits of the First Amendment challenge in *Blum* were never addressed.

4. Animal Enterprise Terrorism Act, 18 U.S.C. § 43(a)(2)(A) (2012). The loss must be in connection with the purpose of “damaging or interfering with the operations of an animal enterprise.” *Id.* § 43(a)(2). The Animal Enterprise Terrorism Act (AETA) defines an “animal enterprise” as “(A) a commercial or academic enterprise that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research, or testing; (B) a zoo, aquarium, animal shelter, pet store, breeder, furrier, circus, or rodeo, or other lawful competitive animal event; or (C) any fair or similar event intended to advance agricultural arts and sciences.” *Id.* § 43(d)(1). “This definition is so broad as to include as ‘animal enterprises’ all public and private universities and schools with cafeterias, sports arenas with meat vendors, and grocery and retail stores that sell meat or leather.” Complaint for Declaratory and Injunctive Relief at 14, *Blum v. Holder*, 930 F. Supp. 2d 326 (D. Mass. 2013) (No. 11-12229-JLT). The law also punishes loss to any “person or entity having a connection to, relationship with, or transactions with an animal enterprise.” 18 U.S.C. § 43(a)(2)(A). Given this expansiveness, it is hard to imagine to which persons or entities the AETA does *not* apply.

5. Petition for Writ of Certiorari at 6–7, 9, 11, *Blum v. Holder*, 135 S. Ct. 477 (2014) (No. 14-133).

6. Appellants’ Opening Brief at 19–30, *Blum v. Holder*, 744 F.3d 790 (1st Cir. 2014) (No. 13-1490). The First Circuit Court of Appeals did not decide “whether plaintiffs’ interpretation of the phrase ‘personal property’ in subsection (a)(2)(A) to include lost profits was reasonable” Petition for Writ of Certiorari at 11, *Blum*, 135 S. Ct. 477 (No. 14-133). *Cf.* Trial Transcript, Day 10 at 47, *United States v. Fullmer*, 584 F.3d 132 (3d Cir. 2009) (No. 06-4211) (recording defense motions for judgments of acquittal, including prosecutor arguing that “the loss of property includes lost profits”).

proscribes more than vandalism, theft, and other harm to tangible property, and further legitimizes their alleged chill from documenting agricultural conditions, organizing lawful protests, speaking at public events, and other protected expression aimed at harming the profits of animal enterprises.

One plaintiff alleged a distinct chill. She argued the AETA dissuaded her from engaging in a course of conduct that included both advocacy of illegal tactics and protests against specific individuals because, while each of these actions is constitutionally protected on its own,⁷ together they violate the AETA.⁸ These allegations were directed, in particular, at § (a)(2)(B) of the statute, which punishes “intentionally plac[ing] a person in reasonable fear of [death or bodily injury] . . . by a course of conduct involving threats, . . . harassment, or intimidation”⁹

This plaintiff had good reason to fear prosecution under this section of the law. Five years before *Blum* was filed, in *United States v. Fullmer*, she had been convicted of conspiring to violate the AETA’s predecessor statute, the Animal Enterprise Protection Act (AEPA), for precisely this conduct: speech in the course of a campaign that included both advocacy of illegal tactics and protests against individuals.¹⁰ In *Fullmer*, this entire multi-year campaign was treated by the Third Circuit Court of Appeals as an illegal conspiracy to violate the AEPA.¹¹ Additionally, the Third Circuit ruled that protest chants used by this *Blum* plaintiff, then a *Fullmer* defendant, were unprotected *true threats*—despite the fact that a Massachusetts court had previously ruled that the exact same chants were protected by the First Amendment and dismissed state indictments against this plaintiff.¹² For her conviction under the AEPA and related charges, this *Blum* plaintiff was sentenced to 52 months in federal prison, 3 years of probation, and ordered

7. *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (holding that advocacy of unlawful action is protected by the First Amendment unless it imminently incites lawless action); *Frisby v. Schultz*, 487 U.S. 474, 480–81, 487–88 (1988) (holding that picketing on a public street in a residential neighborhood is protected by the First Amendment, but residential picketing may be regulated by time, place, and manner restrictions). See also *Dean v. Byerley*, 354 F.3d 540, 549–51 (6th Cir. 2004) (holding that, “[a]lthough the government may restrict [the right to engage in targeted residential picketing] through appropriate regulations, that right remains unfettered unless and until the government passes such regulations”).

8. Petition for Writ of Certiorari at 8, *Blum*, 135 S. Ct. 477 (No. 14-133).

9. Animal Enterprise Terrorism Act, 18 U.S.C. § 43(a)(2)(B).

10. *United States v. Fullmer*, 584 F.3d 132, 137, 161 (3d Cir. 2009). The Animal Enterprise Protection Act (AEPA) was broadened and renamed the Animal Enterprise Terrorism Act in 2006. Under the AEPA, the offense was “animal enterprise terrorism.” Animal Enterprise Protection Act of 1992, Pub. L. No. 102-346, 106 Stat. 928 (current version at 18 U.S.C. § 43 (2012)).

11. *Fullmer*, 584 F.3d at 160–62.

12. *Id.* at 157 n.11. See also *Commonwealth v. Gazzola*, No. 02-11098, 2004 Mass. Super. LEXIS 28, *14–16 (Mass. Sup. Ct. Feb. 6, 2004).

to pay \$1,000,001.00, jointly and severally with her codefendants, in restitution.¹³ Thus, in *Blum*, this plaintiff alleged that her speech had been chilled both because she was uncertain whether the speech she wished to engage in would be deemed protected and because the AETA unconstitutionally discriminates on the basis of content and viewpoint *within* the unprotected category of true threats.¹⁴

That plaintiff in *Blum* and defendant in *Fullmer* was me.

There has been limited scholarly treatment of the grave First Amendment dangers raised by the Third Circuit's affirming my and my codefendants' (collectively, the SHAC 7) convictions. Though a smattering of law review articles have discussed the case,¹⁵ none has thoroughly probed the depths of the First Amendment problems in *Fullmer*—namely: (1) the Third Circuit's reckless use of *conspiracy* to criminalize an entire protest campaign; (2) the court's use of a protest campaign wherein some individuals committed illegal acts as *context* to deny First Amendment protection to nonthreatening speech and expressive activity; and, (3) an extensive factual record that belies many of the Third Circuit's conclusions. Meanwhile, *Fullmer* has not gone quiet. Indeed, in *Blum* both the district and appellate courts repeated *Fullmer*'s sweeping and unsupported claims that the SHAC 7 defendants' speech was evidence of illegal activity.¹⁶

13. *Fullmer*, 584 F.3d at 151, 165.

14. Appellants' Opening Brief at 49–50, 54–55, *Blum v. Holder*, 744 F.3d 790 (1st Cir. 2014) (No. 13-1490). See also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–86 (1992) (explaining that the government cannot proscribe specific viewpoints within unprotected categories of speech).

15. The only other in-depth review of *Fullmer* is Michael Hill, *United States v. Fullmer and the Animal Enterprise Terrorism Act: 'True Threats' to Advocacy*, 61 CASE W. RES. L. REV. 981 (2011). A handful of books and articles touch upon *Fullmer* while discussing more broadly the criminalization of animal rights and environmental activism. See DARA LOVITZ, MUZZLING A MOVEMENT: THE EFFECTS OF ANTI-TERRORISM LAW, MONEY, & POLITICS ON ANIMAL ACTIVISM, (2010); WILL POTTER, GREEN IS THE NEW RED: AN INSIDER'S ACCOUNT OF A SOCIAL MOVEMENT UNDER SIEGE, (2011); Lee Hall, *Disaggregating the Scare from the Greens*, 33 VT. L. REV. 689, 690–94 (2009); Joumana King, *The Animal Enterprise Terrorism Act: Legislation in Need of Revision*, 3 PITT. POL. REV. 64, 66–67 (2011); Will Potter, *The Green Scare*, 33 VT. L. REV. 671, 676–78 (2009); Odette J. Wilkens, *The Animal Enterprise Terrorism Act – An Unjust Law and the Case for Repeal*, 54 S. TEX. L. REV. 535, 551–52 (2012); Jared S. Goodman, Note, *Shielding Corporate Interests from Public Dissent: An Examination of the Undesirability and Unconstitutionality of 'Eco-Terrorism' Legislation*, 16 J.L. & POL'Y 823, 839–43 (2008); see also Enrique Armijo, *Kill Switches, Forum Doctrine, and the First Amendment's Digital Future*, 32 CARDOZO ARTS & ENT. L.J. 411, 460 (2014).

16. “Gazzola was convicted in 2004 under AETA's predecessor statute, the Animal Enterprise Protection Act ('AEPA'), for making true threats against individuals and for *planning and executing illegal activities . . .*” *Blum v. Holder*, 744 F.3d 790, 793 (1st Cir. 2014) (emphasis added) (citing *Fullmer*, 584 F.3d at 157), *cert. denied*, 135 S. Ct. 477 (2014).

That Gazzola previously engaged in and was convicted under AEPA for plainly illegal conduct does not help her claim that she would be prosecuted for legal expressive activities. Gazzola's previous actions went well beyond expressing

Almost a century ago, during the first Red Scare, the fervor of war and anti-socialist panic led a nation to prosecute hundreds of anti-war agitators based on nothing more than their words and associations—and the Supreme Court to (in)famously affirm the convictions it reviewed.¹⁷ Justice Brandeis and Justice Holmes are lauded for their (eventual) bold dissents from this line of cases and for articulating principles that ultimately prevailed and created robust protections for speech.¹⁸ Who will dissent from the Green Scare?¹⁹

Activists and lawyers have been sounding alarms and defending against repression of the animal rights and environmental movements for over a decade.²⁰ But they have been almost completely ignored by the scholarly First Amendment community. Despite the seriousness of the charges in *Fullmer*—terrorism—the nature of the evidence against the defendants—speech and expressive activity—and the gravity of the consequences—multi-year prison sentences and excessive financial

general support for illegal action by others. The Third Circuit found that Gazzola and her co-defendants “coordinated and controlled SHAC’s [illegal] activities,” engaged in “[d]irect action” and “intimidation and harassment,” and “participated in illegal protests, in addition to orchestrating the illegal acts of others.”

Id. at 802 (alterations in original) (citing *Fullmer*, 584 F.3d at 155–56). “Gazzola was arrested and convicted under the AEPA in 2004 for her involvement with SHAC, including for making true threats against individuals and for planning and executing SHAC’s illegal activities.” *Blum v. Holder*, 930 F. Supp. 2d 326, 332 (D. Mass. 2013) (citing *Fullmer*, 584 F.3d at 157), *aff’d*, 744 F.3d 790 (1st Cir. 2014), *cert. denied*, 135 S. Ct. 477 (2014). In its opposition to CCR’s certiorari petition in *Blum*, the government disingenuously cited *Fullmer* to claim that plaintiff Gazzola “was previously convicted for . . . a bombing” Brief for the Respondent in Opposition at 3, *Blum v. Holder*, 135 S. Ct. 477 (2014) (No. 14-133). They did so even though, as shown *infra* at text accompanying note 115 through note 117, the extent of Gazzola’s involvement in the (smoke) bombing was her being interviewed about it on a radio program.

17. *Schenck v. United States*, 249 U.S. 47, 49, 53 (1919); *Debs v. United States*, 249 U.S. 211, 212, 217 (1919); *Frohwerk v. United States*, 249 U.S. 204, 205–06, 210 (1919); *Abrams v. United States*, 250 U.S. 616, 616–17, 624 (1919); *Gitlow v. New York*, 268 U.S. 652, 654–56, 672 (1925).

18. *Abrams v. United States*, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting); *Gitlow v. New York*, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting).

19. The Green Scare began around 2001 and is widely understood to refer to corporate and government repression of the animal rights and radical environmental movements in the form of designer criminal legislation, civil SLAPP suits, trumped up charges and excessive sentences, criminal investigations of legal activist activity, and the recasting of dissent as “terrorism.” See POTTER, *supra* note 15.

20. Along with other advocacy, the Center for Constitutional Rights, the National Lawyers Guild, and the First Amendment Lawyers Association filed amicus briefs in *Fullmer*. Brief for Center for Constitutional Rights, et al. as Amici Curiae Supporting Defendant-Appellants, *Fullmer*, 584 F.3d 132 (06-4211); Brief for Center for Constitutional Rights & First Amendment Lawyers Ass’n as Amici Curiae Supporting Petitioners, *Kjonaas v. United States*, 562 U.S. 1273 (2011) (10-7187) (mem.); Brief for National Lawyers Guild as Amici Curiae Supporting Petitioners, *Kjonaas*, 562 U.S. 1273 (10-7187) (mem.).

penalties—First Amendment scholars have been silent. Law students, lawyers, activists, and a journalist have written the few law review articles addressing the case.²¹ Meanwhile, industries and legislatures continue working to criminalize animal rights activism in an effort to silence a movement that challenges the inviolability of human dominance over, and violence against, all other species on Earth.²²

In March 2015, a federal court rejected another First Amendment challenge to the Animal Enterprise Terrorism Act. In *United States v. Johnson*, defense attorneys, including the Center for Constitutional Rights, moved to dismiss animal enterprise terrorism charges against two activists alleged to have released, and conspired to release, thousands of mink and foxes from fur farms in rural Illinois.²³ The motion to dismiss argued that the AETA is unconstitutionally vague and overbroad, and that charging the defendants as terrorists for allegedly freeing animals was an unconstitutional denial of substantive due process.²⁴ In July 2015, two more activists were indicted on AETA charges for allegedly freeing animals from fur farms and vandalizing property.²⁵

As courts allow the AETA to stand, the way that such designer legislation was used in *Fullmer* is instructive. It reveals the reality of what activists face and fear due to the very existence of the AETA.

21. See *supra* Articles cited in note 15.

22. Particularly in the form of state-level *ag-gag* legislation, which prohibits whistleblowing and undercover investigations in animal agricultural facilities and slaughter plants. *E.g.*, IOWA CODE § 16.717A.3A (2015) (prohibiting “obtain[ing] access to an agricultural production facility by false pretenses” and knowingly making “a false statement or representation” as part of an employment application “with an intent to commit an act not authorized by the owner of the agricultural production facility”).

23. *United States v. Johnson*, 14-cr-390, 2015 WL 1058087, at *2–3 (N.D. Ill. Mar. 5, 2015). Animals are considered property.

24. Defendants’ Motion to Dismiss Indictment at 1–2, *United States v. Johnson*, No. 14-cr-390 (N.D. Ill. Nov. 6, 2014).

25. Grand Jury Indictment at 3–6, *United States v. Buddenberg*, No. 3:15-cr-01928-LAB (S.D. Cal. 2015). See also SUPPORT NICOLE & JOSEPH, supportnicoleandjoseph.com (last visited May 27, 2016) (explaining details of Joseph Buddenberg and Nicole Kissane’s case and rallying support for them); Glenn Greenwald, *Dylann Roof Is Not a “Terrorist”—But Animal Rights Activists Who Free Minks from Slaughter Are*, INTERCEPT (July 28, 2015, 2:37 PM), <https://theintercept.com/2015/07/28/dylan-roof-terrorist-animal-rights-activists-free-minks/> (discussing Buddenberg and Kissane’s case and contrasting it with the response to a mass murder at an historic Black church by a white supremacist gunman).

I. OVERVIEW: CAMPAIGN AND CASE

A. The SHAC Campaign

On May 20, 2004,²⁶ seven animal rights activists and a nonprofit organization were federally indicted for their roles in a campaign to close the animal testing lab Huntingdon Life Sciences (HLS).²⁷ The Stop Huntingdon Animal Cruelty (SHAC) campaign was launched in England in 1999 and ultimately spread to almost 20 countries.²⁸ The United States arm of the campaign, in which the defendants were involved, began in 2000.²⁹ HLS had been exposed in five undercover investigations, wherein activists and a journalist documented what occurred inside of HLS's facilities in both England and New Jersey, including both legal and illegal violence against animals.³⁰ The defendants were known as the SHAC 7.³¹

SHAC sought to drive HLS out of business through a strategy of secondary targeting, personal protest, siege mentality, and illegal direct action.³² By targeting companies affiliated with HLS—its investors, customers, stockbrokers, insurers, service providers, et cetera—and demanding that these companies stop doing business with the lab, SHAC aimed to starve HLS of necessary services and capital. By protesting not

26. Defendants were arrested on May 26, 2004. Robert Hanley, *Seven Animal Rights Advocates Arrested*, N.Y. TIMES (May 27, 2004), http://www.nytimes.com/2004/05/27/nyregion/seven-animal-rights-advocates-arrested.html?_r=0.

27. On September 16, 2004, a superseding indictment added a sixth count against five of the defendants. Charges against the seventh defendant, John McGee, were dropped by the government in advance of trial.

28. *United States v. Fullmer*, 584 F.3d 132, 138 (3d Cir. 2009).

29. Gov't Ex. 1001, *Fullmer*, 584 F.3d 132 (No. 06-4211). The United States campaign did not begin in earnest until 2001, as is apparent from the dearth in the record of United States protest reports before late winter 2001.

30. In the United States, for example, the only federal law that regulates the use of animals in research is the Animal Welfare Act (AWA). Animal Welfare Act, 7 U.S.C. §§ 2123–59 (2012). However, the AWA regulates only such things as adequate food, water, space, exercise, and veterinary care; it places no restrictions whatsoever on what can be done to animals in actual experiments. *Id.* Moreover, the AWA covers only warm-blooded animals and explicitly excludes from its definition of “animal” “birds, rats . . . , mice . . . , horses not used for research purposes, and other farm[ed] animals.” *Id.* § 2132(g). These animals, including fish, constitute the overwhelming majority of the animals used in research. *See, e.g., Questions and Answers About Biomedical Research*, HUMANE SOC'Y U.S., (Sept. 16, 2013), http://www.humanesociety.org/issues/biomedical_research/qa/questions_answers.html (noting that rats and mice make up 85–90% of the animals used in research). Thus, animals in labs are subjected to massive amounts of violence that does not run afoul of the AWA and is perfectly legal.

31. Following the dismissal of charges against John McGee, SHAC 7 referred to the six remaining individual defendants and the nonprofit corporate defendant, Stop Huntingdon Animal Cruelty, USA, Inc. (SHAC USA).

32. *See infra* note 123 (defining and further discussing *direct action*).

only against monolithic corporations, but also against the employees of HLS and affiliated companies, SHAC sought to pierce the corporate façade and more directly pressure corporate decisionmakers. By branching out beyond traditional protests to engage in residential picketing, in-office disruptions, phone blockades, and a variety of other protest tactics, SHAC aimed to create a siege mentality, so that the annoyance and inconvenience of the SHAC campaign were constant features in the lives of those who worked for HLS and affiliated companies.³³ And by openly expressing support for illegal activity, including vandalism and liberating animals, SHAC sought to up the financial cost of doing business with HLS or, in the case of HLS itself, the cost of being in the business of animal testing—and to applaud those who directly saved lives. SHAC voiced its support for “any action that does not harm any animal, human or non human [sic]”³⁴—essentially, anything short of physical violence.

Between the late winter of 2001 and May 2004,³⁵ beginning with HLS’s largest investor and primary financial backer, Stephens Inc.,³⁶

33. See, e.g., Superseding Indictment at 11, *United States v. Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2 (D.N.J. Sept. 16, 2004), *aff’d sub nom. United States v. Fullmer*, 584 F.3d 132 (3d Cir. 2009) (“[W]e’ll be at their offices, at their doorsteps, on their phones or in their computers. There will be no rest for the wicked.”); *Report of Huntingdon Life Sciences Protest*, ANIMALS IN PRINT, (Nov. 7, 2001), <http://www.all-creatures.org/aip/nl-7nov2001.html> (“[A]ctivists . . . vow to be in their offices, on their phones, at their doorsteps and at the offices of their most significant business affiliates until they sever their ties with HLS.”).

34. Gov’t Ex. 1004, *Fullmer*, 584 F.3d 132 (No. 06-4211). See also *Fullmer*, 584 F.3d at 149 (“Following [a smoke bombing of HLS’s insurance broker], SHAC posted the following statement on its website: ‘. . . SHAC is not affiliated with the attack, although we do support direct action as long as it does not hurt any animal, human, [sic] or nonhuman.’”).

35. The campaign continued after the May 2004 indictment. On August 12, 2014, SHAC in the United Kingdom announced an official end to the campaign. *SHAC Ends, We Made History . . . The Future Is Ours*, EARTH FIRST, (Aug. 12, 2014) <http://earthfirstjournal.org/newswire/2014/08/12/shac-ends-we-made-history-the-future-is-ours/>. See also Paul Peachy, *Animal Rights Group Ends 15-Year Campaign Against Experiments at Huntingdon*, INDEPENDENT, (Aug. 23, 2014), <http://www.independent.co.uk/news/uk/crime/animal-rights-group-ends-15year-campaign-against-experiments-at-huntingdon-9687843.html>. However, the bulk of the campaign, the acts covered by the indictment, and the speech and activity presented as evidence in the case (with one notable exception), occurred before May 20, 2004. The one exception is Gov’t Ex. 1293A, *Fullmer*, 584 F.3d 132 (No. 06-4211), a black-and-white printout of a page from the SHAC USA website entered into evidence ostensibly to show a hyperlink to the disclaimer on the website. Trial Transcript, Day 2 at 108–10, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Mark Bibi) (reading the SHAC USA disclaimer on Gov’t Ex. 1293A). Prosecutor Charles B. McKenna dropped the exhibit on the defense table on the day it was entered into evidence. *Id.* at 108 (McKenna: “Mr. Bibi, I’d like to show you now what has been marked for identification as 1293 A [sic]. Counsel, this is a document I gave out this morning, so it’s not going to be in the book but I have copies. I gave you copies before.”). It was the only exhibit not amongst the thousands of web printouts and other documents handed over in discovery. Prominently displayed, more visible than anything else on the page (which is mostly greyed out due to the poor quality of the printout), is a banner that reads “F&@# AL-QAEDA! we got ourselves SHAC USA!” and

activists around the country campaigned against dozens of HLS's business affiliates, until each company severed its ties with the lab. Other protest targets included HLS's, and the world's largest, insurance broker, Marsh & McLennan; HLS's auditor, Deloitte & Touche; stockbrokers Charles Schwab and E*Trade, as well as various market makers; the investment firm Quilcap; pharmaceutical company Forest Labs and biotech firm Chiron corporation, both clients of HLS; and HLS's phone and Internet service provider, Focal Communications.

Three of the individual defendants—Kevin Kjonaas, Lauren Gazzola, and Jacob Conroy—lived together between 2001 and 2004 in a series of houses in Philadelphia, New Jersey, and California. From those locations

shows an image of a soldier carrying an automatic weapon. Under the banner was an editorial—which was not shown to the jury, but which is available archived at <http://web.archive.org/web/20040827094618/http://shacamerica.net/indictments/index.htm> (last visited May 28, 2016)—mocking the government for spending the time

and resources to go after SHAC activists as “terrorists,” in the form of the SHAC 7 prosecution, while at the same time impressing upon the public grave threats of impending attacks by foreign extremists. For an archived display of the banner, see <http://web.archive.org/web/20040604213327/http://www.shacamerica.net/> (last visited May 28, 2016). The editorial makes clear that the “Al-Qaeda/SHAC USA” banner was published *after* the defendants were indicted, thus it could not properly be evidence that supported the charges against them. Moreover, there were numerous exhibits already in evidence that showed the hyperlink to the SHAC USA disclaimer. See, e.g., Gov’t Ex. 1064A, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov’t Ex. 1203A, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov’t Ex. 1204A, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov’t Ex. 1207A, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov’t Ex. 1216A, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov’t Ex. 1217A, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov’t Ex. 1225A, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov’t Ex. 1226A, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov’t Ex. 1232A, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov’t Ex. 1233, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov’t Ex. 1233A, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov’t Ex. 1234A, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov’t Ex. 1236A, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov’t Ex. 1240A, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov’t Ex. 1242, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov’t Ex. 1245A, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov’t Ex. 1264, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov’t Ex. 1268A, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov’t Ex. 1285A, *Fullmer*, 584 F.3d 132 (No. 06-4211). Indeed, nearly every exhibit showing the homepage of or news postings on the website would have displayed the hyperlink to SHAC USA’s disclaimer had the government printed better quality copies. The Al-Qaeda/SHAC USA exhibit was gratuitous and prejudicial. Unfortunately, as with a number of problematic pieces of evidence and testimony, defense attorneys failed to object.

36. Widespread protest activity in the United Kingdom had followed undercover investigations inside Huntingdon’s New Jersey facility and one of its United Kingdom facilities, by People for the Ethical Treatment of Animals and a British journalist, respectively. All of this caused HLS significant financial woes. Stephens Inc. was part of a consortium of financial backers that stepped in to save the lab from bankruptcy after protests drove an earlier lender, the Royal Bank of Scotland, to cancel a previous loan. *Animal Rights Activists Target Stephens Group*, ARK. BUS., (Feb. 12, 2001), <http://www.arkansasbusiness.com/article/62492/animal-rights-activists-target-stephens-group>; Ian McKerron & David Harrison, *Animal Testing Lab Faces Ruin as Bank Cancels Overdraft*, TELEGRAPH, (Jan. 14, 2001), <http://www.telegraph.co.uk/news/uknews/1314750/Animal-testing-lab-faces-ruin-as-bank-cancels-overdraft.html>.

they published a website, a quarterly paper newsletter, and eventually an e-newsletter; researched and selected targets of the campaign;³⁷ created and distributed leaflets, placards, and merchandise (such as t-shirts, buttons, and campaign videos); sent press releases, conducted interviews, and collected press clippings; and organized national demonstrations and conferences.

Three other defendants—Joshua Harper, Andrew Stepanian, and Darius Fullmer—were local organizers in Seattle, Long Island, and New Jersey, respectively, and had long been prominent figures in the grassroots animal rights movement. Kjonaas, Gazzola, Conroy, Harper, Stepanian, and Fullmer had known or known of each other for years, were friends or had numerous mutual friends and acquaintances, and had worked on some of the same campaigns. The last defendant, John McGee, was unknown to all of the defendants except Fullmer, who knew him nominally through animal rights activities in New Jersey. Charges against McGee were dropped by the government in advance of trial,³⁸ even though—or perhaps, strategically, *because*—he was the only defendant accused of committing an independent illegal act (other than trespasses at protests). McGee was accused of slashing tires and spray-painting the home of an HLS employee.³⁹

The website was the central information hub of the campaign. It contained information about the undercover investigations into HLS,⁴⁰ a short history of the campaign,⁴¹ an explanation of the campaign's strategy and its ideological support for unlawful tactics,⁴² a list of the current targets

37. In general, Kjonaas, Gazzola, and Conroy identified what they believed to be the most strategic protest targets. However, SHAC activists around the country often developed their own campaigns or held sporadic protests against other companies, either because those activists believed those companies to be worthwhile targets or because the primary targets of the campaign at any particular time were not local. The campaign against Forest Labs, for example, was prompted by activists in Ohio, and Forest was selected from a long list of HLS's customers posted on the SHAC USA website. The SHAC USA website did not emphasize Forest as a protest target until after local activists began protests against the company.

38. Order for Dismissal of Defendant John McGee, *Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2 (D.N.J. June 22, 2005).

39. The initial indictment charged that "[o]n or about May 30, 2001, defendant JOHN MCGEE and another slashed the tires on the car of DD, an HLS employee, and spray painted on his house." Indictment at 11, *Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2 (D.N.J. May 20, 2004).

40. Gov't Ex. 1001, *Fullmer*, 584 F.3d 132 (No. 06-4211) (showing link to Inside HLS). The pages themselves were not entered into evidence.

41. *Id.*

42. Gov't Ex. 1003, *Fullmer*, 584 F.3d 132 (No. 06-4211). This page, which discusses *direct action*, was one of three pages on the website that discussed the tactics of the SHAC campaign: education, protest, and direct action. Links to the other two pages are visible in the right column of this exhibit, but the pages themselves were not entered into evidence.

of the campaign and their contact information (for both office locations and individual employees),⁴³ a list of upcoming events,⁴⁴ and reports of past protests. Activists around the country held demonstrations, participated in phone blockades and electronic civil disobedience (ECD),⁴⁵ disrupted offices and company events, distributed information throughout neighborhoods, vandalized property, harassed campaign targets, and engaged in a variety of other forms of creative protest. Then, these activists wrote short descriptions of their actions and emailed the reports to the activists who published the website for posting on the website. For example, one protest report read:

received anonymously on March 10:

Last night the homes of Dallas Marsh employees Michael Rogan and Sally Dillenback were visited by activists. Mr. Rogan's garage was plastered with stickers of mutilated puppies such as those his company insures. Mrs. Dillenback's side wall was covered in stickers, as was her mailbox.

Let the stickers serve to remind Marsh employees and their neighbors that their homes are paid for in blood, the blood of innocent animals that are killed in labs like HLS. Every day that Marsh insures HLS, they insure death.

Activists then visited a Charles Schwab office in Plano, Texas to redecorate its glass walls with stickers of mutilated puppies. As a stockbroker for HLS, Charles Schwab has chosen to profit from cruelty, neglect and murder. Perhaps their customers walking in on Monday morning will get a glimpse of the true cost of their investments.⁴⁶

Another read:

Received from ADL-LI:

43. Gov't Ex. 1001, *Fullmer*, 584 F.3d 132 (No. 06-4211) (showing links to HLS shareholders, HLS breeders, HLS addresses, and HLS clients). Few of the actual pages were entered into evidence.

44. *Id.* (showing a link to Upcoming Events); Gov't Ex. 1011, *Fullmer*, 584 F.3d 132 (No. 06-4211).

45. Electronic Civil Disobedience (ECD), also known as a virtual sit-in, involves overloading a website with requests, thereby crashing the website. It is generally conducted through a program that automatically floods the targeted server.

46. Gov't Ex. 1162, *Fullmer*, 584 F.3d 132 (No. 06-4211).

“On Saturday, October 11th, the Animal Defense League held two home demonstrations against employees to Sumitomo Corporation of America and Sumi-trans (Sumitomo’s transportation subsidiary). First we visited the waterfront condo of Yasutsugu Kawahara, Assistant to the President of Sumitomo Corporation of America, but to our disappointment he was not home. We took advantage of this time to leave him with literature and then began to knock on his neighbors doors, inform them of Yasutsugu’s involvement with animal torture at HLS, we left them with literature as well and urged them to pressure Yasutsugu to use his power at Sumitomo to sever all relations both current and future, that Sumitomo and all it’s family associates may have with HLS!

The dozen or so of us moved on to the home of Kazuo “Nick” Okahashi, Senior Vice President to Sumi-Trans. We held signs and a banner that read “Sumitomo/HLS – partners in shame”, many neighbors stopped and looked, and asked questions about their apparently mysterious neighbor. Unfortunately we now developed a police escort, and a somewhat overzealous one at that, we decided after a half hour to pack it up and head back to the home of Yasutsugu Kawahara.

Here at the home of Yasutsugu Kawahara we broke out the [megaphones] and thunderous chants that drew neighbors from all surrounding blocks to come down and see what all the racket was about. One neighbor knew of the campaign to close down HLS and even spoke highly of the ALF’s nearby sinking of a yacht owned by a Bank of New York director formally responsible for managing HLS’ ADR facility. We drew so much support and racket that even the former mayor came down. Each house on the adjacent blocks were visited and given full color brochures on their neighbors Yasutsugu Kawahara and Kazuo “Nick” Okahashi complete with their contacts so that they too can join this unstoppable effort to close HLS! Bank of New York (won), Stephens (won), Quilcap (won in a week), Marsh (won), CBC (won), Icon (won in a week), Sumitomo your next on our list!

Everyone who reads this can get in on the fun too!

Yasutsugu Kawahara, Assistant to the President
[Address redacted]
Home Phone: [Redacted]

yasutsugu.kawahara@sumitomocorp.co.jp

Kazuo “Nick” Okahashi, Senior Vice President

[Address redacted]

Home Phone: [Redacted]

kazuo.okahashi@sumitomocorp.co.jp

Animal Defense League

ADL@riseup.net

<http://web.archive.org/web/20031206092235/http://www.pathofcompassion.com/>⁴⁷

And another:

SHAC: 9278 HLS: 0

Earlier this afternoon, April 10, eight activists stormed the fifth floor offices of Marsh Inc. in Portland, Oregon. Sliding through the door to the key-card restricted offices behind the pizza guy, the activists loudly informed the local employees of their company’s dealings with animal torture. W[ic]lding signs, fliers, stickers and a harmonica, they caused quite a disruption before being forcefully escorted out by angry puppy killers. They seemed pretty upset as quite a mess was left for them to clean up and their business [as] usual was successfully interrupted. Marsh has been hit all over the country by compassionate people, and now Marsh Portland knows we’re here and we’re not going away until they stop helping HLS kill 500 each day.⁴⁸

Hundreds, if not thousands, of these protests occurred in the course of the SHAC campaign. The SHAC USA website reported on everything from candlelight vigils and traditional protests to vandalism and electronic attacks; from a protest at an employee’s church, during which the pastor invited the activists inside to attend the service, to a putrid smelling durian fruit hidden in the office of HLS’s insurance broker. The protest reports were the main focus of the website, published in its central news column on the homepage. They were also the main focus of the SHAC 7 prosecution.

47. Gov’t Ex. 1209A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (grammatical mistakes and misspellings in original, addresses and phone numbers were published on the website but have been redacted for this Article).

48. Gov’t Ex. 1172, *Fullmer*, 584 F.3d 132 (No. 06-4211).

Because of the SHAC campaign, HLS lost vital revenue and services as companies—including some of the largest corporations in the world—abandoned the lab,⁴⁹ which teetered on the brink of closure several times. The SHAC campaign decimated HLS's share price and got the company kicked off the New York Stock Exchange and the Over The Counter Bulletin Board. After a successful campaign against the lab's market makers, HLS was relegated to the Pink Sheets, a trading forum for companies that do not meet minimum Securities and Exchange Commission requirements.⁵⁰ When no commercial bank would provide

49. Gov't Ex. 2043D, *Fullmer*, 584 F.3d 132 (No. 06-4211) (memo from Hughes Enterprises confirming that the company had decided to terminate its business relationship with HLS); Gov't Ex. 2043E, *Fullmer*, 584 F.3d 132 (No. 06-4211) (letter from Spencer Edwards Investments confirming that the company no longer made a market in HLS's stock, LSRI); Gov't Ex. 2043F, *Fullmer*, 584 F.3d 132 (No. 06-4211) (statement of TD Waterhouse confirming that the company had withdrawn both trading and nominee facilities for customers holding HLS shares); Gov't Ex. 2043I, *Fullmer*, 584 F.3d 132 (No. 06-4211) (fax from HLS's food service provider informing SHAC USA that U.S. Foodservice had ended its business with HLS); Gov't Ex. 2043J, *Fullmer*, 584 F.3d 132 (No. 06-4211) (letter from Oracle Partners, L.P. confirming that the company was in the process of divesting, and ultimately eliminating, its stake in HLS); Gov't Ex. 2043K, *Fullmer*, 584 F.3d 132 (No. 06-4211) (letter from Charles Schwab & Co., Inc., indicating that the company would cease providing custody services for and executing transactions in HLS's stock); Gov't Ex. 2043N, *Fullmer*, 584 F.3d 132 (No. 06-4211) (letter from Wien Securities Corp. confirming that the company no longer made a market in LSRI); Gov't Ex. 2043P, *Fullmer*, 584 F.3d 132 (No. 06-4211) (press release from Stephens Group LLC announcing that the company had entered into an agreement to sell all of its stock and debt investments in HLS); Gov't Ex. 2043R, *Fullmer*, 584 F.3d 132 (No. 06-4211) (letter from Spear, Leeds & Kellogg confirming that the company no longer made a market in HLS); Gov't Ex. 2043S, *Fullmer*, 584 F.3d 132 (No. 06-4211) (letter from Aetna confirming that neither the company nor any of its affiliates had any business relationship with HLS). *See also* Andrew Clark, *Huntingdon Life Finds a Friend*, *GUARDIAN* (Oct. 18, 2001), <http://www.theguardian.com/business/2001/oct/19/animalrights.businessofresearch> (noting that “[m]any City firms have severed links with Huntingdon over the past two years, including WestLB Pannure, Merrill Lynch and HSBC. . . . [m]ost stockbrokers refuse to take orders for Huntingdon's shares”).

50. Trial Transcript, Day 3 at 146–63, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Richard Michaelson) (testifying about SHAC's campaign against HLS's market makers). *See, e.g.*, Gov't Ex. 1268A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (website posting announcing that Robotti and Company, Inc., no longer made a market in HLS and advocating that activists “keep the pressure on Brokerage America!”); Gov't Ex. 1272, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov't Ex. 1272A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report that Domestic Securities, Inc., lasted one hour and Mellon Investment lasted five hours as market makers for HLS due to protests); Gov't Ex. 1273, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov't Ex. 1273A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report that Jefferies & Company, Inc., had stopped making a market for HLS after only one day of action); Gov't Ex. 1277, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov't Ex. 1277A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report that Crown Financial Services had stopped making a market for HLS); Gov't Ex. 1281, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report that Spencer Edwards had stopped making a market for HLS); Gov't Ex. 2043E, *Fullmer*, 584 F.3d 132 (No. 06-4211) (letter from Spencer Edwards Investments confirming that the company no longer made a market in HLS's stock, LSRI); Gov't Ex. 2043N, *Fullmer*, 584 F.3d 132 (No. 06-4211) (letter from Wien Securities Corp. confirming that the company no longer made a market

HLS with a bank account, leaving the lab unable to conduct routine business transactions such as issuing paychecks, the British government arranged for the State-owned Bank of England to give the lab an account.⁵¹ Activists drove away various suppliers, including HLS's crematorium, janitorial service, lawn care, and food service provider.⁵²

B. Other Legal Matters

Thousands of activists in the United States, and many thousands more around the world, participated in the SHAC campaign. Individuals and organizations saw their share of arrests and lawsuits. However, while a few people faced the kinds of minor charges normally associated with protests, neither these minor infractions nor the vandalism that peppered the campaign were the substantive basis for the case against the SHAC 7.

C. The Indictment

Count One of the indictment alleged that the defendants conspired to “use a facility in interstate and foreign commerce for the purpose of causing physical disruption to the functioning of HLS, an animal enterprise, and intentionally damage and cause the loss of property used by HLS”⁵³ in violation of the Animal Enterprise Protection Act.⁵⁴ Count Two alleged that Kjonaas, Gazzola, Conroy, and SHAC USA, Inc., conspired to “use a facility in interstate and foreign commerce to engage in a course of conduct that placed a person, a member of the immediate family of that person, or a spouse or intimate partner of that person, in reasonable fear of death or serious bodily injury to” any of those persons, in violation of the federal stalking statute.⁵⁵ Counts Three through Five were substantive stalking charges, alleging that the same four defendants did in fact place three

in LSRI); Gov't Ex. 2043R, *Fullmer*, 584 F.3d 132 (No. 06-4211) (letter from Spear, Leeds & Kellogg confirming that the company no longer made a market in LSRI).

51. Gov't Ex. 1074, *Fullmer*, 584 F.3d 132 (No. 06-4211).

52. *See, e.g.*, Gov't Ex. 2043I, *Fullmer*, 584 F.3d 132 (No. 06-4211) (fax from HLS's food service provider informing SHAC USA that U.S. Foodservice had ended its business with HLS).

53. Superseding Indictment at 5, *United States v. Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2 (D.N.J. Sept. 16, 2004), *aff'd sub nom.* *United States v. Fullmer*, 584 F.3d 132 (3d Cir. 2009).

54. *Id.*; Animal Enterprise Protection Act of 1992, Pub. L. No. 102-346, 106 Stat. 928 (1992) (codified as amended at 18 U.S.C. § 43(d)(1) (2012)).

55. Superseding Indictment at 23–24, *Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2; 18 U.S.C. § 2261A (2012); 18 U.S.C. § 371 (2012).

specific individuals in the aforementioned fear.⁵⁶ Finally, Count Six alleged that Kjonaas, Gazzola, Conroy, Harper, and SHAC USA, Inc., conspired to “utilize a telecommunications device to abuse, threaten and harass persons at the called number . . . without disclosing the identity of the person utilizing the telecommunications device and without engaging in conversation and communication” in violation of a federal prohibition on obscene or harassing telephone calls.⁵⁷

The indictment focused heavily on the content of the speech on the SHAC USA website.⁵⁸ The overt acts of the conspiracy toggled between acts of protest and postings on the SHAC USA website. For example,

In or about October, 2002, the SHAC Website posted an announcement listing the home address and telephone number of CA, an HLS employee.

56. Superseding Indictment at 25–27, *Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2; 18 U.S.C. § 2261A; 18 U.S.C. § 2 (2012).

57. Superseding Indictment at 28, *Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2; 47 U.S.C. § 223(a)(1)(C) (2012). The *Fullmer* court did not address the defendants’ substantive arguments on Count 6. *Fullmer*, 584 F.3d at 164–65.

58. For example, the “Manner and Means” of the conspiracy were listed as the defendants . . . enlist[ed] animal rights activists to . . . harm the business of HLS in any manner available[;] . . . e-mail and web-based communications were used to disseminate information and coordinate the campaign to shut down HLS[;] . . . the defendants espoused and encouraged others to engage in “direct action,” which as described by SHAC involved activities that “operate outside the confines of the legal system”[;] . . . information would be disseminated through the SHAC Website to coordinate computer attacks[;] . . . SHAC would post the names, addresses, home telephone numbers and other personal information of HLS employees on the SHAC Website and encourage people to engage in acts of harassment and intimidation[;] . . . acts of intimidation and vandalism . . . would be reported on the SHAC Website in a manner designed to foster additional acts[;] acts . . . reported on the SHAC Website [were] used as examples in order to intimidate, harass and threaten other individuals and companies[;] . . . [i]t was further part of the conspiracy that each week SHAC designated a company . . . as the “target of the week”[;] . . . the names, addresses, home telephone numbers and other personal information of employees of the target companies would be posted on the SHAC Website, and viewers of the website were encouraged to engage in acts of harassment and intimidation against those employees at their homes, through mailings, telephone calls, home demonstrations and vandalism[;] . . . [i]t was further part of the conspiracy that the SHAC Website reported on acts perpetrated on [protest targets] to be used as examples to intimidate, harass and threaten other individuals and companies and place individuals in a reasonable fear of serious bodily injury and/or death.

Superseding Indictment at 6–10, *Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2. Similarly, the “Overt Acts” of the conspiracy focused heavily on SHAC USA website postings. *Id.* at 11–22.

On or about October 21, 2002, the SHAC Website posted an announcement relating to signs that were posted in and around the Princeton, New Jersey area, which referred to CA as “deluded and deranged” and listed her home address and telephone number.⁵⁹

Also,

On or about March 9, 2002, the home of SD, an employee of M. Corp., was vandalized.

On or about March 10, 2002, the SHAC Website posted a report of the vandalism at the home of SD.

On or about March 9, 2002, the home of MR, an employee of M. Corp., was vandalized.

On or about March 10, 2002, the SHAC Website posted a report of the vandalism at the home of MR.⁶⁰

The protest activity was variously attributed to unidentified individuals or described in the passive voice (e.g., “rocks were thrown through windows,”⁶¹ without any allegation as to who threw the rocks).

In the entire indictment, only four acts were specifically attributed to any of the defendants:

On or about May 13, 2001, defendants KEVIN KJONAAS, LAUREN GAZZOLA, ANDREW STEPANIAN, DARIUS FULLMER and others appeared at the doorstep of [Bank of New York] employee TP’s home and shouted, cursed and threatened his wife.⁶²

. . .

59. *Id.* at 12–13.

60. *Id.* at 15.

61. *Id.* at 11.

62. *Id.* at 20. Kjonaas, Gazzola, and Stepanian were arrested at this protest and charged with defiant trespass and harassment. They each pleaded guilty to one charge in exchange for dismissal of the other charge and were sentenced to a 30-day suspended jail sentence and a \$500 fine. In accordance with the First Amendment, this is the proper treatment of protest activity that transcends the bounds of constitutional protection: charge protesters for acts in which they personally engaged. The Third Circuit did not mention this incident in *Fullmer*.

On or about September 10, 2002, W. Corp. received a letter from SHAC, signed by Angela Jackson, an alias utilized by defendant LAUREN GAZZOLA, requesting written confirmation that W. Corp had ceased as a Market Maker of HLS stock stating: "If we can obtain a statement, on company letterhead confirming that [W. Corp.] no longer acts as a Market Maker for LSRI, and has no intention of doing so in the future, we are happy to contact our supporters and confirm that the campaign against [W. Corp] has ended. This should bring a prompt end to the phone calls and faxes and e-mails your company is receiving."⁶³

. . . .

On or about August 10, 2002, members of the conspiracy, including defendant LAUREN GAZZOLA, assembled outside the home of RH, an employee of M. Corp. and, using a megaphone, threatened RH, his wife and family with burning down their home.⁶⁴

. . . .

On or about October 17, 2002, defendant Joshua Harper gave a presentation to a group of people in Seattle, Washington wherein he explained how to send black faxes noting that "it knocks out the entire line of communication" of the recipients of the black faxes.⁶⁵

On March 2, 2006, all defendants were convicted on all charges.⁶⁶ The website was taken down, the individual defendants were sentenced to between one and six years in federal prison, and all defendants were held jointly and severally liable for \$1,000,001.00 in restitution to HLS.⁶⁷ On October 14, 2009, the Third Circuit Court of Appeals upheld their

63. *Id.* at 19–20 (alteration in original).

64. *Id.* at 17. *See infra* text at note 361 through note 369 (discussing this incident further).

65. Superseding Indictment at 29–30, *Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2.

66. *United States v. Fullmer*, 584 F.3d 132, 151 (3d Cir. 2009).

67. *Id.* at 151, 165.

convictions in *United States v. Fullmer*.⁶⁸ On March 7, 2011, the Supreme Court denied certiorari.⁶⁹

II. DOCTRINAL ANALYSIS

United States v. Fullmer implicates three central First Amendment doctrines: freedom of association, incitement, and true threats. The Third Circuit misapplied all three.

A. Conspiracy and Freedom of Association

The foundational flaw of *Fullmer* is the Third Circuit's failure to adequately assess allegations of an unlawful conspiracy in the sensitive area of the First Amendment. Conspiracies are anathema to American conceptions of free speech and free association. Courts have long recognized the danger to these freedoms posed by holding some participants in a collective political effort responsible for the actions of others. Indeed, the development of modern First Amendment doctrine was in large part a reaction to early 20th century prosecutions of socialists, communists, and anti-war agitators simply for advocating their ideas and associating with others who did the same.⁷⁰ Ultimately, First Amendment

68. *Id.* at 165.

69. *Kjonaas v. United States*, 526 U.S. 1273 (2011) (mem.) (denying certiorari).

70. *See* *Schenck v. United States*, 249 U.S. 47, 48–49 (1919) (affirming defendants' conviction for conspiracy and other crimes under the Espionage Act for distributing leaflets opposing the military draft); *Debs v. United States*, 249 U.S. 211, 212–13 (1919) (affirming defendant's conviction under the Espionage Act for giving a speech advocating socialism and opposing militarism); *Frohwerk v. United States*, 249 U.S. 204, 205–06 (1919) (affirming defendant's conviction for conspiracy to violate the Espionage Act for publication of newspaper articles criticizing World War I); *Abrams v. United States*, 250 U.S. 616, 617 (1919) (affirming defendants' conviction for conspiring "to unlawfully utter, print, write and publish . . . disloyal, scurrilous and abusive language about the form of Government of the United States;" use "language intended to bring the form of Government of the United States into contempt, scorn, contumely and disrepute" and language "intended to incite, provoke and encourage resistance to the United States in [a] war;" and "by utterance, writing, printing and publication, to urge, incite and advocate curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of the war." As the Court described, "[i]t was charged in each count of the indictment that it was a part of the conspiracy that the defendants would attempt to accomplish their unlawful purpose by printing, writing and distributing in the City of New York many copies of a leaflet or circular, printed in the English language, and of another printed in the Yiddish language . . .") (internal quotations omitted); *Gitlow v. New York*, 268 U.S. 652, 654–55 (1925) (affirming defendant's conviction for criminal anarchy for having "advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and unlawful means, by certain writings therein set forth entitled 'The Left Wing Manifesto'" and "printed, published and knowingly circulated and distributed a certain paper called 'The Revolutionary

doctrine developed with an aim toward preventing these kinds of prosecutions. In a famous articulation of the principle of free association, the Supreme Court stated:

The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected.

. . . .

[A] “blanket prohibition of association with a group having both legal and illegal aims” would present “a real danger that legitimate political expression or association would be impaired.” . . . [T]o punish association with such a group, there must be “clear proof that a defendant ‘specifically intend[s] to accomplish [the aims of the organization] by resort to violence.’” Moreover, . . . this intent must be judged “according to the strictest law,” for “otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes”⁷¹

This is exactly what happened in *Fullmer*.⁷² The Third Circuit erred by treating the entire SHAC campaign as an illegal conspiracy and inquiring into the *extent* of each defendant’s involvement, rather than the *nature* of that involvement. In doing so, the Third Circuit abdicated its responsibility

Age,’ containing the writings set forth in the first count advocating, advising and teaching the doctrine that organized government should be overthrown by force, violence and unlawful means”).

71. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 908, 919 (1982) (third and fourth alterations in original) (first quoting *Scales v. United States*, 367 U.S. 203, 229 (1961); then quoting *Noto v. United States*, 367 U.S. 290, 299 (1961)).

72. At one point, in its closing arguments, the government explicitly countenanced removing oneself from a collective political effort when others engage in (minor) unlawful activity:

[Defendant Fullmer remaining on the curb during a protest at which other activists approached the front door of a home and harassed the occupants might absolve him of criminal liability] if when he saw that happen Mr. Fullmer said, do you know what, this is not what I’m about. I’m out of here. That’s not what he did because after that [protest] he remained with the SHAC campaign

Government’s Rebuttal Summation at 115, *United States v. Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2 (D.N.J. Feb. 28, 2006), *aff’d sub nom.* *United States v. Fullmer*, 584 F.3d 132 (3d Cir. 2009).

to apply the strictest law in order to determine whether each individual defendant had been prosecuted and convicted despite his or her “adherence to lawful and constitutionally protected purposes.”⁷³

i. *NAACP v. Claiborne Hardware Co.*

In the landmark case *NAACP v. Claiborne Hardware Co.*, the Supreme Court laid down the law for determining how a collective political effort that involved both protected activity and unlawful conduct should be treated.⁷⁴ Because of the extensive similarities between the facts in *Claiborne Hardware* and *Fullmer*, it is worth examining *Claiborne Hardware* in detail.

In 1966, Black citizens of Claiborne County, Mississippi, along with the local chapter of the NAACP, launched a boycott of white-owned businesses.⁷⁵ The businesses sued for their losses, and boycott participants, including the NAACP and its Mississippi Field Secretary, Charles Evers, were held liable for more than \$1.25 million in damages.⁷⁶ As the Supreme Court described it, the seven-year boycott “included elements of criminality and elements of majesty.”⁷⁷

The boycott was supported by speeches and nonviolent picketing. Participants repeatedly encouraged others to join in its cause.

. . . .

[C]ertain practices generally used to encourage support for the boycott were uniformly peaceful and orderly. The few marches associated with the boycott were carefully controlled by black leaders The police made no arrests—and no complaints are recorded—in connection with the picketing and occasional demonstrations supporting the boycott.⁷⁸

However, the boycott also included unlawful activity. In the course of the effort, “an unlawful form of discipline was applied to certain boycott

73. See *Noto v. United States*, 367 U.S. 290, 299–300 (1961) (applying the doctrine of strictissimi juris).

74. *Claiborne Hardware*, 458 U.S. at 933–34 (1982).

75. *Id.* at 889.

76. *Id.* at 889–90, 893.

77. *Id.* at 888.

78. *Id.* at 907, 903.

violators.”⁷⁹ “[C]ertain of the defendants . . . engaged in acts of physical force and violence against the persons and property of certain customers and prospective customers.”⁸⁰ Shots were fired into homes, a brick was thrown through a windshield, tires were slashed, a flower garden was damaged, goods purchased at boycotted stores were destroyed, weapons were publicly displayed, and people were threatened and physically assaulted.⁸¹ The lower courts concluded that these factors rendered the entire boycott an illegal conspiracy, and the appellate court affirmed liability against the boycotters for all of the losses in a seven-year period “on the ground that each of the petitioners had agreed to effectuate the boycott through force, violence, and threats.”⁸² The Supreme Court reversed.⁸³

The Court began by acknowledging that the “nonviolent elements”⁸⁴ of the boycott—including participation by several hundred persons; demands to civic and business leaders for equality and racial justice; speeches, nonviolent picketing, marches, and demonstrations; and encouragement to others to join the cause—were all “form[s] of speech or conduct that [are] ordinarily entitled to protection under the First and Fourteenth Amendments.”⁸⁵ Crucially, the Court did not go on to hold that these activities lost constitutional protection because they were part of an effort that also included unlawful activity. On the contrary, it “consider[ed] . . . the effect of [its] holding that much of petitioners’ conduct was constitutionally protected on the ability of the State to impose liability for elements of the boycott that were not so protected.”⁸⁶ The Court concluded that

79. *Id.* at 905.

80. *Id.* at 894 (quoting *NAACP v. Claiborne Hardware Co.*, 393 So.2d 1290, 1300 (Miss. 1980)).

81. *Id.* at 897 n.22, 904, 906. The Court assigned various levels of significance to each of these events.

82. *Id.* at 896. *Cf.* *United States v. Fullmer*, 584 F.3d 132, 153 (3d Cir. 2009) (“The government contends that the conduct underlying Defendants’ convictions is not protected by the First Amendment because, through the SHAC website, Defendants knowingly and purposefully *adopted illegal means*, including threats of violence and destruction of property, to achieve their political goals.” (emphasis added)). In both cases, *effectuate* and *adopted* refer to association with others who engaged in, and speech about, unlawful acts. Clearly, the only way to *adopt* property destruction through a website is to *talk about it*.

83. *Claiborne Hardware*, 458 U.S. at 934.

84. *Id.* at 915.

85. *Id.* at 907.

86. *Id.* at 916.

[w]hen [violence and threats of violence] occur[] in the context of constitutionally protected activity . . . “precision of regulation” is demanded. Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.

. . . .

“[T]he permissible scope of state remedies in this area is *strictly confined to the direct consequences of [violent] conduct*, and does not include consequences resulting from associated peaceful picketing or other . . . activity.” . . . [D]amages *[are] restricted to those directly and proximately caused by wrongful conduct chargeable to the defendants*. . . . While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered.⁸⁷

With this constitutional requirement in mind, the Court distinguished each boycott participant according to what they actually *did*. In response to the Court’s request, the respondents “specif[ied] the acts committed by each

87. *Id.* at 916–17, 918 (emphasis added) (first quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963); then quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 729 (1966)). The Court discussed the opinions below:

The opinion of the Mississippi Supreme Court itself demonstrates that all business losses were not proximately caused by the violence and threats of violence found to be present. The court stated that “coercion, intimidation, and threats” formed “*part of the boycott activity*” and “*contributed to its almost complete success*.” The court broadly asserted—without differentiation—that “[i]ntimidation, threats, social ostracism, vilification, and traduction” were devices used by the defendants to effectuate the boycott. The court repeated the chancellor’s finding that “the volition of *many* black persons was overcome out of sheer fear.” These findings are inconsistent with the court’s imposition of all damages “resulting from the boycott.” To the extent that the court’s judgment rests on the ground that “many” black citizens were “intimidated” by “threats” of “social ostracism, vilification, and traduction,” it is flatly inconsistent with the First Amendment. The ambiguous findings of the Mississippi Supreme Court are inadequate to assure the “precision of regulation” demanded by that constitutional provision.

Id. at 921 (alterations in original) (quoting *NAACP v. Claiborne Hardware Co.*, 393 So.2d 1290, 1300, 1302, 1307 (Miss. 1980)). *Cf. Fullmer*, 584 F.3d at 156 (“[the defendants’] actions meet the standard of a ‘true threat’ [because] the speeches, protests, and web postings, were all tools to further their effort.”).

of the petitioners giving rise to liability for damages,”⁸⁸ grouping the boycotters into five groups: “managers” (regular attendees at the NAACP’s weekly meetings and “11 persons who took leadership roles at those meetings”); “enforcer[s]” (so-called “Black Hats” and “store watchers”); individuals who engaged in or threatened violence; NAACP Field Secretary Charles Evers, in his individual capacity, and the national NAACP, due to Evers’s actions in his official capacity; and seven individuals for whom respondents were “unable to determine on what record evidence the state courts relied in finding liability.”⁸⁹

The Court flatly rejected the rationale, put forward by both the respondents and the lower courts, that the overall effort was unlawful and its leaders could be held liable because some of its participants had engaged in unlawful activity.⁹⁰ This is best demonstrated by the Court’s treatment of Charles Evers. Evers, said the Court, “unquestionably played the primary leadership role in the organization of the boycott.”⁹¹ Yet

[l]iability [could] not be imposed on Evers for his presence at NAACP meetings or his active participation in the boycott itself.

88. *Claiborne Hardware*, 458 U.S. at 896 (internal citation omitted). Notably, in *Fullmer*, the court denied defendants’ request for a Bill of Particulars. Transcript of Motion Hearing at 56–58, *United States v. Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2 (D.N.J. Nov. 19, 2004), *aff’d sub nom.* *United States v. Fullmer*, 584 F.3d 132 (3d Cir. 2009).

89. *Claiborne Hardware*, 458 U.S. at 897–98 (internal citations omitted). Respondents argued that “anyone who participates in the decisionmaking functions of an enterprise, with full knowledge of the tactics by which the enterprise is being conducted, manifests his assent to those tactics” *Id.* at 897 n.20 (internal citation omitted).

90. *See id.* at 894–95 (describing the lower court’s rationale):

The Mississippi Supreme Court . . . quoted the following finding made by the trial court: “In carrying out the agreement and design, certain of the defendants, acting for all others, engaged in acts of physical force and violence against the persons and property of certain customers and prospective customers. Intimidation, threats, social ostracism, vilification, and traduction were some of the devices used by the defendants to achieve the desired results. Most effective, also, was the stationing of guards (‘enforcers,’ ‘deacons,’ or ‘black hats’) in the vicinity of white-owned businesses. Unquestionably, the evidence shows that the volition of many black persons was overcome out of sheer fear, and they were forced and compelled against their personal wills to withhold their trade and business intercourse from the complainants.” On the basis of this finding, the court concluded that the entire boycott was unlawful. “If any of these factors—force, violence, or threats—is present, then the boycott is illegal regardless of whether it is primary, secondary, economical, political, social, or other.” . . . “The agreed use of illegal force, violence, and threats against the peace to achieve a goal makes the present state of facts a conspiracy.”

Id. (quoting *Claiborne Hardware*, 393 So. 2d at 1300–01).

91. *Id.* at 926.

To the extent that Evers caused respondents to suffer business losses through his organization of the boycott, his emotional and persuasive appeals for unity in the joint effort, or his “threats” of vilification or social ostracism, Evers’ conduct [was] constitutionally protected and beyond the reach of a damages award.⁹²

In short, Evers’s leadership of a collective effort that involved both protected and illegal activity did not render him any more liable than any other boycott participant who did not personally engage in unlawful activity. Ultimately, the presence of illegal activity in the boycott did not transmute the entire effort into an unprotected whole, rendering unprotected mere involvement in, or leadership of, the collective effort. Instead, *Claiborne Hardware* stands for the principle that a collective political effort involving both protected and unprotected activity must be assessed in terms of its parts.⁹³

92. *Id.*

The chancellor’s findings do not suggest that any illegal conduct was authorized, ratified, or even discussed at any of the meetings. . . . To impose liability for presence at weekly meetings of the NAACP would—ironically—not even constitute “guilt by association,” since there is no evidence that the association possessed unlawful aims. Rather, liability could only be imposed on a “guilt for association” theory. Neither is permissible under the First Amendment.

Id. at 924–25.

93. *See id.* at 933–34.

The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy. A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees.

Id. But see generally *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941) (upholding injunction against both violent and nonviolent activity because violent conduct was pervasive, including more than 50 window smashings, multiple bombings, arsons, and physical assaults, people held at gunpoint and shot at; and noting that prohibiting “normally free conduct” was “exceptional”). See also *infra* text at note 327 through note 328 (noting that the overwhelming majority of the protest activity in the SHAC campaign was protected).

The significance of this holding relative to *Fullmer* becomes salient when one considers the Supreme Court's treatment of the rhetoric that accompanied the boycott in Claiborne County. The white business owners argued that Evers could be held responsible not only for his leadership of the boycott but also for his public speeches.⁹⁴ In particular, respondents pointed to three speeches by Evers.⁹⁵ In one, "[he] told his audience that they would be watched and that blacks who traded with white merchants would be *answerable to him* [and] that any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people."⁹⁶ In a separate speech, given in conjunction with a march to the courthouse, "Evers stated that boycott violators would be 'disciplined' by their own people and warned that the Sheriff could not sleep with boycott violators at night."⁹⁷ In yet another speech, Evers repeated his earlier warning: "If we

94. *Claiborne Hardware*, 458 U.S. at 926 (noting that "Evers was specially connected with the boycott in four respects": playing the primary leadership role in the organization of the boycott; participating in negotiations that led a community action organization to participate in the boycott; presiding over the meeting at which the vote to begin the boycott was taken; and giving at least three speeches (including one at the aforementioned vote meeting)).

95. *Id.* (identifying speeches on April 1, April 19, and April 21, 1969). Notably, only one of Evers's speeches was recorded. *Id.* at 900 n.28, 902. When comparing the facts in canonical free speech cases like *Claiborne Hardware* with contemporary prosecutions like *Fullmer*, one must be "eternally vigilant" against attempts to undermine the principles established in the former because of different fact patterns in the latter. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In contemporary United States society, in which vast quantities of speech are recorded in one form or another, a chill can easily result from picking apart every bit of a person's speech and giving equal prominence and importance to every utterance. *See, e.g., infra* text at note 361 through note 369 (discussing defendant Gazzola's prosecution in Massachusetts on the basis of ten seconds of speech uttered at a demonstration that was videotaped); *see also infra* text at note 268 (discussing speech on the SHAC USA website consisting of "about two square inches of space, . . . tucked away on the corner of the ninth page of a PDF that was linked from an html page," which itself was "under a banner on the website's homepage.") As the Court recognized in *Claiborne Hardware*, "[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause." *Claiborne Hardware*, 458 U.S. at 928. *See also* *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam).

[W]e must interpret [speech regulations] "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." The language of the political arena, like the language used in labor disputes, is often vituperative, abusive, and inexact.

Id. (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) (citing *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53, 58 (1966)).

96. *Claiborne Hardware*, 458 U.S. at 900 n.28 (internal citations omitted).

97. *Id.* at 902.

catch any of you going in any of them racist stores, we're gonna break your damn neck."⁹⁸

Additionally,

[o]ne form of "discipline" of black persons who violated the boycott appears to have been employed with some regularity. Individuals stood outside of boycotted stores and identified those who traded with the merchants. Some of these "store watchers" were members of a group known as the "Black Hats" or the "Deacons." The names of persons who violated the boycott were read at meetings of the Claiborne County NAACP and published in a mimeographed paper entitled the "Black Times." As stated by the chancellor, those persons "were branded as traitors to the black cause, called demeaning names, and socially ostracized for merely trading with whites."⁹⁹

In a footnote, the Court noted that "[i]t is undisputed that the 'Black Hats' were formed during the boycott, that members of the organization engaged in 'store watching' and other 'enforcement' activities, and that some individuals who belonged to the group committed acts of violence."¹⁰⁰

Thus, the rhetoric of violence and illegality in Evers's speeches was borne out in the form of property damage, physical attacks, fired bullets, et cetera. The lower court found that an "'atmosphere of fear . . . prevailed'" for four of the seven years of the boycott.¹⁰¹ Still, the Supreme Court ruled that neither the leaders of the boycott (e.g., Charles Evers) nor those classified by the respondents as enforcers (e.g., the Black Hats) could be held liable without having personally participated in violence.¹⁰² This, however, was the very basis for the conviction of the SHAC 7.

98. *Id.* (internal citation omitted).

99. *Id.* at 903–04 (internal citations omitted). According to the supplemental brief that the respondents filed in *Claiborne*,

"[o]nce the pattern had been established—warnings to prospective customers, destruction of goods purchased at boycotted stores, public displays of weapons and of military discipline, denunciation of names gathered by the store-watchers, and subsequent violence against the persons and property of boycott breakers—store-watching in Port Gibson became the sort of activity from which a court could reasonably infer an intention to frighten people away from the stores."

Id. at 897 n.22 (internal citation omitted).

100. *Id.* at 903 n.34.

101. *Id.* at 904 (internal citation omitted).

102. "Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *Id.* at 910. *See also* *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418–20 (1971) (reversing a ruling that speech was not entitled to First Amendment protection because it

ii. Contrasting *Claiborne Hardware* with *Fullmer*

The Third Circuit treated the SHAC campaign in exactly the manner rejected by the Supreme Court in *Claiborne Hardware*: as an unprotected whole. Though the court gave lip service to acknowledging that some parts of the SHAC campaign were protected and to distinguishing the acts of each individual defendant, any thoughtful review of the opinion will show that liability clearly rested upon *conflating*, rather than disaggregating, unlawful and protected acts.

The campaign to close HLS is precisely the kind of “concerted action” wherein illegal activity occurred “in the context of constitutionally protected activity,” thereby demanding “precision of regulation.”¹⁰³ In *Fullmer*, as in *Claiborne Hardware*,

[t]he fact that [nonviolent, politically motivated campaigns are] constitutionally protected . . . impose[d] a special obligation on [the c]ourt to examine critically the basis on which liability was imposed. . . . Although the extent and significance of the violence [were] vigorously disputed by the parties, there is no question that acts of violence occurred. . . . [T]he presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.

. . . .

“[T]he permissible scope of state remedies in this area is strictly confined to the direct consequences of [violent] conduct . . .” [Liability should have been] restricted to [harm] directly and proximately caused by wrongful conduct chargeable to the defendants.¹⁰⁴

In this regard, the Third Circuit failed miserably.

was “coercive and intimidating, rather than informative”). “The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. . . . [S]o long as the means are peaceful, the communication need not meet standards of acceptability.” *Id.* at 419.

103. *Claiborne Hardware*, 458 U.S. at 888, 916 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

104. *Id.* at 915–18 (quoting *United Mine Workers v. Gibbs*, 383 U.S. 729, 729 (1966)).

The SHAC campaign as a whole certainly had “both legal and illegal aims,”¹⁰⁵ namely to close HLS and to sometimes use illegal tactics to achieve this goal, respectively. Importantly, the overall goal of closing Huntingdon was lawful.¹⁰⁶ This should go without saying, but sadly, “the object of the conspiracy,” according to the indictment, was to “physically disrupt the operations of HLS and drive it out of business”¹⁰⁷ However, had the SHAC campaign consisted entirely of writing letters to companies affiliated with HLS, asking them politely to stop doing business with the lab, and had such a campaign been successful, there would be no question that the goal of closing HLS was protected. It is only because some of the *tactics* used in the campaign were unlawful that there is any question as to whether the defendants’ activities were lawful. This clearly colored the court’s analysis, contributing to its focus on the extent, rather than the nature, of each defendant’s involvement in the campaign.

Properly, under *Claiborne Hardware*, the only way the defendants could have been held liable was if they personally committed or conspired to commit unlawful acts.¹⁰⁸ Throughout *Fullmer*, the court claimed that the individual defendants were involved in illegal activity:

[T]he government presented evidence that Defendants coordinated, directed and personally participated in the illegal acts.¹⁰⁹

105. *Id.* at 919 (quoting *Scales v. United States*, 367 U.S. 203, 229 (1961)).

106. *See id.* at 913–15 (explaining that causing or intending economic harm does not render otherwise protected conduct unlawful).

107. Superseding Indictment at 5, *United States v. Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2 (D.N.J. Sept. 16, 2004), *aff’d sub nom.* *United States v. Fullmer*, 584 F.3d 132 (3d Cir. 2009). Even more unfortunate, the Third Circuit accepted this position: “The government’s evidence showed that the ultimate object of the conspiracy was to cause a physical disruption—which the jury instruction defined as ‘interference with the normal course of business or activity’—at Huntingdon resulting in damage to Huntingdon.” *Fullmer*, 584 F.3d 132 at 159, (quoting Jury Charge at 55, *Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2 (D.N.J. May 26, 2004)). *Cf.* Complaint for Declaratory and Injunctive Relief at 8, *Blum v. Holder*, 930 F. Supp. 2d 326 (D. Mass. 2013) (No. 1:11-cv-12229-JLT) (“‘Physical disruption’ had no positive definition [under the AEPA], but rather the [statute] excluded from the term ‘lawful disruption that results from the lawful public, governmental, or animal enterprise employee reaction to the disclosure of information about an animal enterprise.’” (quoting Animal Enterprise Protection Act of 1992, Pub. L. No. 102-346, 106 Stat. 928, § 43(d)(2) (1992) (codified as amended at 18 U.S.C. § 43 (2012))). The *Fullmer* court rejected defendants’ overbreadth challenge because the AEPA was superseded by the enactment of the AETA. *Fullmer*, 584 F.3d at 151 n.7.

108. *See Claiborne Hardware*, 458 U.S. at 918–19 (explaining that the First Amendment limits liability to the direct consequences of unlawful acts committed by a defendant).

109. *Fullmer*, 584 F.3d at 147.

. . .

[The defendants] coordinated and controlled SHAC's activities, both legal and illegal. . . . [The] individual Defendants employed [direct action, electronic civil disobedience, intimidation and harassment] . . . The record also supports a jury inference that these individual Defendants personally participated in illegal protests, in addition to orchestrating the illegal acts of others.¹¹⁰

. . .

[There was] overwhelming evidence that Kjonaas was deeply involved in the coordination and execution of illegal protest activity . . . The record contains more instances of Kjonaas's involvement in and coordination of illegal activity than we could possibly recount here.¹¹¹

. . .

[T]he record establishes that Gazzola, like Kjonaas, was instrumental in the planning and execution of SHAC's illegal activities. She repeatedly employed illegal tactics as one of the strategies used to further SHAC's overall goal of closing Huntingdon.¹¹²

. . .

Kjonaas and Gazzola were instrumental in the coordination of all of SHAC's activities, both legal and illegal.¹¹³

Unarguably, if the defendants had *orchestrated* or *participated in* unlawful acts, they could have been held liable for that conduct. However, despite evidence of several illegal acts that occurred in the course of the SHAC campaign, the court provided no support—including no record citations¹¹⁴—for its sweeping claims about the defendants' *coordination*,

110. *Id.* at 155–56.

111. *Id.* at 156.

112. *Id.* at 157.

113. *Id.* at 161.

114. Following its claim that “the government presented evidence that Defendants coordinated, directed and personally participated in the illegal acts,” the court purported to “recount a sample of

direction, control, employment, orchestration, and execution of, and *involvement and personal participation* in, any illegal acts. Moreover, there is reason to suspect that these claims were not only unsupportable, but also disingenuous.

For example, the court claimed that “Gazzola was personally involved in . . . a bombing of a Marsh subsidiary in Seattle.”¹¹⁵ “Personal involvement” in a “bombing” certainly sounds illegal. But if the reader skips down a bit to further discussion of this incident, they learn, first, that the “bombing” was a smoke bomb.¹¹⁶ Of course, this does not make it any less illegal, but it does make the bombing less serious. More importantly, the reader learns that Gazzola’s “involvement” consisted of “appear[ing] on a Seattle-based radio talk show to defend the bombings”¹¹⁷—that is, *speech*. The court’s careless language, on display throughout the entire opinion, makes it exceedingly difficult to determine what the defendants actually *did*—which, of course, is the crux of the First Amendment analysis.¹¹⁸

If, in fact, the defendants committed unlawful acts, the only question would be whether each individual defendant’s actions satisfied the elements of the charged crime or crimes. For example, the evidence showed that, on or about April 2, 2001, activists broke into HLS’s facility in New Jersey and liberated 14 beagles.¹¹⁹ Had any of the defendants been among those who planned or participated in this action, they could no doubt have been convicted of violating the AEPA. However, the only evidence of the

specific instances that demonstrate Kjonaas’s involvement” and provided record citations to the Joint Appendix. *Id.* at 147–48. *But see infra* text at note 147 through note 156 (noting that none of these activities constitute unprotected activity in furtherance of an illegal act). No record citations were provided for the other quoted sections.

115. *Fullmer*, 584 F.3d at 148.

116. *Id.*

117. *Id.* at 149. The court went on to recount the content of what Gazzola said in the interview. It is unclear why the court mentioned the radio interview at all. Mention of it appears in the court’s description of each defendant, but the interview—i.e., Gazzola’s purported “personal involve[ment]” in a bombing—is not referenced again in the court’s analysis, and the court did not declare whether the interview was protected or unprotected.

118. Notwithstanding that the facts blatantly contradict the court’s claim that Gazzola was *involved* in a *bombing*, this claim was repeated by the government in its opposition to CCR’s petition for certiorari in *Blum*: “Gazzola . . . was previously convicted for . . . a bombing.” Brief for the Respondent in Opposition at 3, *Blum v. Holder*, 135 S. Ct. 477 (2014) (No. 14-133) (mem.).

119. Trial Transcript, Day 3 at 191–92, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Richard Michaelson) (testifying that HLS’s New Jersey facility was broken into and people came in and “stole” animals, causing physical damage and economic costs); Trial Transcript, Day 11 at 33, 93, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of defendant Joshua Harper) (testifying about dogs rescued from HLS).

defendants' *involvement* in the liberation was that the SHAC USA website reported it.¹²⁰

Ultimately, with one minor exception,¹²¹ all of the defendants' involvement in illegal activity discussed by the *Fullmer* court took the same form as their involvement in the beagle liberation: speech and expressive activity. By turning *Claiborne Hardware* on its head and allowing the presence of unlawful acts to color protected conduct, the Third Circuit upheld the defendants' convictions on the very same basis that the Supreme Court rejected in the case of Charles Evers: the leadership of a campaign.

The Third Circuit's descriptions of the SHAC campaign, and of efforts to pressure particular companies to sever ties with HLS, are telling. Within the first few paragraphs of the opinion, the court described the SHAC campaign in the United Kingdom as a "campaign of harassment,"¹²² despite the fact that the SHAC UK campaign involved thousands of people regularly marching in the streets and a host of other traditional protest tactics. The court went on. Efforts to get HLS's largest investor to divest from the lab were described by the court as "a massive direct action campaign,"¹²³ despite the fact that the effort to get Stephens to divest, which began in the fall of 2000¹²⁴ and ended in or around February 2002,¹²⁵

120. Actually, the record only contains mention of the liberation in a "2001: the Year in HLS" timeline posting, and in a SHAC USA newsletter containing a floor plan of HLS's New Jersey facility. Gov't Ex. 1013, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov't Ex. 2032, *Fullmer*, 584 F.3d 132 (No. 06-4211). However, shacusa.net did contain a report about the liberation. *14 Beagles Liberated from Controversial Lab Days Before Major Protest*, SHAC USA (Apr. 2, 2001), <http://web.archive.org/web/20010428145511/http://www.shacusa.net/news/04-02-01a.html>.

121. A trespass by defendant Stepanian at a Deloitte & Touche office. *See infra* text at note 162 through note 166 (discussing this further).

122. *Fullmer*, 584 F.3d at 138.

123. *Id.* at 147. *See also id.* at 156 ("After the meeting, during which Stephens refused to stop dealing with Huntingdon, an illegal direct action campaign against Stephens escalated.") By *direct action* the court meant *illegal action*. *Id.* at 139, 153. The definition of direct action is somewhat contested. Particularly during the years of the SHAC campaign, the animal rights movement's understanding of direct action focused on underground, illegal activity, diverging from the term's more traditional definition, which distinguishes direct action—including strikes, demonstrations, civil disobedience, and other forms of action—from electoral politics and appeals to authoritative bodies. For purposes of this Article, I accept the Third Circuit's definition of direct action as illegal activity. *But see* Trial Transcript, Day 9 at 86, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Forest Laboratories Director of Corporate Security and Safety, Joseph Sciandra) (testifying that he includes home demonstrations—i.e., constitutionally protected protest activity—in his categorization of "direct actions").

124. *Id.* at 147 ("In the fall of 2000, a website called www.stephensskills.com was published online."). *See also* Trial Transcript, Day 3 at 215–16, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Frank Thomas) (testifying that his "first recollection of hearing of [SHAC] was in the summer, early fall of 2000").

included much lawful activity.¹²⁶ Defendants, said the court, “engaged in various ‘direct action’ campaigns, which . . . constitute illegal activity”¹²⁷ and “took credit for the success of the direct action campaigns as companies discontinued their business dealings with Huntingdon, one by one[, and] held up the successes of the illegal campaigns as an example to other companies they targeted.”¹²⁸ The court listed what it said were “representative samples of Kjonaas’s direction and coordination of the direct action campaign.”¹²⁹ Thus, the court repeatedly characterized the campaign as a whole as unlawful.

The court claimed to recognize that some of the protest activity in the SHAC campaign was legal and protected. For example, “[t]he website . . . lauded both legal and illegal protest activity.”¹³⁰ The court also noted that “[c]oordinating demonstrations at the homes of Huntingdon employees, under the parameters set forth in injunctions, is not unlawful”¹³¹ and held

125. Trial Transcript, Day 3 at 274–75, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Frank Thomas) (testifying that animal rights activity against Stephens Inc. ended in or around February 2002).

126. For example, activists with the national animal rights group In Defense of Animals traveled to Las Vegas to protest at a hotel where Stephens was holding a conference, rented a hotel room, and held a parallel news conference. See Barbara Stagno, *Doctors Join Animal Advocates in Criticizing Stephens Inc.’s Support of Huntingdon Life Sciences*, VIVISECTIONINFO.ORG (Mar. 20, 2001), <http://web.archive.org/web/20010409070006/http://www.vivisectioninfo.org/hls/hlsnr032001.html>. Activists placed calls to the Augusta National Golf Club when Stephens Inc. President and CEO Warren Stephens was reported to be there for a members’ weekend. Gov’t Ex. 1098, *Fullmer*, 584 F.3d 132 (No. 06-4211). They held a protest tour, in which they held demonstrations at Stephens offices and employees’ homes in several cities. Gov’t Ex. 1082, *Fullmer*, 584 F.3d 132 (No. 06-4211). In October 2001, hundreds of activists traveled to Little Rock, Arkansas, for three days of presentations and demonstrations at Stephens’s headquarters and the homes of executives. The meetings were open to the public and featured prominent philosophers and activists as speakers. Gov’t Ex. 1084, *Fullmer*, 584 F.3d 132 (No. 06-4211); *Report of Huntingdon Life Sciences Protest*, *supra* note 33. Activists went back in January 2002 for another round of Little Rock protests and public meetings. Gov’t Ex. 1084, *Fullmer*, 584 F.3d 132 (No. 06-4211). They held protests against Bank of America for its relationship with Stephens Inc. as a form of tertiary targeting. “*Bank of America Kills*” Campaign Off to a Great Start, PORTLAND INDYMEDIA (Nov. 7, 2001), <http://www.portland.indymedia.org/portland/en/2001/08/3116.shtml>. Activists created a website that parodied Stephens Inc.’s website, and which a New Jersey court deemed protected by the First Amendment. *Judge Denies Request to Close Web Site Protesting Animal Cruelty*, SHAC USA, http://web.archive.org/web/20010411013042/http://www.stephenskills.com/site_12-12.html (last visited May 28, 2016).

127. *Fullmer*, 584 F.3d at 153.

128. *Id.* at 156.

129. *Id.* at 157.

130. *Id.* at 139–40.

131. *Id.* at 155. “The website mentions that police were often on site to oversee the protests and to protect the targets of the protests.” *Id.* at 155 n.9. It is important to note that residential picketing *absent* an injunction is also protected. See *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (ascertaining

that “the publication of the ‘Top Twenty Terror Tactics,’ without more, [was] also protected.”¹³² And the court said “there was ample evidence at trial to demonstrate that [the defendants] coordinated and controlled SHAC’s activities, both legal and illegal.”¹³³ However, the court did not actually *treat* any of the defendants’ activity as protected.

Instead, the court traveled the short step from the conception of SHAC as an illegal campaign to convicting the defendants for leading it. The Third Circuit’s operating theory in order to do this was to assess the defendants’ actions *in context*—that is, activity that would otherwise be protected was deemed evidence of the defendants’ involvement in an unlawful conspiracy because it occurred *in the context of* the campaign.¹³⁴ This is a complete inversion of *Claiborne Hardware*. The very “presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.”¹³⁵ The *Claiborne* decision explained that the remedies the state may impose in this area are damages “restricted to those directly

“what limits, if any, may be placed on *protected speech*” (emphasis added)). “[A] public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood.” *Id.* at 480. The question in *Frisby*, whether the ordinance “‘leave[s] open ample alternative channels of communication,’” so as to satisfy “the stringent standards [the Court has] established for restrictions on speech in traditional public fora,” was “easily answered.” *Id.* at 482, 481–82 (first alteration in original) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

[O]nly focused picketing taking place solely in front of a particular residence is prohibited. . . . “Protestors have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching. . . . They may go door-to-door to proselytize their views. They may distribute literature in this manner . . . or through the mails. They may contact residents by telephone, short of harassment.”

Id. at 483–84 (quoting Brief for Appellants at 41–42, *Frisby v. Schultz*, 487 U.S. 474 (1998) (No. 87-168)). The ordinance at issue in *Frisby* was a *time, place, and manner* restriction. *Id.* at 481. Time, place, and manner restrictions are constitutional regulations of *protected* expression. *See also* *Dean v. Byerley*, 354 F.3d 540, 549–51 (6th Cir. 2004) (holding that, in the absence of regulation, the constitutional right to engage in targeted residential picketing is “unfettered”).

132. *Fullmer*, 584 F.3d at 155. As the *Fullmer* court acknowledged, the “Top Twenty Terror Tactics” was a list compiled by a pro-vivisection British lobbying group (the Research Defence Society). *Id.* at 140. It listed tactics that had been used by anti-HLS campaigners in England. Gov’t Ex. 1004, *Fullmer*, 584 F.3d 132 (No. 06-4211). SHAC USA republished the list on its website. *Id.* In a common move throughout the opinion, after declaring that “the publication of the ‘Top Twenty Terror Tactics’ [was] protected,” the court later included the posting in the evidence deemed sufficient to convict defendant Kjonaas on four counts of interstate stalking, thus declaring the exact same speech both protected and evidence of a crime. *Fullmer*, 584 F.3d at 163. *See infra* discussion at text accompanying note 422 through note 423.

133. *Fullmer*, 584 F.3d at 155. *See also id.* at 161 (“Kjonaas and Gazzola were instrumental in the coordination of all of SHAC’s activities, both legal and illegal.”).

134. *Id.* at 161.

135. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916–17 (1982).

and proximately caused by wrongful conduct chargeable to the defendants.”¹³⁶ “[T]he permissible scope of state remedies in this area is strictly confined to the direct consequences of such [violent] conduct, and does not include consequences resulting from associated peaceful picketing[.]”¹³⁷ The presence of protected activity is the context in which unlawful acts are to be assessed. Instead, the Third Circuit treated the unlawful acts as the context in which the protected acts were assessed and upheld the defendants’ convictions without showing that any of them had ever “directly and proximately caused” an unlawful act.

Perhaps the best example of this is the court’s rationale for upholding defendant Joshua Harper’s conviction. According to the court, the evidence against Harper showed that he

coordinated a SHAC campaign in Seattle, . . . gave speeches advocating and explaining electronic civil disobedience [and how to send black faxes,] . . . visit[ed] a Deloitte and Touche office in Seattle during which it appears he did nothing illegal[,]. . . wrote an editorial in which he endorsed militant action[,]. . . called Kjonaas to express his surprise and pleasure with SHAC’s successes, and . . . e-mailed Kjonaas asking for speakers to travel to Seattle to speak on behalf of the organization and the movement.¹³⁸

The court stated unequivocally, “Harper’s personal conduct does not cross the line of illegality; to punish him simply on the basis of his political speeches would run afoul of the constitution.”¹³⁹ *The analysis should have ended there.*

Yet the court continued: “his conduct, as discussed *infra*, does provide circumstantial evidence from which a jury could have reasonably inferred that Harper was involved in a conspiracy to violate the AEPA.”¹⁴⁰ Later in the opinion, when assessing the sufficiency of the evidence that the defendants “acted for the purpose of causing physical disruption to Huntingdon and to intentionally damage or cause the loss of Huntingdon’s

136. *Id.* at 918.

137. *Id.* (second alteration in original) (quoting *Mine Workers v. Gibbs*, 383 U. S. 715, 729 (1966)).

138. *Fullmer*, 584 F.3d at 158.

139. *Id.* Moreover, not only was Harper’s conduct *legal*, it was constitutionally *protected*.

140. *Id.*

property,”¹⁴¹ the court recounted *the same exact activity* as the basis for concluding that defendant Harper agreed to participate in an unlawful conspiracy:

Harper organized a Seattle branch of SHAC and a local campaign against Stephens, a company targeted by SHAC. In a lengthy telephone conversation with Kjonaas, Harper enthusiastically discussed recent events in the SHAC campaign and future strategies. He wrote editorials and gave speeches praising militant tactics and direct action. These included a speech in Seattle in which he explained how the audience could send black faxes, a primary tool in SHAC’s campaign. In that speech Harper declared, “I think that it’s appropriate to have a militant response . . . to go after them with everything at . . . our hands. Anything that we have available to use and do our utmost to shut them down.” *From this constellation of evidence* the jury could reasonably conclude that Harper conspired with others and shared the purpose of causing unlawful physical disruption and damage to property at Huntingdon.¹⁴²

How can it be both unconstitutional to convict Harper on the basis of this activity and at the same time constitutional to use this activity as sufficient evidence that he agreed to participate in an unlawful

141. *Id.* at 160. The Third Circuit considered the sufficiency of the evidence separately from its First Amendment analysis, while recognizing that “[d]efendants’ sufficiency arguments are largely tied to their argument that the AEPA was unconstitutional as-applied.” *Id.* Of course, sufficiency is only relevant where the defendants have been properly found to have engaged in unprotected acts—if all of the defendants’ activities are protected, then there is insufficient evidence to convict them of a crime. *See also infra* text at note 354 through note 356 (noting that the court erroneously attached First Amendment protection to—or, rather, removed it from—the individual defendants, rather than from particular utterances).

142. *Id.* at 161–62 (emphasis added) (quoting Gov’t Ex. 8018A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (transcript of an audio recording of Harper’s speech, Gov’t Ex. 8018, *Fullmer*, 584 F.3d 132 (No. 06-4211))). Throughout the trial, audio recordings were entered into evidence, however transcripts of them were not. The jury was given transcripts as listening aids while the recordings were played in open court. The jury was also permitted to reference transcripts during deliberations. *See* Trial Transcript, Day 9 at 62, *Fullmer*, 584 F.3d 132 (No. 06-4211) (“[A]t this time the government would ask to publish 8018. . . . [I]t’s the testimony was [sic] the University of Washington speech by Joshua Harper on October 17, 2002. If we can just have a moment to pass out the transcripts to the jury.”); Jury Charge at 23, *United States v. Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2 (D.N.J. Sept. 16, 2004), *aff’d sub nom. Fullmer*, 584 F.3d 132 (“Transcripts of the conversations that were recorded were given to you during the trial. You may use such transcripts in your deliberations as an aid to assist you in listening to the tapes. I instruct you, however, that the evidence of the conversations is the tape recordings, themselves.”).

conspiracy?¹⁴³ The only way to do that is to transmute protected activity into unprotected activity—in this case, to allow expression that would have been protected in isolation to lose that protection because it was part of an overall collective effort that included unlawful activity. In short, sufficient evidence that Harper agreed to participate in *the campaign* (i.e., a quantitative assessment) was deemed sufficient evidence that he agreed to participate in an unlawful conspiracy (i.e., what should have been a qualitative assessment of whether the specific activity undertaken by Harper was protected or unprotected). Thus, the entire basis for defendant Harper’s conviction is a “constellation” of protected speech and expressive activity in the context of the SHAC campaign.

“Constellation[s] of evidence” are far from the particularized analysis required by the First Amendment, as articulated in *Claiborne Hardware*. So are “metaphorical fingerprints.” In its First Amendment assessment of defendant Kjonaas’s activities, the court asserted that “[t]he record contains more instances of Kjonaas’s involvement in and coordination of illegal activity than we could possibly recount here. Suffice it to say that, as detailed above, Kjonaas’s metaphorical fingerprints were all over several of SHAC’s illegal activities.”¹⁴⁴ Quite simply, “metaphorical fingerprints” do not come close to “suffic[ing]” to satisfy the “‘precision of regulation’” demanded by the First Amendment.¹⁴⁵

There is ample reason to be skeptical of claims that Kjonaas was *involved in* and *coordinated* illegal activity, especially in light of the court’s claim that defendant Gazzola was “personally involved” in a “bombing,” referring to a radio interview she conducted following a smoke bombing.¹⁴⁶ Indeed, the activities “detailed above,”¹⁴⁷ supposedly demonstrating Kjonaas’s “involvement in and coordination of” illegal activity, are: arranging to have www.stephenskills.com temporarily taken offline and meeting with a Stephens Inc. employee;¹⁴⁸ leading an effort to obtain the

143. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 929 (1982) (“If there were other evidence of [Charles Evers’s] authorization of wrongful conduct, the [content of his speech, namely] references to discipline[,] could be used to corroborate that evidence. But any such theory fails for the simple reason that there is no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence.”).

144. *Fullmer*, 584 F.3d at 156.

145. *Claiborne Hardware*, 458 U.S. at 921 (“The ambiguous findings of the Mississippi Supreme Court are inadequate to assure the ‘precision of regulation’ demanded by that constitutional provision.” (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963))).

146. *Fullmer*, 584 F.3d at 148–49.

147. See *id.* at 147 (“Here, we recount a sample of specific instances that demonstrate Kjonaas’s involvement [in illegal acts].”).

148. *Id.*

identities of new Huntingdon directors;¹⁴⁹ stating that it was “awesome” that a company had dumped Huntingdon after only 10 days of protests because it had seen previous campaigns against other companies;¹⁵⁰ suggesting to defendant Fullmer that protests be attributed to the Animal Defense League rather than SHAC USA;¹⁵¹ being quoted in a press release following a bombing at biotech company and HLS client Chiron, Inc.;¹⁵² and the fact that a pen register on a phone number registered to Kjonaas in New Jersey showed that a call had been placed to a number registered in California to the activist later charged with the bombing.¹⁵³ None of these are illegal acts. What’s more, according to the court, the clearest example of Kjonaas’s “involvement in and coordination of” illegal activity was his

149. *Id.*

150. *Id.* at 147–48.

151. *Id.* at 148. After being sued in dozens of SLAPP suits, or Strategic Lawsuits Against Public Participation, in at least eight states, all of which were flawed in the same way as *Fullmer* insofar as they sought to hold the *speakers* (SHAC USA and any activists whose names the plaintiffs could identify) liable for the unlawful acts of unidentified others, SHAC USA incorporated and tried to distance itself from protest activity. Incorrectly believing that the constitutional line was drawn between “activity” and “pure speech,” the organization aimed to avoid lawsuits by focusing on communications, or pure speech, and moving away from organizing demonstrations. This was the reason for Kjonaas’s email to Fullmer requesting that demonstrations be attributed to the Animal Defense League, rather than SHAC USA. See Gov’t Ex. 8021, *Fullmer*, 584 F.3d 132 (No. 06-4211); see also *infra* discussion at note 159. Thus, SHAC USA was chilled from First Amendment-protected protests. While the defendants can be forgiven for their ignorance about First Amendment law, the Third Circuit Court of Appeals should be reluctant to identify this as evidence of unlawful activity—shell games are meaningless when it is *protected* activity that is being misattributed or disguised.

152. *Fullmer*, 584 F.3d at 148. The building was empty at the time and no one was injured in the bombing.

153. *Id.* The opinion claimed that “[l]ess than twelve hours after the bomb detonated, telephone records show that Kjonaas called Daniel Andreas San Diego, the man later charged with the bombing.” *Id.* See also *id.* at 156–57 (“Kjonaas’s telephone records indicate that he called the person responsible for the Chiron bombing in Seattle hours after it happened.”). The court did not provide a record citation for either of these claims. In fact, the evidence showed only that a call was placed between two numbers registered to those two individuals. Trial Transcript, Day 9 at 178–80, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Sharon Jude Serra). Serra referenced Gov’t Ex. 8029, *Fullmer*, 584 F.3d 132 (No. 06-4211), a pen register showing a call from a phone number registered to Kjonaas to a phone number registered to Daniel Andreas San Diego. (The exhibit itself is missing from my copy of the Joint Appendix, and it is not clear that it was ever moved into evidence.) There was no evidence showing who placed or answered the call, whether San Diego was present at that time at the address to which the landline in his name was registered, or what was the content of the call. The *Fullmer* court also erroneously claimed that the bombing occurred in Seattle, though the record is clear that the bombing occurred in Emeryville, California. See Gov’t Ex. 1249A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (SHAC USA press release commenting on the bombing). The court cited and quoted from this exhibit when first mentioning the bombing, in a line of the opinion immediately before mentioning the phone call it ascribed to Kjonaas. See also Stacy Finz & Bernadette Tansey, *2 Bombs Shatter Biotech Firm’s Windows/Animal Rights Group Takes Responsibility for Chiron Attack*, S.F. CHRON. (Aug. 29, 2003), <http://www.sfgate.com/bayarea/article/2-bombs-shatter-biotech-firm-s-windows-Animal-2559486.php>.

“involvement with the campaign against [HLS’s largest investor] Stephens [Inc.].”¹⁵⁴ Namely,

prior to [a meeting Kjonaas had] with [a] Stephens representative to discuss Stephens’s investment with Huntingdon, the Stephens representative asked Kjonaas to shut down www.stephenskills.com, a website that encouraged electronic civil disobedience. Within days, the website was down. After the meeting, during which Stephens refused to stop dealing with Huntingdon, an illegal direct action campaign against Stephens escalated.¹⁵⁵

Kjonaas’s ability to have the stephenskills.com website taken down, and the correlation between Stephens’s decision not to divest from HLS and the escalation of a campaign pressuring it to do so, was deemed “the clearest example of” his “metaphorical fingerprints [on] SHAC’s illegal activities,” despite the fact that neither taking down a (constitutionally protected)¹⁵⁶ website, nor the correlation of protest activity to a company’s refusal to meet the protesters’ demands, demonstrate unlawful activity on *anyone’s* part, let alone Kjonaas’s. These are not illegal acts. Kjonaas’s apparent control over one of the campaign’s websites only establishes his “involvement in and coordination of” unlawful activity if the SHAC campaign itself is deemed unlawful—i.e., an illegal conspiracy.

Repeatedly, the court offered the defendants’ leadership of a campaign that included illegal activity as the basis for upholding their convictions for conspiring to violate the AEPA. For example, the court deemed defendant Gazzola’s activity unprotected because “the record establishes that Gazzola, like Kjonaas, was instrumental in the planning and execution of SHAC’s illegal activities. She repeatedly employed illegal tactics as one of the strategies used to further SHAC’s overall goal of closing Huntingdon.”¹⁵⁷ However, the court pointed to no evidence of how either defendant *employed* illegal tactics other than *talking about them* (i.e., via the SHAC USA website).

When assessing the sufficiency of the evidence against Kjonaas and Gazzola on Count 1, the court merely asserted their leadership of the campaign.

154. *Fullmer*, 584 F.3d at 156.

155. *Id.* See *infra* text at note 200 through note 208 (discussing electronic civil disobedience).

156. *Judge Denies Request to Close Web Site Protesting Animal Cruelty*, *supra* note 126.

157. *Fullmer*, 584 F.3d at 157.

Kjonaas and Gazzola had leadership positions in SHAC, an organization that clearly engaged in unprotected activity via its website. Kjonaas and Gazzola were instrumental in the coordination of all of SHAC's activities, both legal and illegal. There is also overwhelming evidence of their constant attempts to evade law enforcement and cover their tracks: use of encryption devices and programs to wipe their computer hard drives; attributing illegal activities to fake organizations and activists; and the use of pseudonyms.¹⁵⁸

The court cited no evidence of what illegal activities Kjonaas and Gazzola coordinated; no evidence suggesting that what was concealed by encryption, et cetera, was unlawful activity;¹⁵⁹ no identification of any unlawful act that was attributed to a fake organization or activist; and no connection between the use of pseudonyms and participation in an illegal act. Instead, there is only an unequivocal statement that the defendants' crimes consisted of participating in "an organization that . . . engaged in unprotected activity."¹⁶⁰ In short, Kjonaas and Gazzola were in charge. Leading the overall political effort was a crime. Agreeing to join the campaign was agreeing to join an illegal conspiracy.¹⁶¹

Ultimately, the court attributed only a single independent illegal act to any of the defendants.

158. *Id.* at 584 F.3d at 161.

159. Indeed, there was evidence that what was encrypted was *not* unlawful. *See, e.g.*, Gov't Ex. 8021, *Fullmer*, 584 F.3d 132 (No. 06-4211). This is a decrypted email exchange between defendant Kjonaas and defendant Fullmer, in which Kjonaas asked Fullmer if demonstrations could be attributed to the Animal Defense League – New Jersey:

We can handle all the organizing, notices, advertising, etc[.] – but would rather put the sponsor name of the events in the ADL NJ name. SHAC is supposed to be a national "communications" group (now incorporated as such for a plethora of reasons) and cannot thereby take responsibility for them. i think adl nj should exist for this purpose. it make no sense making up other silly little groups that are going to be bound by the injunction anyways.

Id. (grammatical mistakes and misspellings in original). *See also* Trial Transcript, Day 8 at 215–16 (testimony of computer expert Eoughan Casey). As discussed *infra* at text accompanying note 373 through note 375, and *supra* at note 151, this is a shell game of attribution for constitutionally protected activity—indeed, activity that would comply with an injunction—concealed by encryption.

160. *Fullmer*, 584 F.3d at 161. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 919 (1982) ("[A] blanket prohibition of association with a group having both legal and illegal aims' would present 'a real danger that legitimate political expression or association would be impaired.'" (quoting *Scales v. United States*, 367 U.S. 203, 229 (1961))).

161. Or, at least, joining the campaign in a leadership capacity. This was also the theory underlying the dozens of civil lawsuits filed against SHAC USA and several of the *Fullmer* defendants—that multiple protected acts (i.e., leadership) add up to an unprotected whole.

In February 2003, [defendant] Stepanian led a protest of approximately twenty people at a New York office of Deloitte and Touche, Huntingdon's auditor. After security refused to admit him to the building, Stepanian followed a pizza delivery person inside, and asked to speak to a Deloitte employee, Maureen Collins. When Collins arrived she asked Stepanian to leave, to which Stepanian responded that if Deloitte refused to talk to him, the organization would launch a "full-fledged campaign" against the company within 48 hours. Collins called the police, and a security guard grabbed Stepanian and escorted him out of the building. At that moment, other protestors threw flyers from a third floor balcony, showering people below. They also chanted and plastered stickers throughout the interior of the building. The police arrived and detained one protestor, who later escaped.¹⁶²

In short, Stepanian trespassed. Concededly, he could have been arrested and charged or ticketed for having done so. However, such activity hardly rises to the level of a federal conspiracy to disrupt an animal enterprise and, in particular, charges of domestic terrorism. Or, at least, it should not.¹⁶³

Moreover, Stepanian, a "New York activist,"¹⁶⁴ did not cross state lines and Deloitte & Touche is not an animal enterprise.¹⁶⁵ Thus, Stepanian did not proximately physically disrupt an animal enterprise by way of unlawful conduct. Here, we confront the central problem of *Fullmer*: the only

162. *Fullmer*, 584 F.3d at 150 (internal citation omitted).

163. The government insisted on this very point in its appellate brief: "When defendants intentionally engage in *unlawful* physical disruption (which a trespass is), with the *purpose* of inflicting *economic damage* by their *unlawful* disruptions, then a crime under the AEPA has in fact been committed." Consolidated Brief for Appellee at 111, *Fullmer*, 584 F.3d 132 (No. 06-4211).

164. See *infra* further discussion at text accompanying note 389 through note 391.

165. See *Fullmer*, 584 F.3d at 167 (Fisher, J., dissenting) ("I fail to see any evidence of an agreement to cause physical disruption to Huntingdon—as opposed to other non-animal enterprise companies affiliated with Huntingdon—or to cause damage or loss to property used by Huntingdon."). This raises important questions. What if, like the AETA, the AEPA *did* reach non-animal enterprises? Alternatively, what if Stepanian had crossed state lines to trespass at an animal enterprise? One of the primary problems with the Animal Enterprise Protection (and Terrorism) Act(s) is that the law invites the treatment of minor illegal activity, the type common to all protests, as acts in furtherance of a criminal conspiracy to commit a federal felony—namely, terrorism. See NANCY CHANG, SILENCING POLITICAL DISSENT: HOW POST-SEPTEMBER 11 ANTI-TERRORISM MEASURES THREATEN OUR CIVIL LIBERTIES 113 (2002) ("[P]rotest activities that previously would most likely have ended in a charge of disorderly conduct under a local ordinance can now lead to federal prosecution and conviction for terrorism"); see also *supra* note 163 (quoting the government insisting in its appellate brief that mere trespasses violate the AEPA).

connection between Stepanian's activity and both an interstate element and an animal enterprise is a protest write up posted on the SHAC USA website.¹⁶⁶ A layer of constitutional protection lies between Stepanian's unlawful act and the alleged charge of animal enterprise terrorism. The only way to satisfy the elements of the AEPA is to strip Stepanian's speech of this protection. The same problem arises in the case of each defendant.

B. Categorically Unprotected Expression

Of course there is a way that the defendants could have "engaged in unprotected activity via [the SHAC USA] website"¹⁶⁷—namely, if their web-based speech was unprotected. Again, if there was "evidence that Defendants coordinated, directed and personally participated in the illegal acts,"¹⁶⁸ as the court claimed, there would be no reason to determine whether their speech was protected. However, no such evidence was forthcoming. The court made these unsupported claims repeatedly, yet still proceeded to assess the defendants' speech. "We must first decide," said the court, "whether the content on the SHAC website, the cornerstone of the government's case, is protected by the First Amendment. If so, the AEPA's criminalization of the speech on and through the website is unconstitutional."¹⁶⁹

It is a fundamental First Amendment principle that, in general, the State cannot restrict speech based on its content.¹⁷⁰ The narrow exception to this general rule encompasses a handful of content-based categories of unprotected speech:¹⁷¹ fighting words,¹⁷² incitement,¹⁷³ true threats,¹⁷⁴ obscenity,¹⁷⁵ child pornography,¹⁷⁶ and (to a limited extent) libel.¹⁷⁷

166. *Fullmer*, 584 F.3d at 150.

167. *Id.* at 161.

168. *Id.* at 147.

169. *Id.* at 153–54.

170. *See* *United States v. Stevens*, 559 U.S. 460, 468 (2010) ("[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (alteration in original) (quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002))).

171. *Hess v. Indiana*, 414 U.S. 105, 107–08 (1973) ("It hardly needs repeating that '[t]he constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within "narrowly limited classes of speech.'" (alteration in original) (quoting *Gooding v. Wilson*, 405 U.S. 518, 521–22 (1973))).

172. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (identifying "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," including "'fighting' words").

The Third Circuit held that defendants' speech fell into two unprotected categories: incitement and true threats.¹⁷⁸

i. Incitement

The incitement doctrine, established in *Brandenburg v. Ohio*, holds that

the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.¹⁷⁹

In *Brandenburg*, a Ku Klux Klan member led a rally where "12 hooded figures, some of whom carried firearms[,] . . . gathered around a large wooden cross, which they burned."¹⁸⁰ The defendant made derogatory statements towards Jewish people and Black people, and stated that "if our President, our Congress, our Supreme Court, continues [sic] to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken."¹⁸¹ He was charged under Ohio's Criminal Syndicalism Statute, which punished persons who

"advocate or teach the duty, necessity, or propriety" of violence
"as a means of accomplishing industrial or political reform"; or

173. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (identifying incitement of imminent lawless action as the threshold for when advocacy of unlawful conduct transcends the bounds of First Amendment protection).

174. See *Watts v. United States*, 394 U.S. 705, 708 (1969) (identifying the unprotected category of "true threats"); *Virginia v. Black*, 538 U.S. 343, 359 (2003) (defining "true threats" as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals").

175. See *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that obscenity is not protected by the First Amendment).

176. See *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding that child pornography is not protected by the First Amendment).

177. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that liability for defamatory falsehoods about the official conduct of a public official requires "actual malice"); *Gertz v. Welch*, 418 U.S. 323, 332, 345–47 (limiting *Sullivan*'s actual malice requirement in the case of a defamed individual who is neither a public official nor a public figure).

178. *United States v. Fullmer*, 584 F.3d 132, 155–56 (3d Cir. 2009).

179. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

180. *Id.* at 445.

181. *Id.* at 446.

who publish or circulate or display any book or paper containing such advocacy; or who “justify” the commission of violent acts “with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism”; or who “voluntarily assemble” with a group formed “to teach or advocate the doctrines of criminal syndicalism.”¹⁸²

The Court struck down the statute, which the Court said, “by its own words . . . purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action,”¹⁸³ thus violating the “constitutional guarantees of free speech and free press.”¹⁸⁴

The operating principle behind this doctrine was articulated in Justice Brandeis’s famous and eloquent concurrence in *Whitney v. California*:¹⁸⁵

[A] State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.

. . . .

[E]ven advocacy of [law] violation, however reprehensible morally, *is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on* Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied

182. *Id.* at 448 (internal citations omitted).

183. *Id.* at 449.

184. *Id.* at 447.

185. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 23 (1971):

The law of free speech we know today grows out of the Supreme Court decisions following World War I—*Schenck v. United States*, *Abrams v. United States*, *Gillow v. New York*, *Whitney v. California*—not out of the majority positions but rather from the opinions, mostly dissents or concurrences that were really dissents, of Justice Holmes and Brandeis. . . . The great Smith Act cases of the 1950’s . . . and, more recently, in 1969, *Brandenburg v. Ohio* . . . mark the triumph of Holmes and Brandeis.

Id.

through the processes of popular government, *no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.* Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.¹⁸⁶

The crux of the incitement test is the temporal element of imminence—the time between when a speaker advocates unlawful activity and when a listener commits an illegal act: “[i]f there be time . . . to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”¹⁸⁷ If someone gives a speech in which they urge listeners to violate the law, some of the listeners may immediately agree with the speaker, while others may immediately disagree, and some may have no strong opinion at all. Some of the people who immediately agree with the speaker may leave the speech and encounter other arguments that reinforce their agreement, while others may encounter arguments that challenge the speaker’s position and cause them to change their minds. Likewise, some of the people who immediately disagree with the speaker may leave the speech and encounter arguments that cause them to eventually agree or to be even more convinced of their disagreement. Some individuals who had strong or weak opinions upon hearing the speech may change their minds multiple times as they continue to encounter different perspectives.

This process, of course, is hardly orderly or predictable; it is nothing more or less than the constant and irrepressible exchange of ideas between minds—an exchange that Justice Brandeis believed must be allowed to play

186. *Whitney v. California*, 274 U.S. 357, 374, 376–78 (1927) (Brandeis, J., concurring) (emphasis added).

187. *Id.* at 377.

out in order to preserve liberty. If members of the speaker's audience act on the advocacy, those who acted may be punished for having broken the law. But the time between the speech and the crime—the time in which those individuals have been able to consider the advocacy and choose their own actions—protects the speaker from liability for the actions of the listeners: “[a]mong free [people], the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law.”¹⁸⁸

The Vietnam War-era case *Hess v. Indiana* demonstrates just how *imminent* unlawful action must be in order for the speech advocating it to lose protection.¹⁸⁹ During an anti-war demonstration at Indiana University,

approximately 100 to 150 of the demonstrators moved onto a public street and blocked the passage of vehicles. When the demonstrators did not respond to verbal directions from the sheriff to clear the street, the sheriff and his deputies began walking up the street, and the demonstrators in their path moved to the curbs on either side, joining a large number of spectators who had gathered.¹⁹⁰

Gregory Hess yelled to the demonstrators “[w]e’ll take the fucking street later,” or “[w]e’ll take the fucking street again.”¹⁹¹ He was arrested and charged with disorderly conduct.¹⁹²

The Supreme Court held that Hess’s speech was protected by the First Amendment and overturned his conviction.¹⁹³ In doing so, it rejected the lower courts’ conclusion that Hess’s statement “was intended to incite further lawless action on the part of the crowd in the vicinity of appellant and was likely to produce such action.”¹⁹⁴ The Court said

[a]t best . . . the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time. . . . And since there was no evidence or rational inference from the import of

188. *Id.* at 378. See also *Kingsley Int’l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 689 (1959) (incorporating this point from Brandeis’s *Whitney* concurrence into a majority opinion); *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) (“The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.”).

189. *Hess v. Indiana*, 414 U.S. 105, 1078–09 (1973).

190. *Id.* at 106.

191. *Id.* at 107.

192. *Id.*

193. *Id.* at 108–09.

194. *Id.* at 108 (quoting *Hess v. State*, 297 N.E.2d 413, 415 (Ind. 1973)).

the language, that his words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State on the ground that they had a “tendency to lead to violence.”¹⁹⁵

Thus, even in a near-riot situation, the advocacy of law violation was protected because it was not intended or likely to produce *imminent* disorder.

The Court treated Charles Evers’s speech similarly in *Claiborne Hardware*.

The emotionally charged rhetoric of Charles Evers’ speeches did not transcend the bounds of protected speech set forth in *Brandenburg*. . . . If [the strong language Evers used] had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct. In this case, however—with the possible exception of the Cox incident—the acts of violence . . . occurred weeks or months after the . . . speech.¹⁹⁶

As Justice Brandeis put it, “[o]nly an emergency can justify repression.”¹⁹⁷

In *Fullmer*, the Third Circuit stripped protection from speech that did not meet the imminence requirement under *Brandenburg*. To the court’s credit, it rejected the government’s theory that the defendants’ “coordinated efforts (including their use of the SHAC website) incited numerous acts of violence against SHAC’s targets. After companies and their employees were targeted for ‘direct action,’ *acts of violence followed soon thereafter, which would satisfy any requirement of ‘imminence’ under Brandenburg*.”¹⁹⁸ On the contrary, any conception of imminence in which *soon*, rather than a specified time period, is deemed sufficient should immediately be rejected as too vague to satisfy constitutional requirements.

195. *Id.* at 108–09 (quoting *Hess*, 297 N.E.2d at 415).

196. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982). It is notable that Evers’s speech was deemed protected, even with a “possible exception” to the lack of subsequent violence.

197. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

198. Consolidated Brief for Appellee at 129, *United States v. Fullmer*, 584 F.3d 132 (3d Cir. 2009) (No. 06-4211) (emphasis added). *See also* Superseding Indictment at 8, *United States v. Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2 (D.N.J. Sept. 16, 2004), *aff’d sub nom.* *United States v. Fullmer*, 584 F.3d 132 (3d Cir. 2009) (“It was further part of the conspiracy that acts of intimidation and vandalism perpetrated on HLS employees would be reported on the SHAC website *in a manner designed to foster additional acts . . .*” (emphasis added)).

Though it failed to deliver the scathing rejection such an assertion deserved, the Third Circuit did reject the substance of the claim, writing “merely posting information on unlawful acts that have already occurred, in the past, does not incite future, imminent unlawful conduct.”¹⁹⁹

However, the court went on to err by holding that the defendants’ advocacy of electronic civil disobedience (ECD) (through the SHAC USA website and shacusa@envirolink.org email address) constituted incitement.²⁰⁰ After “emphasiz[ing] that much of the speech on the website [did] not run afoul of the *Brandenburg* standard,” the court found that “the posts that coordinate electronic civil disobedience . . . [were] more problematic.”²⁰¹

Through its website, SHAC . . . invited its supporters to engage in electronic civil disobedience against Huntingdon and various companies associated with Huntingdon. Electronic civil disobedience involves a coordinated campaign by a large number of individuals to inundate websites, e-mail servers, and the telephone service of a targeted company. Electronic civil disobedience also includes the use of “black faxes,” repeatedly faxing a black piece of paper to the same fax machine to exhaust the toner or ink supply.

. . . .

One specific example of SHAC’s coordination of electronic civil disobedience was an e-mail from “shacuse@envirolink.org” [sic] that was disseminated on October 26, 2003. The subject line of the e-mail was “Electronic Civil Disobedience,” and it advised SHAC supporters that on the following day, SHAC’s website would provide a link to the SHAC-Moscow website where “electronic civil disobedience will be taking place.”²⁰²

199. *Fullmer*, 584 F.3d at 155.

200. *Id.*

201. *Id.* SHAC’s website merely “included links to the tools necessary to carry out virtual sit-ins.” *Id.* Indeed, the evidence shows that the ECD tools were “located within the ‘open directory’ service provided by the Free Range Activism web site.” Gov’t Ex. 1034, *Fullmer*, 584 F.3d 132 (No. 06-4211). See also Gov’t Ex. 1033, *Fullmer*, 584 F.3d 132 (No. 06-4211) (showing that the tool to flood HLS’s email server and instructions for using it were available at <http://www.fraw.org.uk/opendir/ClogScript.class> and <http://www.huntingdonsucks.com/eec/ClogScript.html>, respectively).

202. *Fullmer*, 584 F.3d at 141.

SHAC USA used the term “electronic civil disobedience” to refer only to a coordinated effort to trigger a specific program to overload the servers of a particular target.²⁰³ The court, by contrast, referred to all telephonic and electronic protests as electronic civil disobedience: “Another way that SHAC encouraged the use of electronic civil disobedience was through its ‘Investor of the Week’ feature, which highlighted a company associated with Huntingdon by publishing the company’s contact information.”²⁰⁴ This is highly problematic. According to the court, merely publishing a company’s publicly available contact information constitutes electronic civil disobedience, with its implicit illegality. But this is quintessential First Amendment-protected expression: urging people to contact an entity to register objections to its practices.

The court noted that SHAC USA told activists to “[t]ake advantage of pay phones! Especially with toll free numbers!” linked to a “black fax,” and noted that, alternatively, “supporters could just use black paper to ‘give [a] target’s fax machine a run for its money . . . or ink!’”²⁰⁵ Additionally,

[t]he website explained how a supporter could block his phone number so that it would not appear on the fax or telephone line’s caller identification. In addition, the website explained how to prevent the targeted company’s servers from blocking e-mails, and provided a link to encryption devices that mask the sender.²⁰⁶

However, merely telling people how to prevent a message from being blocked, because “[s]ome companies have put filters on their email systems that direct email with HLS[-]related terms directly to the trash,”²⁰⁷ amounts to advocacy of *lawful* activity, as does providing publicly available information about how to block one’s phone number or mask the identity of an email sender.²⁰⁸

203. Evidence at trial confirmed this definition. Jeffrey Dillbone, the only witness to testify about having participated in electronic civil disobedience, defined it as “overloading the server of a company or overloading any internet server to the point that it can’t perform as it should be performing.” Trial Transcript, Day 4 at 14, *Fullmer*, 584 F.3d 132 (No. 06-4211).

204. *Fullmer*, 584 F.3d at 141.

205. *Id.* (quoting Gov’t Ex. 1006, *Fullmer*, 584 F.3d 132 (No. 06-4211)). The court incorrectly provided a record citation to Gov’t Ex. 1007, however the quoted language is on Gov’t Ex. 1006.

206. *Id.*

207. Gov’t Ex. 1006, *Fullmer*, 584 F.3d 132 (No. 06-4211).

208. Anonymous speech is protected by the First Amendment. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 343, 344 (1995) (acknowledging the “respected tradition of anonymity in the advocacy of political causes” and “the First Amendment’s protection of anonymity”).

Ultimately, the most fundamental problem with the court's incitement analysis is its failure to properly understand the imminence requirement. The court recounted the October 26, 2003, ECD email.

When SHAC's website included links to the tools necessary to carry out virtual sit-ins, those posts were clearly intended to incite imminent, lawless conduct that was likely to occur. . . . As described above, an October 26, 2003, e-mail titled "Electronic Civil Disobedience," urged SHAC supporters to participate in electronic civil disobedience at a specified time. This message encouraged and compelled an imminent, unlawful act that was not only likely to occur, but provided the schedule by which the unlawful act was to occur. This type of communication is not protected speech under the *Brandenburg* standard.²⁰⁹

This reasoning is contrary to both the doctrine and the principle behind *Brandenburg*. As demonstrated in *Hess*, even in a near-riot situation the degree of imminence must be extremely high before speech can constitutionally be punished for advocating unlawful action. Moreover, *Brandenburg* embodies the principles laid out in Justice Brandeis's *Whitney* concurrence and the esteemed World War I opinions of Justices Brandeis and Holmes,²¹⁰ including Justice Holmes' famous *Abrams v. United States* dissent: "[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that *an immediate check is require to save the country*."²¹¹ In *Brandenburg*, these dissents became the law.²¹²

209. *Fullmer*, 584 F.3d at 155.

210. Bork, *supra* note 185.

211. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (emphasis added).

212. Language in several cases in the intervening years between the Holmes and Brandeis dissents and *Brandenburg* shows the Court's evolving First Amendment jurisprudence, which fully matured in *Brandenburg*. See, e.g., *Bridges v. California*, 314 U.S. 252, 262–63 (1941):

[T]he likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be "substantial," it must be "serious." . . . What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.

Id. (quoting *Whitney v. California*, 274 U.S. 357, 374, 376 (1927) (Brandeis, J., concurring)) (relying on an earlier concurrence by Justice Brandeis).

Thus, *imminent* in *Brandenburg* is understood to mean *immediate*. Sending out an email a day in advance²¹³ allows more than sufficient time for individuals to assess the speech and decide for themselves whether or not to break the law²¹⁴—and then to be held accountable if they are caught doing so. Just before holding that SHAC USA incited people to participate in the ECD by sending out an email publicizing it a day in advance, the court rejected the government’s attempt to link the posting of the Top Twenty Terror Tactics on March 6, 2001, to “later unlawful conduct, the earliest of which occurred on March 31, 2001. These events occurred a minimum of three weeks apart, which does not meet the ‘imminence’ required by the *Brandenburg* standard.”²¹⁵ However, the court never explained why three weeks is too much time to satisfy *Brandenburg*’s imminence requirement, but one day is not.

The only witness who testified to personally participating in ECD and sending black faxes stated that both tactics are “commonly used when you can’t be physically present at the demonstration,” and that he had known about these tactics for “[a]pproximately, a year” before engaging in them.²¹⁶ Further, according to this witness, “[the ECD] was announced a few weeks ahead of time.”²¹⁷ He described his decision to participate as follows: “I chose to do so. . . . I did it on my own free will. . . . I did it on my own free will as SHAC simply provided me with the information.”²¹⁸

Defense attorney: So you had time to think about it?

Witness: Yes.

Defense attorney: You had time to deliberate on whether or not you were going to engage in that kind of action?

Witness: Yes, in fact, I set the computer up in our house so that we can run them all at the same time.

213. See Gov’t Ex. 8036, *Fullmer*, 584 F.3d 132 (No. 06-4211) (October 26, 2003 email from SHAC USA announcing ECD to be held on October 27).

214. Moreover, it is hard to see how written speech, which is generally removed from a charged atmosphere, could ever amount to incitement.

215. *Fullmer*, 584 F.3d at 155 n.10.

216. Trial Transcript, Day 4 at 35, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Jeffrey Dillbone).

217. *Id.*

218. *Id.* at 15, 31–32.

Defense attorney: The point is before you actually decided to do it, you had time to think about whether or not you were going to do that kind of act, isn't that right?

Witness: Yes, it was ultimately my choice, a 100 [sic] percent.²¹⁹

The court seemed to think that providing a specific day and time at which the ECD was to take place satisfied the imminence element:

[A]n October 26, 2003, e-mail titled "Electronic Civil Disobedience," urged SHAC supporters to participate in electronic civil disobedience at a specified time. *This message encouraged and compelled an imminent, unlawful act that was not only likely to occur, but provided the schedule by which the unlawful act was to occur.*²²⁰

This is neither the meaning of, nor the spirit behind, the imminence requirement. Indeed, announcing a particular time when an unlawful act will occur *in the future* is the opposite of imminence. It allows more than enough "time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education."²²¹ In short, there was no "emergency [to] justify repression."²²²

The court's flawed understanding of the incitement doctrine is starkly apparent in its discussion of defendant Fullmer's activities. After assessing SHAC USA's speech as a whole, the court considered each defendant to determine whether that defendant had engaged in the expression the court had deemed unprotected or had engaged in unlawful activity.²²³ "Fullmer," said the court, "operating under an e-mail address that the government identified as belonging to him, coordinated illegal protest activity on behalf

219. *Id.* at 35–36. Notably, the witness was never charged for his participation in the ECD. *Id.* at 33.

220. *Fullmer*, 584 F.3d at 155 (emphasis added).

221. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

222. *Id.*

223. *Fullmer*, 584 F.3d at 156.

We therefore conclude that some of the speech on SHAC's website, viewed in context, is not protected by the First Amendment. Likewise, we find that any Defendant who created or disseminated that speech, or who personally participated in illegal activity, is likewise not protected by the First Amendment. We discuss the individual Defendants below.

Id. See *infra* text at note 455 through note 462 (discussing *context* further); *infra* text at note 354 through note 356 (discussing stripping defendants, rather than particular speech, of First Amendment protection).

of SHAC via a Yahoo message board. This activity included inciting the readers to participate in ‘Black Fax Mondays’ against Stephens, Inc. and Bank of New York.”²²⁴ Here, the court is referring to its description, earlier in the opinion,²²⁵ of Exhibit 1021, an email, dated “Thu Aug 30, 2001” with the subject line “SHAC September Calendar.”²²⁶ Because of how perfectly it demonstrates the court’s deep misunderstanding and misapplication of the incitement doctrine, the body of the email is worth reproducing in full.

SEPTEMBER

September 3-7 – Stephens Week of Action

Monday, September 3 – “Black Fax Monday”
fax Warren Stephens all day: 501.377.2379

All week long – call and e-mail Stephens
HQ: 1.800.643.9691
See StephensKills.com for auto-emailer

Please plan a demo against Stephens or contact your local group
for your area!

Saturday, September 8 – Fundraise for October 29 in your area!

September 10-14 – Bank of New York Week of Action

Monday, September 10 – “Black Fax Monday”
Bank of New York: 212.809.9528

All week long – call and e-mail BNY
HQ: 1.800345[sic].1612 (for purchase and sale of ADRs)
Chairman and CEO: Thomas Renyi: trenyi@b...

Please plan a demo against Stephens or contact your local group
for your area!

Friday, September 14 – HLS “Greet the Workers” Demo 4-7pm
Mettlers Rd., East Millstone, NJ

224. *Id.* at 158.

225. *Id.* at 150–51.

226. Gov’t Ex. 1021, *Fullmer*, 584 F.3d 132 (No. 06-4211).

contact SHAC* or ADL-NJ** for more info

Saturday, September 15 – Bank of New York Demo
contact ADL-LI*** for details

September 17-21 – Customer Week of Action
Monday, September 17 – “Black Fax Monday”
Shell: 212.218.3113

Tuesday, September 18 – call and e-mail Shell
phone: 212.218.3113
ir-newyork@s . . .

Wednesday, September 19 – American Chemistry Council Demo
details TBA – contact SHAC* for more information

call ACC: 1.800.262.8200
fax: 703.741.6000

Thursday, September 20 – call and e-mail Glaxo Smithkline
phone: 888.825.5249
e-mail: [info@g . . .](mailto:info@g...)

Friday, September 21 – call, fax and e-mail Dow
phone: 732.271.2000
fax: 732.271.7873
e-mail: go to dow.com/assistance/thoughts.htm

September 24-28 – Market Maker Week of Action

Monday, September 17 – “Black Fax Monday”
Investor of the Week – to be announced

Saturday, September 29 – table at your local library or city center

*Stop Huntingdon Animal Cruelty
PO Box 22398
Philadelphia, PA 19129
(215) 951-9593
[shacusa@e . . .](mailto:shacusa@e...)

**Animal Defense League – New Jersey
(732) 296-1202
(732) 296-8687

adlnj@h . . .

Animal Defense League – Long Island
(631) 340-4708
xneveragainx@y . . .

WWW.NOCOMPROMISE.ORG²²⁷

The court held that “Fullmer’s speech incited others to commit illegal acts at a designated time and place, which meets the *Brandenburg* standard, removing it from the realm of protected speech.”²²⁸ This is an appalling inversion of the incitement doctrine. This email does not even come close to satisfying the *Brandenburg* standard. First, most of the activity it advocates—simply contacting companies to register one’s objections to their involvement with HLS—is *protected* expression. However, even where the email advocates arguably unlawful activity—sending black faxes—this is exactly the sort of speech *Brandenburg* protects: advocacy that listeners should do something unlawful. Moreover, as with the court’s disingenuous claims that Gazzola was *personally involved* in a bombing, the court’s treatment of this email announcement as having “coordinated” and “personally orchestrated”²²⁹ unlawful activity should make us extremely skeptical of its repeated claims that the defendants *coordinated* and *controlled* unlawful acts, for which no record citations are offered. Ultimately, Exhibit 1021 was the sole piece evidence referenced by the court in concluding there was sufficient evidence to uphold defendant Fullmer’s conviction for conspiring to commit animal enterprise terrorism.²³⁰

For the foregoing reasons, defendants’ advocacy that activists participate in electronic civil disobedience, send black faxes, and place phone calls must be regarded as advocacy protected under *Brandenburg*.

ii. True Threats

Unlike some categories of unprotected speech, true threats are defined entirely by their meaning. Compare, for example, the reasons that true

227. *Id.* (truncated email addresses are as they appear in government exhibit).

228. *Fullmer*, 584 F.3d at 158.

229. *Id.* at 161.

230. *Id.* at 150–51, 158, 161.

threats are unprotected (“protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur”²³¹) with the reasons protection is denied to child pornography (to dry up the market and remove the economic motive for the production of such materials, in order to “safeguard[] the physical and psychological well-being of [minors]”²³²). Not only is the meaning conveyed by child pornography irrelevant to whether or not such expression is protected by the First Amendment, the meaning of that expression—the idea of minors engaging in sexual activity—is itself protected.²³³ By contrast, meaning is the very core of a threat; in order to be a *true threat*, speech *must* communicate a particular meaning: “a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”²³⁴

In most true threats cases, a court is determining whether speech that is threatening on its face is a true threat for constitutional purposes. The classic example is the 1966 statement by an anti-war protester that “[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.”²³⁵ The protester, Watts,²³⁶ was charged with threatening the life of the President.²³⁷ While Watts’s statement can certainly be understood on its face as threatening, the question for the Court was whether the statement could be reasonably²³⁸ understood as a threat to kill the President.²³⁹ The

231. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

232. *New York v. Ferber*, 458 U.S. 747, 760, 761, 756–57 (1982) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

233. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246, 250–51 (2002) (using performers who appear to be minors, but are not, using virtual images, and simulating sexual performances by children, are all protected by the First Amendment.)

[T]he visual depiction of an idea—that of teenagers engaging in sexual activity—... is a fact of modern society and has been a theme in art and literature throughout the ages.

Ferber’s judgment about child pornography was based upon how it was made, not on what it communicated.

Id. (citing *Ferber*, 458 U.S. at 764–65). *See also Ferber*, 458 U.S. at 763 (“If [visual depictions of children performing sexual acts or lewdly exhibiting their genitals] were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized.”).

234. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

235. *Watts v. United States*, 394 U.S. 705, 706 (1969) (per curiam).

236. No first name available.

237. *Watts*, 394 U.S. at 705.

238. In order for speech to constitute an unprotected true threat, the victim’s fears must be reasonable. *See* Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337, 1348 (2006) (“[T]he threats exception requires that the statement be objectively threatening. It would be an intolerable intrusion on free speech to apply the threats exception

Supreme Court ruled that Watts's "only offense . . . was 'a kind of very crude offensive method of stating a political opposition to the President.' Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise."²⁴⁰

Still, speech need not be threatening on its face in order to carry a constitutionally unprotected threatening meaning. For the same reasons that "[t]he First Amendment affords protection to symbolic or expressive conduct as well as to actual speech"²⁴¹—because it conveys meaning²⁴²—symbolic speech can also be unprotected because the message it conveys is threatening.

Whether an utterance is threatening on its face or not, the constitutional analysis turns on whether the speech reasonably conveys a threatening *meaning*, and—in law as in life—"contextual factors . . . are necessary to decide whether a particular [utterance] is [threatening]."²⁴³ "[W]ithout context, a burning cross or dead rat mean nothing."²⁴⁴ The exact same statement can carry completely different meanings in different contexts.

to a message just because someone feels threatened by it. The First Amendment requires jurors and judges to make some evaluation of reasonable expectations."); *see also infra* note 291 (discussing *Elonis v. United States*, 135 S. Ct. 2001 (2015)).

239. "The speaker need not actually intend to carry out the threat." *Black*, 538 U.S. at 359–60.

240. *Watts*, 394 U.S. at 708 (internal citation omitted).

241. *Black*, 538 U.S. at 358. *See also* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed." (first citing *Cantwell v. Connecticut*, 310 U.S. 296, 309–11 (1940), then citing *Texas v. Johnson*, 491 U.S. 397, 406 (1989))); *Texas v. Johnson*, 491 U.S. 397, 403–06 (1989) (setting out to determine whether burning a flag was expressive conduct; recognizing that the First Amendment's protection "does not end at the spoken or written word"; noting that the First Amendment forbids not only the abridgment of speech but also of conduct that expresses ideas; and concluding that the flag burning in question was sufficiently communicative to implicate the First Amendment); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505 (1969) (noting that symbolic acts are within the Free Speech Clause of the First Amendment).

242. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) ("Symbolism is a primitive but effective way of communicating ideas."). *See also Black*, 538 U.S. at 360.

It is true, as the Supreme Court of Virginia held, that the burning of a cross is symbolic expression. The reason why the Klan burns a cross at its rallies, or individuals place a burning cross on someone else's lawn, is that the burning cross represents the message that the speaker wishes to communicate.

Id.

243. *Black*, 538 U.S. at 367. *See also Watts*, 394 U.S. at 708 ("Taken in context . . . we do not see how [Watts's statement] could be interpreted [other than as a very crude offensive method of stating a political opposition to the President]."); *see generally* Karst, *supra* note 238, at 1372 (explaining that "[v]ery often the words are only part of the story").

244. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1079 (9th Cir. 2002) (en banc).

The *Watts* Court did not lay down a test for determining when a statement is a true threat. Not until the 2003 case *Virginia v. Black* did the Court finally articulate a definition of a true threat: “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”²⁴⁵ In *Black*, the Court reversed a conviction for violating Virginia’s cross-burning statute, which banned “burn[ing] . . . a cross on the property of another, a highway or other public place [with the intent of intimidating any person or group of persons]” and provided that “[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.”²⁴⁶ The Court noted that cross burning often carries a threatening meaning but “does not inevitably convey a message of intimidation.”²⁴⁷ Thus, it overturned *Black*’s conviction, holding that the statute was unconstitutional because it “ma[de] no effort to distinguish among these different types of cross burnings.”²⁴⁸

[The statute] does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor’s lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers. It allows a jury to treat a cross burning on the property of another with the owner’s acquiescence in the same manner as a cross burning on the property of another without the owner’s permission.²⁴⁹

This very particular attention to the substantive meaning of a statement is the crux of determining whether a statement is a true threat.²⁵⁰ The Third Circuit paid no such attention in *Fullmer*. Moreover, oddly, and tellingly in terms of assessing the quality of the Third Circuit’s analysis, in *Fullmer* the court held that “the *Virginia v. Black* analysis”—at the time, the only Supreme Court case to articulate the definition of a true threat since the

245. *Black*, 538 U.S. at 359.

246. *Id.* at 348.

247. *Id.* at 357. “Intimidation in the constitutionally proscribable sense of the word is a type of true threat” *Id.* at 360.

248. *Id.* at 366, 367.

249. *Id.* at 366.

250. See Karst, *supra* note 238, generally and at 1338 (“The central inquiry in each [true threats] case goes to the assignment of meaning . . .”).

category was established—“is not applicable in this case.”²⁵¹ Thus, the Third Circuit completely ignored the existence of guiding Supreme Court caselaw on this issue.²⁵² Ultimately, the evidence did not show a factual context that could reasonably impart a threatening meaning to the defendants’ speech.

Most importantly, there was no credible threat of physical violence. On this point, the Third Circuit made a serious error in its description of the facts, stating that “SHAC displayed placards with photos of Brian Cass after his beating, with his injuries highlighted in red, at protests.”²⁵³ There was simply no evidence of this.

Brian Cass, the Managing Director of Huntingdon Life Sciences, was the victim of the only act of physical violence identified by the court in the entire global SHAC campaign.²⁵⁴ In February 2001, three masked assailants

251. *United States v. Fullmer*, 584 F.3d 132, 154 n.8 (3d Cir. 2009).

252. As well as its own true threats doctrine. *See United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991) (adopting the true threats test of the Courts of Appeals for the Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits as the law of the Third Circuit). Though the Third Circuit cited the *Kosma* true threats test at least as recently as 2013, in *United States v. Elonis*, considering whether to—and declining to—revise the standard, the *Fullmer* court mentioned *Kosma* only to note that the First Amendment requires an appellate court to conduct an “‘independent review’ of the entire record.” *United States v. Elonis*, 730 F.3d 321, 327–28, 332 (3d Cir. 2013); *Fullmer*, 584 F.3d at 159 (quoting *Kosma*, 951 F.2d at 555).

253. *Fullmer*, 584 F.3d at 156.

254. In defendant Harper’s speech delivered in Seattle, cited by the Third Circuit (*see supra* note 142), he stated that he was “pretty upset” and “disappoint[ed]” to have learned that “a man who works for HLS called Andrew Gay, uh, he was attacked outside of his home and, um, a substance, I-I think that had ammonia in it or something, was-was sprayed on his face.” Gov’t Ex. 8018A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (transcript of an audio recording of Harper’s speech; the audio recording (Gov’t Ex. 8018, *Fullmer*, 584 F.3d 132 (No. 06-4211)) was entered into evidence, however the transcript was not. *See supra* note 142.) Media reports support Harper’s assertion that Gay was physically attacked in the United Kingdom. *See, e.g.*, Alan Cowell, Company in Animal Rights Battle, N.Y. TIMES (Jan. 22, 2002), <http://www.nytimes.com/2002/01/22/business/worldbusiness/22ANIM.html?pagewanted=all>. However, there is no other evidence in the trial record of an assault on Gay or that any such assault was perpetrated by animal rights activists. While the Third Circuit quoted from Harper’s speech, it did not reference his mention of Gay or any assault on him. *Fullmer*, 584 F.3d at 162. The only other mentions of Gay in the record are Gov’t Ex. 2032, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report in SHAC USA newsletter of demonstrations at Gay’s home in the United Kingdom) and Gov’t Ex. 1166, *Fullmer*, 584 F.3d 132 (No. 06-4211), which mentions Gay but not any assault on him. The government did not ask any witness about or make any reference to the mention of Gay in Exhibit 2032. The only witness to testify to having seen Exhibit 1166, Ian Bradbrook, stated that he understood the website posting in the exhibit to refer to the assault on Brian Cass; he did not mention Andrew Gay or any assault on him, and the government did not ask about it. Trial Transcript, Day 6 at 125–26, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Ian Bradbrook). When the prosecutor cross-examined defendant Harper during the defense case, he asked Harper about the reference to Brian Cass in Exhibit 1166 but did not ask about Andrew Gay or any assault on him. Trial Transcript, Day 11 at 100, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of defendant Joshua Harper). Gay did not testify at trial, nor did any other witness

attacked Cass outside his home in England.²⁵⁵ He was beaten with ax handles, sustaining bruising, cracked ribs, and head injuries.²⁵⁶ One individual was convicted and sentenced to prison for the attack; the other two assailants were never identified.²⁵⁷ For the sake of argument, I will concede that if SHAC protestors regularly displayed such photos at demonstrations, and then those demonstrations were followed by physical attacks, that could sufficiently color the context of the SHAC campaign such that merely being identified as a target of the campaign²⁵⁸ could be reasonably understood as being the target of physical violence.²⁵⁹ However, the court's statement is wholly unsupported.

Though there is no record citation, the court was most certainly referring to Exhibit 2007, a poster with a photocopied image of Brian Cass following the beating, with his injuries painted red and text that reads: "It's my party and I'll cry if I want to."²⁶⁰ The sign was recovered during a Joint Terrorism Task Force raid on the home shared by Kjonaas, Gazzola, and Conroy.²⁶¹ A New Jersey State Police detective who assisted in the raid testified that the sign was "located on the top floor of the residence in a crawl space."²⁶² There was no evidence that the sign, or any other sign with an image or mention of Brian Cass's beating, was ever used at a

testify that they were aware of an assault on Gay or that such an assault was perpetrated by animal rights activists.

255. On February 23, 2001, when the United States arm of the SHAC campaign was in its infancy and long before October 2001, when the government alleged the first conspiracies began. Trial Transcript, Day 1 at 147–48, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Brian Cass); Superseding Indictment at 5, 28, *United States v. Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2 (D.N.J. Sept. 16, 2004), *aff'd sub nom. United States v. Fullmer*, 584 F.3d 132 (3d Cir. 2009).

256. Trial Transcript, Day 1 at 147–48, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Brian Cass).

257. *Id.* at 149.

258. *See infra* text at note 297 through note 303 (speculating that designating people as protest targets of the campaign constituted the threats in *Fullmer*, though the court never indicated what particular speech was threatening).

259. *Cf. Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1079 (9th Cir. 2002) (en banc) (holding that earlier utterances made prior to a pattern of utterance followed by violence, which created a threatening context for later utterances, may have been protected speech because no pattern of violence had yet been established when earlier statements were uttered). "Even if the Gunn poster, which was the first 'WANTED' poster, was a purely political message when originally issued, and even if the Britton poster were too, by the time of the Crist poster, the poster format itself had acquired currency as a death threat for abortion providers." *Id.* *See infra* note 295 (noting that the Cass beating was not part of any pattern).

260. Trial Transcript, Day 4 at 65, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Detective Dennis Buoye) (reading the poster to the jury). The poster itself is not included in the Joint Appendix and, thus, is not in the Author's possession; presumably it remains in the custody of the court.

261. *Id.* at 60–62.

262. *Id.* at 62.

demonstration. There were no photos of any protester, including any of the defendants, using such a sign at a demonstration. The government entered into evidence videotapes of various SHAC protests, however none of the footage shown at trial showed any protester, including any defendant, using such a sign. Finally, no witness testified to having ever seen such a sign used at a demonstration. There is simply no evidence to support the court's claim.²⁶³

Moreover, in the entire record, covering approximately three-and-a-half years of the SHAC campaign, there are five instances²⁶⁴ of SHAC USA's or any defendants' public mention of Cass's assault, one of which denounced the attack and, according to witness testimony, only one of which was ever seen or heard by any protest target.

Exhibit 1071 is a financial report created by SHAC USA detailing the dire state of HLS's finances.²⁶⁵ Throughout the report, there are breakout boxes featuring various individuals related to HLS and its affiliates: in addition to Cass, Larry Feinberg of HLS investor Oracle Partners, HLS CEO Andrew Baker, and Stephens Inc. President Warren Stephens appear. The boxes list each individual's position (i.e., relationship to HLS), "Black Eye" (how this relationship to HLS has harmed them or their company),²⁶⁶ and a quote from each person, commenting on HLS or SHAC. The entry for Cass's "Black Eye" reads: "Quite literally. Brian Cass was attacked outside of his home by masked assailants. Using axe handles and CS gas, Mr. Cass was beaten simply for his work with HLS."²⁶⁷ The mention, which takes up about two square inches of space, is tucked away on the corner of the ninth page of a PDF that was linked from an html page. The html page, in turn, was under a banner on the website's homepage.²⁶⁸ HLS's CFO, Richard

263. Not even the government insisted on such an unsupported conclusion, describing the poster as one that "could be used during demonstrations" and "was apparently intended for use during SHAC's demonstrations." Consolidated Brief for Appellee at 28, 183, *Fullmer*, 584 F.3d 132 (No. 06-4211).

264. A sixth piece of evidence arguably references Cass's beating, though it does not explicitly mention it. Gov't Ex. 1166, *Fullmer*, 584 F.3d 132 (No. 06-4211). See *infra* further discussion at text accompanying note 283 through note 285.

265. Gov't Ex. 1071, *Fullmer*, 584 F.3d 132 (No. 06-4211).

266. Excluding Brian Cass, who is discussed in the main text, the "Black Eye" for each individual reads as follows: Larry Feinberg, "Oracle was once the 3rd largest shareholder in HLS"; Andrew Baker, "To keep HLS afloat, Baker has pumped millions of dollars into the lab, out of his own pockets. Still, HLS continues to be a sinking ship"; Warren Stephens, "Stephens saved HLS from bankruptcy by becoming the lab's largest shareholder and primary lender after no company worldwide would do it. He criticized UK firms for abandoning HLS and having a 'low threshold of pain.'" *Id.*

267. *Id.*

268. *Id.* The first page of this exhibit shows the homepage banner in the upper right corner and, on the page to which that banner linked, the website link to the PDF.

Michaelson, is the only witness who testified to seeing the report.²⁶⁹ Michaelson did not state whether the mention in the report of Brian Cass's beating made him fear physical violence. Nor did he testify that any other protest activity made him fearful. Indeed, Richard Michaelson did not testify about feeling threatened or fearful in any way. The extent of his testimony regarding protests against him personally was that his name and home address were listed on the SHAC USA website,²⁷⁰ that there were demonstrations at his home,²⁷¹ and that the website contained a report that someone had placed noise alarms at his home in the middle of the night²⁷²—an incident that Michaelson testified never occurred.²⁷³

Exhibit 8017 is an audio recording of a radio interview with defendant Gazzola, in which she was asked about the Cass beating.²⁷⁴ No witness testified to having heard the interview.

269. Trial Transcript, Day 3 at 182–85, *Fullmer*, 584 F.3d 132 (No. 06-4211). Michaelson testified that he saw the financial report prior to testifying. *See id.* at 183:

Prosecutor: “Did you see this web posting on the website before?”

Michaelson: “Yes, I did.”

Prosecutor: “Have you seen a financial report that’s attached before?”

Michaelson: “Yes, I have.”

However, he did not state when he first saw the report, nor whether he specifically saw the mention of Cass within the report prior to testifying. For purposes of this Article, I will assume that he saw the report shortly after SHAC USA published it, and that he reviewed the entire report, including the mention of Cass, at that time.

270. *Id.* at 172.

271. *Id.* at 197.

272. *Id.* at 174–75.

273. *Id.* at 175 (denying knowledge of any sound alarms placed at his home).

274. Gov’t Ex. 8017, *Fullmer*, 584 F.3d 132 (No. 06-4211). *See also* Gov’t Ex. 8017A at 5–6, *Fullmer*, 584 F.3d 132 (No. 06-4211) (transcript of audio recording of radio interview).

Interviewer: [Y]our website in, in Great Britain uh says HLS workers are animal killers, go get ‘em. And sure enough shortly after that was posted the managing director of Huntingdon, Brian Cass, was beaten outside his home by three masked men swinging baseball bats [sic].

Gazzola: Like I said that’s not something SHAC would engage in however, I can understand (UI)—

Interviewer: Where do you suppose they got the idea to do that? And since they were masked how do you know they weren’t your people?

Gazzola: Well like I said we run a legal campaign we have an office we know each other (laughs); but um, where do I think that they got the idea to do that I think that somebody put themselves in the position of the animals that are inside of Huntingdon Life Sciences and they thought about what they would do if they were in that position, if those animals could fight back for themselves much like when humans fight back for themselves but those animals don’t have the ability to do that and I think that if you look at the campaign I would say that the actions that are carried out are very tame compared to what someone would do if they were forced to live in a cage their entire life, had a tube forced down their throat, things like bleach poured in their stomachs day after day after day . . . And then

In Exhibit 8018, defendant Harper's Seattle speech, he mentioned Cass's assault in the course of discussing the range of protest activity in the SHAC campaign.²⁷⁵ The only witness who testified to having heard Harper's speech was the FBI analyst who recorded the presentation. She further testified that there were only approximately nine people, including defendant Harper and the analyst herself, in attendance at the event.²⁷⁶

Exhibit 1032A is a news article reporting on "name calling" flyers posted downtown in HLS Director of Program Management Carol Auletta's city.²⁷⁷ The news article was republished on the SHAC USA website. The article does not mention Cass by name, but reports that "activists engaged in the campaign against Huntingdon have violently assaulted top company officials in England"²⁷⁸ It also contains commentary from "a volunteer with SHAC's U.S. operation," that "SHAC does not support violence against Huntingdon employees, but 'we do encourage people to protest employees or associates of Huntingdon Life Sciences both at the workplace and at home.'"²⁷⁹ The extent of Auletta's testimony about the exhibit was to read it into the record²⁸⁰ and to state that she did not see the article when it was originally published.²⁸¹ Nor did any other witness testify to having seen the news article on the SHAC USA website (or, for that matter, anywhere else).

murdered. . . . [I]n terms of people being injured the Cass attack was something extraordinary.

Interviewer: And do you—and do you decry that?

Gazzola: I personally wouldn't engage in it or advocate it, however, I certainly understand . . . [h]ow that person felt.

Interviewer: You're not gonna condemn the three men who beat another man almost to death with baseball bats? [sic]

Gazzola: It wasn't almost to death. Um, it's hard to—no I'm not gonna condemn it because it's hard to—it's hard to judge what you're going to do when you're in that situation what would those animals do I think that they would fight back much like you know, humans have the ability to fight back.

Id. The audio recording was entered into evidence, however the transcript was not. *See supra* note 142; *see also* Trial Transcript, Day 6 at 168 (government attorney distributing transcript to jury).

275. *See* Gov't Ex. 8018A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (transcript of an audio recording of Harper's speech). The audio recording (Gov't Ex. 8018, *Fullmer*, 584 F.3d 132 (No. 06-4211)) was entered into evidence, however the transcript was not. *See supra* note 142. The Third Circuit quoted from this speech but did not address Harper's mention of Cass's assault. *Fullmer* at 162.

276. Trial Transcript, Day 4 at 141, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of FBI analyst Cynthia Hlebak).

277. Gov't Ex. 1032A, *Fullmer*, 584 F.3d 132 (No. 06-4211).

278. *Id.*

279. *Id.*

280. Trial Transcript, Day 2 at 208–11, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Carol Auletta).

281. *Id.* at 229.

Defendant Harper testified that “SHAC USA in its official statement denounced the beating of Brian Cass.”²⁸²

Finally, a sixth piece of evidence arguably references the assault on Cass, though it does not mention it explicitly. Exhibit 1166 is a news posting received anonymously and posted on the SHAC USA website, reporting vandalism at a Marsh employee’s home in Chicago.²⁸³ The report states, “We will treat Marsh no differently than we would treat Brian Cass, Andrew Gay, or any other HLS scum.”²⁸⁴ The only witness who testified to seeing the website posting depicted in Exhibit 1166 was Ian Bradbrook, Risk Manager for Marsh & McLennan LLC.²⁸⁵ No SHAC USA publication ever mentioned Bradbrook, much less published personal information about him. Nor did he testify to ever having experienced personal protest activity or ever feeling threatened. Bradbrook was not a target of the campaign.

By itself, the fact that Michaelson was the only protest target who testified to having seen or heard any of these public mentions by any defendant of Cass’s beating should strike physical injury from the list of reasonable fears provoked by defendants’ speech.²⁸⁶ Further, only three additional witnesses²⁸⁷ (other than Cass himself) testified that they knew—

282. Trial Transcript, Day 11 at 100, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of defendant Joshua Harper).

283. Gov’t Ex. 1166, *Fullmer*, 584 F.3d 132 (No. 06-4211).

284. *Id.*

285. Trial Transcript, Day 6 at 125–26, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Ian Bradbrook).

286. Other witnesses testified to having collected exhibits for purposes of the trial and related legal matters. They were not protest targets and their testimony about those exhibits merely authenticated them for purposes of admissibility. See Trial Transcript, Day 2 at 26, 32, 34, 37, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Michael Mamin) (testifying that he and those who worked under his direction had printed and collected pages of the SHAC USA website, including Gov’t Ex. 1166, at the instruction of a client he had represented through his law firm); Trial Transcript, Day 8 at 42–44, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Minnesota State Trooper Michael Paul Roach that, as part of his work with the FBI on this investigation, he intercepted and collected incoming and outgoing emails from defendant Kjonaas’s email address, including Gov’t Ex. 7019, an email containing an attachment of the financial report shown in Gov’t Ex. 1071).

287. Trial Transcript, Day 2 at 157, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Mark Bibi); Trial Transcript, Day 5 at 108, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Parker Quillen); Trial Transcript, Day 5 at 204, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Robert Harper). Harper did not mention Cass by name, but details of the attack he described correspond to the attack on Cass. Harper’s description came in response to the question: “Can you tell us what you recall seeing [on the SHAC website]?” *Id.* However, he did not testify to seeing any of the specific mentions of Cass’s assault on the SHAC USA website and further testified that he would regularly visit not only the SHAC USA website but also “do searches throughout the web.” *Id.* Further, the website’s most explicit mention of the assault on Cass, the Financial Report, was published several months *after* the campaign against Marsh, as well as the defendants’ alleged activity against Robert Harper, had ended. See Gov’t Ex. 1071, *Fullmer*, 584 F.3d 132 (No. 06-4211) (timeline of events in the Financial Report

from any source—about Cass’s beating. Moreover, while upholding the defendants’ convictions in large part because, according to the Third Circuit, “SHAC invoked Brian Cass’s injuries to instill fear in others targeted by the campaign,”²⁸⁸ the court identified only two of these mentions of Cass’s assault by any defendant (or, for that matter, by any SHAC activist)—the radio interview in which defendant Gazzola was asked about the assault on Cass²⁸⁹ and the website posting in Exhibit 1166.²⁹⁰

The dearth of the defendants’ mention of Cass’s assault is telling: contrary to the Third Circuit’s assertion, neither SHAC protesters in general, nor the defendants in particular, emphasized the Cass beating. Defendant-appellant Gazzola’s opening brief put this point quite well.

The notably minimal references to Cass on SHAC’s website illustrate SHAC’s conscious decision not to condone the behavior. The dearth of reporting on Cass is pronounced when contrasted with the hyperbolic nature of SHAC’s other statements, both on the website and spoken at demonstrations. Undoubtedly if Gazzola and other activists had intended to arouse fear of death or bodily violence, they would have referenced the Cass beating. . . .

. . .

Even more telling than where the Cass incident was mentioned is where it was avoided (App. 818-22, Ex. 1013: reference to Cass assault conspicuously absent from “2001: The Year in HLS” timeline and review of events; App. 2634, Ex. 8048: document

through February 28, 2003); Gov’t Ex. 7019, *Fullmer*, 584 F.3d 132 (No. 06-4211) (email from defendant Conroy, dated February 17, 2003, with a draft of the Financial Report attached, noting “this isn’t done yet”); *see also* Gov’t Ex. 1175, *Fullmer*, 584 F.3d 132 (No. 06-4211) (website posting announcing “Marsh gives up!,” dated December 18, 2002); Superseding Indictment at 27, *United States v. Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2 (D.N.J. Sept. 16, 2004) (alleging defendants’ stalked Mr. Harper “through in or about December, 2002”).

288. *Fullmer*, 584 F.3d at 163. *See also id.* at 138, 146, 149, 156, 157, 164 (explaining that Cass’s beating was part of the basis for victims’ fears and that the beating and SHAC USA’s use of it supports certain defendants’ convictions).

289. *Id.* at 149.

290. *Id.* at 164. The court did not provide a record citation for its claim that “[t]he website . . . disseminated . . . threats that people associated with Huntingdon would be treated like Brian Cass,” but presumably the reference was to Exhibit 1166. As discussed *supra*, the court also referenced (though it did not provide a record citation for) Exhibit 2007, incorrectly stating that SHAC displayed the poster at protests. *Id.* at 156.

outlining all of the actions taken by activists against HLS with no mention of Cass assault).

. . .

In contrast, evidence of SHAC's unwavering opposition to violence is plentiful. While SHAC advocated direct protests, demonstrations, and perhaps vandalism, its members specifically denounced any form of physical injury or violence. (App. 2497-98: "[I]n terms of the illegal action that we support that action falls into that category which is anything that further – furthers the cause without hurting a human or an animal"; App. 1247, Ex. 1143: news article stating that "SHAC does not support violence against Huntingdon employees, but 'we do encourage people to protest employees or associates'"; App. 775, Ex. 1003: defines acceptable action in terms of property destruction and animal liberations with no mention of bodily injury; App 778, Ex. 1004: "SHAC does not organize, fund or take part in any illegal activity, however we do support any action that does not harm any animal, human or non human, to further the campaign to shut down HLS"); App. 3219; App. 2513, Ex. 8017/A).

. . .

[T]he low ratio of those assaulted to those targeted [cannot create a reasonable fear that all SHAC targets faced death or serious bodily harm. To the contrary, it] suggest[s] the inverse: that SHAC targets would face nothing more than annoyance and inconvenience.²⁹¹

291. Defendant-Appellant Lauren Gazzola's Brief at 53, n.17, 54, 35, *Fullmer*, 584 F.3d 132 (No. 06-4437). The emphasis here and in the Reply Brief quoted *infra* at text accompanying note 292 on whether the defendants "intended" to "arouse fear" or to "threaten people by reference to Brian Cass's assault" is notable. In June 2015, the United States Supreme Court decided a case presenting the question "whether the statute [18 U.S.C. § 875(c), prohibiting transmitting in interstate commerce "any communication containing any threat . . . to injure the person of another"] requires that the defendant be aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing." *Elonis v. United States* 135 S. Ct. 2001, 2004 (2015). See also Petition for Writ of Certiorari at I, *Elonis*, 135 S. Ct. 2001 (No. 13-983) ("Whether, consistent with the First Amendment and *Virginia v. Black*, 538 U.S. 343 (2003), conviction of threatening another person requires proof of the defendant's subjective intent to threaten . . . ; or whether it is enough to show that a 'reasonable person' would regard the statement as threatening . . ."). The Third Circuit—which reviewed both *Fullmer* and *Elonis*—did not require a subjective intent to threaten in its true threats test. See *United States v. Elonis*, 730 F.3d 321, 327–28 (3d Cir. 2013).

And from defendant Gazzola's reply brief:

[T]he very limited, almost nonexistent, references to Cass and his assault by any of the Defendants can only be seen as a conscious

In *United States v. Kosma*, we held a true threat requires that "the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President, and that the statement not be the result of mistake, duress, or coercion." We rejected a subjective intent requirement that the defendant "intended at least to convey the impression that the threat was a serious one."

Id. (quoting *United States v. Kosma*, 951 F.2d 549, 557–58 (3d Cir. 1991)). True, the *Fullmer* court did not require that the defendants have a subjective intent to threaten. However, this is not because it was adhering to its holding in *Kosma*. Instead, it is because—as with every other part of its true threats analysis—in *Fullmer*, the Third Circuit did not discuss the intent standard at all; it neither required a subjective intent to threaten, nor declared that an objective test (merely requiring that the speaker meant, or intended, to communicate a statement that a reasonable person would interpret as a serious expression of an intent to commit violence, even if the speaker did not intend to threaten the victim) was sufficient. Though the *Fullmer* court cited *Kosma*, it was only to note that the First Amendment requires an appellate court to conduct an "'independent review' of the entire record." *Fullmer*, 584 F.3d at 159–60. In *Elonis*, the Supreme Court did not reach the question of whether the First Amendment requires a subjective intent to threaten, instead deciding that criminal liability under the threats statute requires such intent. *See Elonis*, 135 S. Ct. at 2009, 2011, 2012.

[It is a] basic principle that "wrongdoing must be conscious to be criminal."

[C]ommunicating *something* is not what makes the conduct "wrongful." Here, the "crucial element separating legal innocence from wrongful conduct" is the threatening nature of the communication. The mental state requirement must therefore apply to the fact that the communication contains a threat.

In light of the foregoing, *Elonis*'s conviction cannot stand. The jury was instructed that the Government need prove only that a reasonable person would regard *Elonis*'s communications as threats, and that was error. Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state Given our disposition, it is not necessary to consider any First Amendment issues."

Id. (first quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952); then quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994)). As with the Supreme Court's analysis in *Elonis*, the excerpts from Gazzola's appellate briefs demonstrate the danger of not requiring that a defendant have the subjective intent to threaten a victim—namely, that they could be convicted even when they had the opposite intent and took actions intended to avoid threatening listeners. Despite the defendants' obvious intent to not reference Brian Cass's beating or in any way threaten physical violence, the *Fullmer* court found the incident—which occurred in another country, before the United States arm of the SHAC campaign was substantially underway, before the commencement of the alleged conspiracies, and before certain of the defendants participated in the campaign—relevant to the true threats analysis, to the extent that it saw no problem with the government playing up the attack even while the evidence showed that the defendants had done precisely the opposite and refrained from publicizing it. *Fullmer*, 584 F.3d at 138, 146, 149, 156, 157, 163, 164 (explaining that Cass's beating was part of the basis for victims' fears and that the beating and SHAC USA's use of it supported certain defendants' convictions).

choice not to reference this violence. The dearth of such evidence is especially pronounced when contrasted with the prolific and blunt nature of all the other speech—both on the websites and as shouted by the various protesters at the demonstrations. As is evident from the record, the Defendants here did not mince words or hesitate to speak their minds. To the contrary, they would print or say nearly anything, often in the form of intentional exaggeration, hyperbole, heated rhetoric, shocking images, and grandstanding, in order to get their point across. Thus, undoubtedly if they had intended their “targets” to experience fear of death or bodily violence, they would have drawn attention to, emphasized, and exaggerated the beating of Cass as the head of HLS.

Simply put, considering their *modus operandi* as unapologetic ‘in-your-face’ direct action demonstrators, if these Defendants or their alleged conspirators intended to threaten people by reference to Brian Cass’s assault, they would have made use of his story and his image frequently, prominently, and unambiguously.²⁹²

If these minimal, all-but-hidden references to Cass’s beating are sufficient to color the context of SHAC USA’s speech enough to render that speech threatening, then the First Amendment is fragile indeed.²⁹³

292. Defendant-Appellant Lauren Gazzola’s Reply Brief at 24–25, *Fullmer*, 584 F.3d 132 (No. 06-4437).

293. Moreover, if Cass’s beating was sufficient to color the context of the defendants’ speech, even where defendants themselves barely invoked it, this would countenance a severe form of the heckler’s veto, in which a speaker is silenced because of a reacting party’s behavior. See HARRY KALVEN JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 90 (Jamie Kalven ed., 1988).

In the abstract, if the state did not like what [the speaker] was saying, it would be powerless to silence [them]. In this situation, however, it can claim neutrality. . . . [T]he state . . . in effect transfers the power of censorship to the crowd [T]he end result is the censorship of wholly permissible content.

Id. For an instance of the heckler’s veto, see *Feiner v. New York*, 340 U.S. 315, 319–20 (1951) (explaining that Petitioner was not arrested for the “making or the content of his speech,” but the “reaction which it actually engendered”). *Cf. Gregory v. City of Chicago*, 394 U.S. 111, 117–20 (1969) (Black, J., concurring) (describing protesters’ disorderly conduct guilt as limited to their refusal to obey a police command to move their protest in the face of hecklers, and explaining that vague, “sweeping, dragnet statutes” that affect protest activity and allow discretionary police enforcement undermine First Amendment freedoms; such statutes “could authorize conviction simply because the form of protest displeased some of the onlookers, and of course a conviction on that ground would encroach on First Amendment rights”); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 880 (1997) (holding that a statute “would confer broad powers of censorship, in the form of a ‘heckler’s veto’”). Indeed, in *Fullmer*, if the Cass assault is sufficient to render defendants’ speech a true threat, the effect would be

Finally, the definitive break in any link between publishing home addresses or other personal information²⁹⁴ on the SHAC USA website and the assault on Brian Cass in England, is that there is no evidence that such publication played any role in his attack; there is no evidence that Cass's home address—i.e., where he was attacked—was ever published by any SHAC activist or organization anywhere in the world. Since the publication of personal information played no role in the Cass beating, it is hard to understand how the beating could have created a context that imparted violent meaning to the publication of others' personal information.²⁹⁵ Nonetheless, Brian Cass was the government's first witness at trial, flown in from England to talk about his beating and the only witness to testify that day, and Cass's beating is the first specific act of protest mentioned by the court in *Fullmer*.²⁹⁶

Putting aside this hardly trivial issue in order to address other problems with the Third Circuit's true threats analysis, not only were the defendants convicted in the absence of any credible threat of physical violence, but their speech was deemed threatening without the court even conducting a proper true threats assessment.

In *Fullmer*, the court undertook none of the analysis required by the true threats doctrine to determine the meaning conveyed by defendants' speech. First, it is not entirely clear what the threats were in *Fullmer* because the court did not identify—nor did the prosecution allege—specific utterances as true threats.²⁹⁷ Presumably, the court's statement that “posts that . . . disseminate the personal information of individuals employed by Huntingdon and affiliated companies are more problematic [than other,

even more chilling than these classic examples, as the assault occurred prior to most of defendants' speech, rather than following it or in reaction to it. This rationale requires would-be speakers to refrain from speaking *in advance* because of the *past* actions of others, even if the would-be speakers did not seek to invoke those others' actions.

294. See *infra* discussion at text accompanying note 297 through note 303 (speculating that the publication of personal information constituted the threats in *Fullmer*, though the court never indicated what particular speech was threatening).

295. The Cass beating was not part of any “pattern” of publication of personal information and violence. See *supra* note 259 and *infra* text at note 336 through note 352 (discussing Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1079 (9th Cir. 2002) (en banc)).

296. Trial Transcript, Day 1 at 113, 177, 181, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Brian Cass); *Fullmer*, 584 F.3d at 138.

297. Indeed, in its appellate brief, the government stated that “[t]he web pages were the ‘true threats’ charged in the indictment . . .,” thus deeming all of the hundreds of pages of website printouts entered into evidence, without differentiation, true threats. Consolidated Brief for Appellee at 248, *Fullmer*, 584 F.3d 132 (No. 06-4211).

protected, postings],”²⁹⁸ means that this speech constituted a true threat (just as electronic civil disobedience, referenced in the other half of the sentence, constituted incitement). Curiously, however, the court did not mention the dissemination of personal information in its true threats analysis.

[O]ther conduct constituted “true threats,” which also removes Defendants’ speech from the realm of First Amendment protection. In particular, Defendants used past incidents to instill fear in future targets. For example, SHAC displayed placards with photos of Brian Cass after his beating, with his injuries highlighted in red, at protests.²⁹⁹ Indeed, they attributed the quick exit of some targets, such as Deloitte and Touche, to the past experiences of employees at companies like Stephens and Marsh. In this regard, their actions meet the standard of a “true threat” as articulated in *Watts*, because viewed in context, the speeches, protests, and web postings, were all tools to further their effort. Moreover, given the success of the campaign in the past, including the destruction of private property and the telecommunication attacks on various companies, the implied threats were not conditional, and this speech rightly instilled fear in the listeners.³⁰⁰

Here the court appears to treat vast swaths of expression—the defendants’ actions, generally, and the speeches, protests, and web postings, as a whole, rather than only “posts that . . . disseminate . . . personal information”—as true threats.³⁰¹ “[T]his speech”—i.e., the speech that “instilled fear”—does not refer merely to posts that disseminated personal information, but broadly to defendants’ “speeches, protests, and web postings”—*which encompass all of defendants’ speech*. Indeed, what speech by the defendants exists other than their “speeches, protests, and web postings”? Thus, the Third Circuit’s true threats analysis fails immediately because the court did not specify what speech, in the course of a three-and-half-year campaign, was threatening.

Even the “dissemination of personal information” refers not to particular utterances, but to a broad category of postings. Between early 2001 and May 2004, the evidence shows that the SHAC USA website

298. *Fullmer*, 584 F.3d at 155.

299. See *supra* text at note 260 through note 263 (noting that there is no evidentiary basis for this claim).

300. *Fullmer*, 584 F.3d at 156.

301. *Id.*

published the home addresses of at least 166 individuals.³⁰² Yet the court never identified which individuals were the victims of the alleged threats.

302. Gov't Ex. 1024, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of Cathy Brower, Henning Jonassen, Darioush "Dari" Dadgar, Warren Stephens, Kenneth (Doyle) Lewis, Hugh (Leon) McColl, Jr., and (Floyd) William Vandiver Jr.); Gov't Ex. 1027A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (address of Dean Rodwell); Gov't Ex. 1029, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov't Ex. 1029A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of Michael Caufield and Richard Michaelson); Gov't Ex. 1041A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (address of Philip Petito); Gov't Ex. 1052A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of Carol Auletta, Fiona Fraser-Smith, and Sylvie Gosselin); Gov't Ex. 1053, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov't Ex. 1053A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of Andrew Baker, Rodney C. Armstead, Mark L. Bibi, and Karen Piotti); Gov't Ex. 1054A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of Aleksandr Agadzhyanov, Nancy Beck, Amit K Bharti, Kinga Chrobak, Melissa Elliot, Chirine Fiouzi, Gary M. Hoffman, Judy Hum, Sonya Gray, Manuel Jajin-Castillo, Fran Janone, Carolyn Karen, Thomas J. Lanza, Arpad J. Madarasz, Abdul Majeed, Tracie D. Potter, and Franklin R. Rivera); Gov't Ex. 1064A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of Scott Zion, Richelle Brown, Jeff Wells, Todd Galles, Leo E. Otero, Peter A. Babich, and Margaret Aldred); Gov't Ex. 1067, *Fullmer*, 584 F.3d 132 (No. 06-4211) (address Claire MacDonald); Gov't Ex. 1080, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov't Ex. 1080A, *Fullmer*, 584 F.3d 132 (No. 06-4211); (addresses of David Spina, Ronald E. Logue, John R. Towers, Timothy Halbert, Joseph L. Hooley, John Fiore, John M. Kucharski, Alfred Poe, and William M. Reghitto); Gov't Ex. 1085, *Fullmer*, 584 F.3d 132 (No. 06-4211) (address of James Schutetz); Gov't Ex. 1113, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of Parker Quillen and Whitney Quillen); Gov't Ex. 1121, *Fullmer*, 584 F.3d 132 (No. 06-4211) (address of Thomas J. Perna) (this address actually appeared on a Yahoo!Groups email list, and not on the SHAC USA website; at the risk of replicating the government's conflation of all animal rights forums with SHAC USA forums, I include the address in my tally of those published by the SHAC USA website); Gov't Ex. 1133, *Fullmer*, 584 F.3d 132 (No. 06-4211) (address of Robert Harper); Gov't Ex. 1142, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of Dard Hunter, Andrew Hauser, Allison Mortlock, James Meathe, John P. Spath, Timothy Malhoit, Trey Biggs, Marion B. Harlos, Rick Jeter, Sally H. and Robert G. Dillenback, Michael B. Rogan, Michael DiLoreto, and Sean McCrary); Gov't Ex. 1144, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of Frank Tasco, Skip Boruchin, Cindy and Mike Bechtel, G. and V. Boyd, C. Caffee, John and Vera Carsten, Beate and Jon Hammonds, Jim Horsburgh, James Kerr, Jailing Lin, Lin Liu, Chas F. Mai, Kyle McLain, Beth Morrison, L. Parmenter, Cindy Pelletier, Harold R. Phillips, H. Preston Pool, Mike Rhoades, James Roberts, Mike Rosson, Brandon Rouse, Richard C. Spring, David Steenson, Paula Stein, Dan Stout, Duane Underwood, Malcolm Wall, Bryan Wilson, Dee Wu, and Zhi Zhang); Gov't Ex. 1159, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of Brendan Tebbenn, Marilyn Dungan, Anthony Stellato); Gov't Ex. 1164, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov't Ex. 1164A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of Frances Cowden Minter, Cathlynn Cannon, and Judith Ann Yates); Gov't Ex. 1165, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of John Regan and Leannard [sic] P. Kline); Gov't Ex. 1166, *Fullmer*, 584 F.3d 132 (No. 06-4211) (address of Thomas Wiegand); Gov't Ex. 1187, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of Howard Solomon, Lester B. Salans, and Greg Yurchak); Gov't Ex. 1189, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov't Ex. 1189A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of Jimmy King, Jessica Bode, Donna Wilms, and Jeff West); Gov't Ex. 1193A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (address of William J. Candee); Gov't Ex. 1195A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (address of Raj Tahlil); Gov't Ex. 1198A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of Harry Leslie, Patirica [sic] McDonald, Ken "Weirdo" Allivato, and Tom Loch); Gov't Ex. 1201, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov't Ex. 1201A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of Robert C. Taylor and Cynthia Kujawa); Gov't Ex. 1202A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (address of Jay Sinder); Gov't Ex. 1211, *Fullmer*, 584 F.3d 132 (No. 06-4211) (address of Mrs. French, Tatsuya "Tatsu" Kawano, and Yasutsugu Kawahara); Gov't Ex.

Was every one of these 166 individuals the victim of a true threat? Or is one to assume that only the 16 individual SHAC USA protest targets who testified at trial and had their home addresses published³⁰³ were victims of

1216A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (address of Sudo Kazuyoshi); Gov't Ex. 1225A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (address of Dennis Lanfear); Gov't Ex. 1226A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (address of Jim DeVico); Gov't Ex. 1227A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of Melissa Brotz, Jose M. De Lasa, William Dempsey, and Thomas C. Freyman); Gov't Ex. 1229, *Fullmer*, 584 F.3d 132 (No. 06-4211) (address of Miles White); Gov't Ex. 1235, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov't Ex. 1235A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of Sean Lance, James R. Sulat, Martin J. Forrest, William G. Green, Thomas Hashimoto, Amy Hessler, Carolina Opsina, Edward Etrenne Penhoet, Linda Short, and Katie Sprugel); Gov't Ex. 1239A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (address of Rajen K. Dalal); Gov't Ex. 1252A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of Jennifer Tung, John Martin Leonard, Tatsuya Hasegawa, and Kazuo Okahashi); Gov't Ex. 1263, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of Eugen Groff, Adris Dull, Bill Cusworth, Donald F. Atkinson, Patrick Kelly, Debbie Newell, James T. Sisco, Donald Denbo, Douglas Hathaway, Eric P. Bone, and Rick Breseman); Gov't Ex. 1265, *Fullmer*, 584 F.3d 132 (No. 06-4211) (addresses of Peter Bruce Challoner and Idlefonsoz (Idle) Zante); Trial Transcript, Day 4 at 146, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony Brian Rogan that his home address was published on the SHAC USA website). The home addresses of another nine individuals were published only in the SHAC USA paper newsletter. Gov't Ex. 2032, *Fullmer*, 584 F.3d 132 (No. 06-4211) (SHAC USA newsletter showing home addresses of Robert Conway, Kirby Lee Cramer, Stephen Elliot Halprin, Janice Hanhar, Michael McBrayer, Ken Rolfes, Gary Steele, David Taft, Damion Wicker). There was no evidence that SHAC USA published these nine addresses elsewhere. In a small number of cases, SHAC USA posted more detailed information, such as details about a protest target's family. *See, e.g.*, Gov't Ex. 1160, *Fullmer*, 584 F.3d 132 (No. 06-4211) (providing personal information about Sally Dillenback's family). In other cases, SHAC USA posted less detailed information, such as just phone numbers or email addresses. *See, e.g.*, Gov't Ex. 1093A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (listing the name and phone numbers of Robert "Bob" Towbin); Gov't Ex. 1250A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (listing several dozen email addresses of Chiron employees). Again, however, the court did not distinguish certain personal information from other personal information when declaring the dissemination of such information "problematic." *Fullmer*, 584 F.3d 155. These numbers are drawn only from discovery materials entered into evidence at trial and do not account for the large amount of discovery material that was not used as evidence and additional web postings that were never collected by government witnesses. The exhibits entered at trial did not comprise the complete SHAC USA website. Trial Transcript, Day 2 at 21–23, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Daniel Kozusko); Trial Transcript Day 2 at 37, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Michael Maimin).

303. Trial Transcript, Day 2 at 39–196, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Mark Bibi); Trial Transcript, Day 2 at 196–233, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Carol Auletta); Trial Transcript, Day 2 at 233–47, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Hinning Honnasson, a/k/a Henning Jonassen); Trial Transcript, Day 3 at 5–94, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Michael Caufield); Trial Transcript, Day 3 at 95–143, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Andrew Baker); Trial Transcript, Day 3 at 143–202, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Richard Michaelson); Trial Transcript, Day 4 at 143–55, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Brian Rogan); Trial Transcript, Day 4 at 155–63, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Elaine Perna, wife of Thomas Perna); Trial Transcript, Day 5 at 76–124, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Parker Quillen); Trial Transcript, Day 5 at 158–90, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Michael Rogan); Trial Transcript, Day 5 at 196–213, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Robert Straube Harper, Jr.); Trial Transcript, Day 6 at 11–22, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Dard Hunter); Trial Transcript, Day 6 at 39–64, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Marion Harlos); Trial

threats? If so, what was the substantive—and constitutional—difference between posts containing these witnesses' personal information and posts containing the personal information of individuals who were not threatened?

Since home addresses carry no explicitly threatening meaning on their face, the only way these posts could be threatening is if the context in which they were published imparted a threatening meaning. Otherwise, identical information published on 411.com or in any public record would also be a threat.³⁰⁴ However, the court never said what meaning was conveyed by the alleged threats. The only way to interpret this is that simply having one's personal information published on the SHAC USA website was a threat. This certainly seems to be the rationale if the true threats paragraph is understood to relate to "posts that . . . disseminate . . . personal information"—that to have one's personal information posted on the SHAC USA website was to be a target of the campaign, and that the context of "past incidents" of illegal activity "instill[ed] fear in" (i.e., threatened) "future targets."³⁰⁵

This reasoning³⁰⁶ continues the court's improper treatment of the SHAC campaign as an unlawful whole. Informing an individual that they are a target of a protest campaign is not itself threatening. Thus, the personal information published on the SHAC USA website must contain some other, unstated meaning—namely, it must equate being a target of the campaign with being targeted for "an act of unlawful violence."³⁰⁷ However, if the campaign included lawful—i.e., *protected*—protest activity, and if organizing demonstrations at the homes of Huntingdon

Transcript, Day 6 at 65–97, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Sally Dillenback); Trial Transcript, Day 8 at 82–112, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Katherine Sprugel); Trial Transcript, Day 9 at 189–204, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Amy Hessler). Witness Martha Lobo was also subjected to individualized protests, however there is no evidence that the SHAC USA website published her home address.

304. Various witnesses testified that their phone numbers and other contact information were listed in public telephone directories. *See, e.g.*, Trial Transcript, Day 2 at 146, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Mark Bibi); Trial Transcript, Day 2 at 222, 233 *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Carol Auletta); Trial Transcript, Day 4 at 146, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Brian Rogan); Trial Transcript, Day 8 at 101, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Katherine Sprugel); Trial Transcript, Day 9 at 194, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Amy Hessler).

305. *Fullmer*, 584 F.3d at 155–56.

306. If, in fact, this is the court's reasoning. This lack of clarity as to the court's rationale—what were the threats and what meaning did they convey?—should be enough to reject the court's true threats analysis. Speakers should not have to guess whether or not their speech could be criminalized as a threat.

307. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

employees “is not unlawful”—which the court ostensibly acknowledged³⁰⁸—then it is not clear why every instance of publishing personal information would necessarily convey “a serious expression of an intent to commit an act of unlawful violence” against that individual.³⁰⁹

Indeed, the defendants were convicted of *threatening* constitutionally protected protest activity. Protest targets testified to their general worry and distress simply from being identified as a protest target of the SHAC campaign and being subjected to protests; they made no distinction between fears of lawful and unlawful, much less between violent and nonviolent, protest activity—nor, more importantly, did the court.

The court discussed the testimony of only four protest targets—HLS Managing Director Andrew Baker and the three alleged stalking victims—subsuming the experiences of other witnesses, and even individuals who did not testify, within a footnote to the effect that

[t]he protests against Andrew Baker are discussed here as an example of the way in which SHAC targeted Huntingdon employees. There were several other Huntingdon employees who had similar experiences, including Henning Jonassen, who worked in the Pathology Department at Huntingdon; Darioush Dadgar, a Vice President at Huntingdon; Carol Auletta, Director of Program Management at Huntingdon; Mark Bibi, Huntingdon General Counsel; and Theresa Kushner [sic], a veterinarian at Huntingdon.³¹⁰

The court thus equated the experience of Andrew Baker—who had his home vandalized three times, variously with spray paint, smashed windows, rocks thrown at his house, a broken door, and a smoke bomb in his garage,³¹¹ and the front door of his daughter’s apartment “‘plastered” “‘with posters and pictures . . . depicting [his] death”³¹²—with the experience of, for example, Carol Auletta.

308. *Fullmer*, 584 F.3d at 155.

309. *Black*, 538 U.S. at 359.

310. *Fullmer*, 584 F.3d at 142 n.5. Together, Baker, the three stalking victims, and Jonassen, Auletta, and Bibi comprise less than half of the 17 SHAC USA protest targets who testified at trial; neither Dadgar nor Kushner [sic] testified.

311. Trial Transcript, Day 3 at 122–24, *Fullmer*, 584 F.3d 132 (06-4211) (testimony of Andrew Baker).

312. *Fullmer*, 584 F.3d at 143 (alteration in original) (quoting Trial Transcript, Day 3 at 111, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Andrew Baker)). Notably, this is something I did not learn of until trial. This is true of several acts of protest.

Auletta testified that she received “a lot of letters from [unidentified] people that called [her] nasty names, made vail [sic] threats”;³¹³ received, also from unidentified individuals, magazine subscriptions and products that she had not ordered;³¹⁴ was the subject of a poster placed around her town stating that she was “Wanted . . . [f]or killing Joey, a sweet beagle puppy” and that featured a picture of the dog and provided her home contact information;³¹⁵ and was subjected to a handful of home demonstrations where police were present and that were conducted within the parameters of an injunction.³¹⁶ The injunction required prior notice to police (24 hours in advance) of the demonstration, restricted the duration and frequency of the demonstration (to 90 minutes every two weeks), limited the number of protestors (to 15), and required that protesters stay 100 feet away from HLS employees’ homes.³¹⁷

Notably, Auletta testified that she decided to host her family on Thanksgiving “in spite of SHAC’s threats.”³¹⁸ When the judge inquired “Why do you say in spite of SHAC’s threats. What are you referring to?,”³¹⁹ Auletta explained that by “SHAC’s threats” she meant “I knew that SHAC planned to come out to my home and demonstrate I was informed that SHAC had file[d] a request with the police to come to my home to demonstrate.”³²⁰ Thus, she deemed constitutionally protected protest activity regulated by an injunction a “threat.”

Auletta further testified that the protest activity

affected [my life] quite a bit. I used to be a pretty open person. Now I am very careful. I’m afraid to tell people my name, because it’s been bandied about with all kind of nasty epithets. I’m very careful about personal safety. We have an alarm system. We have motion sensors. We have a bat by the front door. My husband wanted to buy a gu[n] and the police talked him out of

313. Trial Transcript, Day 2 at 205, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Carol Auletta).

314. *Id.*

315. *Id.* at 206–11; Gov’t Ex. 8002, *Fullmer*, 584 F.3d 132 (No. 06-4211) (flyer posted downtown in Auletta’s city).

316. Trial Transcript, Day 2 at 213–19, 223–26, 229, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Carol Auletta).

317. *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty*, No. SOM-C12019-01 (N.J. Super. Ct. Ch. Div., May 30, 2001).

318. Trial Transcript, Day 2 at 217, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Carol Auletta).

319. *Id.*

320. *Id.* at 218.

that. I am very careful whether [sic] I am driving. If a car seems to be following me too closely, too long, I try to take another route. So I am pretty paranoid. And, basically, these people have taken all the joy out of my life.³²¹

The Third Circuit never bothered to assess whether Auletta's paranoia was reasonable, much less whether the First Amendment permits the defendants to be held liable for paranoia—or joylessness—that arises from protected speech and protest activity against her—which, of course, it does not.³²² Auletta's experience, overall, was implicitly lumped in with that of every other protest target in the court's cursory reference to an undifferentiated mass of "speeches, protests, and web postings" against a similarly undifferentiated mass of "listeners."³²³

Yet there was important variation. Of the 166 individuals who had their home addresses published on the SHAC USA website between 2001 and 2004, the evidence showed that the website reported³²⁴ that 25 had property vandalized.³²⁵ This vandalism ranged from having stickers stuck on their

321. *Id.* at 219–20.

322. *See, e.g., Snyder v. Phelps*, 131 S. Ct. 1207, 1219–20 (2011) (holding that Westboro Baptist Church members protesting a funeral could not be held liable for intentional infliction of emotional distress because their protest was protected by the First Amendment).

323. *Fullmer*, 584 F.3d at 156.

324. The website postings were offered for the fact that the postings occurred, not for the truth of what was asserted within them. Transcript of Motion Hearing (including oral argument on Motions In Limine) at 33, *United States v. Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2 (D.N.J. Nov. 19, 2004), *aff'd sub nom. United States v. Fullmer*, 584 F.3d 132 (3d Cir. 2009).

325. Gov't Ex. 1024, *Fullmer*, 584 F.3d 132 (No. 06-4211) (reports of vandalism at the homes of Cathy Brower, Henning Jonassen, and Darioush Dadgar); Gov't Ex. 1041, *Fullmer*, 584 F.3d 132 (No. 06-4211) (mention of vandalism Philip Petito's home); Gov't Ex. 1044, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of vandalism Andrew Baker's home); Gov't Ex. 1047A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of vandalism at the home of Rodney Armstead); Gov't Ex. 1058A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of vandalism at Dean Rodwell's home); Gov't Ex. 1063, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of vandalism at Mark Bibi's home); Gov't Ex. 1104, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of vandalism at Warren Stephens's home); Gov't Ex. 1113, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of vandalism at Parker Quillen's home); Gov't Ex. 1122, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of vandalism at Brian Rogan's home); Gov't Ex. 1134, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of vandalism at Robert Harper's home); Gov't Ex. 1138, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of vandalism at Dard Hunter's home); Gov't Ex. 1146A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of vandalism at Frank Tasco's home); Gov't Ex. 1159, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of vandalism at Anthony Stellato's home); Gov't Ex. 1162, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of vandalism at the homes of Michael Rogan and Sally Dillenback); Gov't Ex. 1165, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of vandalism at the homes of Leonard [sic] P. Kline and John Regan); Gov't Ex. 1166, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of vandalism at the home of Thomas Wiegand); Gov't Ex. 1174, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of vandalism at the home of James Meathe); Gov't Ex. 1208A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of vandalism at the home of Yatsutsgu Kawahara); Gov't Ex. 1226A, *Fullmer*, 584 F.3d

homes to having a boat sunk. The SHAC USA website reported no protest activity at all against at least 41 individuals whose home addresses were published.³²⁶ Between these two extremes there was reportedly a wide range of protest activity, from letters (and nothing more), peaceful candlelight vigils, and traditional demonstrations (often reportedly on only a single occasion), to minor harassment (e.g., use of silly string, noisemakers late at night), to communications that appear threatening on their face. Though the true threats doctrine could use more clarity as to whether unprotected threats are limited to threats of physical violence, the doctrine is very clear that to be a true threat a statement must threaten some kind of violence.³²⁷ “You will be harassed” is not a true threat—much less “you will feel harassed by protected protest activity.” The Third Circuit’s true threats analysis should fail on this point alone: along with its failure to identify which utterances were threats, the court was similarly silent about what activity in particular was threatened.

The overwhelming majority of the protest activity in the campaign and reported on the SHAC USA website was protected, in the form of residential pickets, leafleting, office protests, et cetera. Thus, an individual whose home address was posted on the SHAC USA website was more likely to be subjected to protected protests than to unlawful activity

132 (No. 06-4211) (report of vandalism at the home of Jim DeVico); Gov’t Ex. 1246, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of vandalism at Linda Short’s home); Gov’t Ex. 1229, *Fullmer*, 584 F.3d 132 (No. 06-4211) (reports of vandalism of Skip Borouchin’s property; it is unclear whether the vandalism occurred at Borouchin’s home or at an office location; I include it here as if it was at Borouchin’s home so as to be over-inclusive). Four more individuals reportedly had property damaged or stolen without there being any evidence that SHAC USA ever published their home addresses. See Gov’t Ex. 1072, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of theft at the home of Theresa Kusner); Gov’t Ex. 1086, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of vandalism at the homes of “Smokey” and Craig Maki); Gov’t Ex. 1280A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of theft at Charles Kirby’s home). No evidence was shown that SHAC USA published these individuals’ home addresses.

326. See *supra* note 302 (listing all of the exhibits entered at trial that showed address postings). The SHAC USA website reported no protest activity against Aleksandr Agadzhyanov, Nancy Beck, Amit Bharti, Trey Biggs, Cathlynn Cannon, Kinga Chrobak, Frances Cowden Minter, John Fiore, Chirine Fiouzi, Mrs. French, Silvie Gosselin, Timothy Halbert, Gary Hoffman, Joseph Hooley, Judy Hum, Manuel Jajin-Castillo, Carolyn Karen, John Kucharski, Cynthia Kujawa, Thomas Lanza, Kenneth Lewis, Tom Loch, Ronald Logue, Arpad Madarasz, Abdul Majeed, Timothy Malhoit, Hugh McColl Jr., Sean McCrary, Allison Mortlock, Alfred Poe, Tracie Potter, William Reghitto, Franklin Rivera, Jay Sinder, James Siscel, Raj Tahil, John Towers, William Vandiver Jr., Judith Ann Yates, Greg Yurchak, or Idlefonsoz Zante.

327. I do not believe that vandalism and property destruction are *violence*. However, since the physical violence at issue in *Fullmer* was limited to the attack on Brian Cass, since true threats require a threat of violence and the Supreme Court has not made clear whether *it* limits the term to physical violence, and since the Third Circuit certainly treated vandalism as violence in *Fullmer*, for purposes of this Article I will assume that vandalism and property destruction are violence.

(vandalism and harassment). Indeed, the number of people against whom there was reportedly no protest activity, even after their contact information was posted, indicates that those whose information was posted were, in fact, more likely to be subjected to nothing at all than they were to be subjected to vandalism. Thus, the all-important context that gives meaning to the bare information of home addresses more reasonably conveyed that individuals *might* be subjected to vandalism or harassment, but more likely not. In short the court never ascribed any particular meaning—much less a threatening meaning—to the publishing of personal information on the SHAC USA website. One is left to guess.

The problem with the court's designation of "posts that . . . disseminate . . . personal information"³²⁸ as true threats becomes abundantly clear if one considers what comes immediately before this.

We emphasize that much of the speech on the website does not run afoul of the *Brandenburg* standard. Coordinating demonstrations at the homes of Huntingdon employees, under the parameters set forth in injunctions, is not unlawful.³²⁹ And merely posting information on unlawful acts that have already occurred, in the past, does not incite future, imminent unlawful conduct. Moreover, the publication of the "Top Twenty Terror Tactics," without more, is also protected, because although it lists illegal conduct, there is no suggestion that SHAC planned to imminently implement these tactics.³³⁰

328. *Fullmer*, 584 F.3d at 155.

329. Nor is residential picketing necessarily unlawful in the absence of an injunction. *See Dean v. Byerley*, 354 F.3d 540, 549–51 (6th Cir. 2004) (holding that, in the absence of regulation, the constitutional right to engage in targeted residential picketing is "unfettered."). Restrictions on residential picketing are limited to time, place, and manner regulations, in the form of injunctions or ordinances; the picketing may not be banned entirely. *Frisby v. Schultz*, 487 U.S. 474, 494 (1988) (Brennan, J., dissenting) ("[T]o say that [residential] picketing may be substantially regulated is not to say that it may be prohibited in its entirety."). *See also Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 760, 775 (1994) (rejecting a portion of an injunction prohibiting picketing within 300 feet of the residences of plaintiffs' homes because it banned the "[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses" that saved the *Frisby* ordinance from constitutional infirmity (alteration in original) (quoting *Frisby*, 487 U.S. at 483)); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 417–18 (1971) (holding unconstitutional an injunction that banned "'passing out pamphlets, leaflets or literature of any kind, and . . . picketing, anywhere in the City'" and rejecting the lower court's holding that such activity may be completely banned in order to protect "the privacy of home and family" from petitioners (internal citation omitted)).

330. *Fullmer*, 584 F.3d at 155. It is unclear whether the court was equating "not run[ning] afoul of" *Brandenburg* with "protected."

Here, the court correctly recognized that residential picketing is constitutionally protected. However, it is not clear how the court can reconcile its acknowledgment that organizing home demonstrations is protected with its holding that publishing personal information constitutes a true threat—in order to hold a residential picket, one must advertise the location of that event.³³¹ Moreover, none of the home addresses posted on the SHAC USA website were ever shown to be unavailable publicly. The court ends up criminalizing the *idea* conveyed by the publication of home addresses on the SHAC USA website: an address posted on 411.com is protected, but posting that same address on the SHAC USA website, thereby conveying the idea that the information should be used for protest activity, is unprotected. With regard to unlawful protest activity, the posting of personal information becomes a *Brandenburg* question: the court's reasoning converted advocacy of unlawful action upon which listeners acted into a context that imparted a threatening meaning to SHAC USA's speech.

Similarly, several individuals' home addresses were posted on the SHAC USA website for the first time only *after* protest activity (often lawful protest) had already occurred at that location³³²—that is, as part of the protest write ups the court said do not constitute incitement.³³³ Again, the court transmuted speech that it declared protected by *Brandenburg* into unprotected true threats.

As one attempts to understand the Third Circuit's true threats analysis, it becomes increasingly clear that the court simply lumped together all of the protest activity in the SHAC campaign, both protected and unprotected, and treated the likelihood of unlawful activity as the threshold for a true

331. *Id.* at 155. Compare “[c]oordinating demonstrations at the homes of Huntingdon employees . . . is not unlawful” with “we find that the posts that . . . disseminate the personal information of individuals employed by Huntingdon and affiliated companies are . . . problematic.”

332. *See supra* note 302 (listing all of the exhibits entered at trial that showed address postings). Addresses for the following individuals appear in the evidence only along with reports of protest activity; no independent listing of their addresses was shown: Ken Allivato, Jessica Bode, Melissa Brotz, Cathy Brower, William Candee, Darioush Dadgar, Rajen Dalal, Jim DeVico, Marylin Dungan, Robert Harper, Yatsutsugu Kawahara, Tatsuya Kawano, Jimmy King, Leonard [sic] Kline, Dennis Lanfear, Harry Leslie, Patirica [sic] McDonald, Kazuo Okahashi, Thomas and Elaine Perna, Philip Petito, John Regan, James Schutz, Anthony Stellato, Sudo Kazuyoshi, Brendan Tebbert, Jeff West, Thomas Wiegand, Donna Wilms. This estimate of how many protest targets' addresses were published only after they had already been subjected to protest activity is generous, as many of the addresses included in independent listings published on the SHAC USA website were collected and listed independently only *after* SHAC USA had received reports of protest activity at those locations. This is difficult to discern in the record, as the government presented evidence thematically, rather than strictly chronologically.

333. *Fullmer*, 584 F.3d at 155.

threat. That is, because talk of unlawful protest activity was not merely hypothetical, but actually occurred—even if in smaller proportion to protected activity—the court held that the witnesses’ professed and largely undifferentiated fears were reasonable.

A prime example of how distant this reasoning is from a proper true threats analysis appears in the single paragraph in which the Third Circuit discussed true threats. After noting that “[the defendants’] actions meet the standard of a ‘true threat’ as articulated in *Watts*, because viewed in context, the speeches, protests, and web postings, were all tools to further their effort,” the court argued that “this speech rightly instilled fear in the listeners” in part because of “the success of the campaign in the past, including . . . telecommunication attacks on various companies.”³³⁴ Nonviolent communications to companies have no place in a true threats analysis: one cannot threaten a company, much less by way of attacks on their telecommunications. Once again, the SHAC campaign as an unlawful whole is the underlying rationale; anything uttered within that context—be it the publication of personal information, or a vast collection of “speeches, protests, and web postings”—is a true threat.

Fullmer’s true threats analysis lacks every bit of information necessary to establish a true threat. It fails to identify particular statements, uttered by (specific) defendants, directed to particular individuals, containing a specific meaning—namely, a meaning that could be reasonably understood as “a serious expression of an intent to commit an act of unlawful violence” to those individuals.³³⁵

The decision in *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists* is a useful contrast. In *Fullmer*, the government highlighted the similarities between the two cases.³³⁶ However, the differences are salient. In *Planned Parenthood*, abortion providers brought suit against anti-abortion activists who had published a series of posters identifying individual doctors by name, some of which included the doctors’ home addresses, physical descriptions, and photographs:

Three threats [were] at issue: the Deadly Dozen “GUILTY” poster which identifie[d] [plaintiffs Dr. Warren M. Hern, Dr.

334. *Id.* at 156 (emphasis added).

335. See *Virginia v. Black*, 538 U.S. 343, 359 (2003) (defining *true threats* as “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals”).

336. See Consolidated Brief for Appellee at 116–20, *Fullmer*, 584 F.3d 132 (No. 06-4211). The *Fullmer* court did not address *Planned Parenthood*.

Elizabeth Newhall, and Dr. James Newhall] among ten others; the Crist “GUILTY” poster with [plaintiff Dr. Robert] Crist’s name, addresses and photograph; and the “Nuremberg Files,” which is a compilation about those whom the [American Coalition of Life Activists (ACLA)] anticipated one day might be put on trial for crimes against humanity.

. . . .

[On the Nuremberg Files website] [a]pproximately 200 people [were] listed under the label “ABORTIONISTS: the shooters,” and 200 more [were] listed under Files for judges, politicians, law enforcement, spouses, and abortion rights supporters. [The plaintiffs were] listed in the “abortionists” section, which [bore] the legend: “Black font (working); Greyed-out Name (wounded); Strikethrough (fatality).” The names of [doctors who had been murdered after similar posters bearing their names and other identifying details had been published were] struck through.”³³⁷

The question in the case was whether the posters and website identifying the plaintiffs were true threats in violation of the Freedom of Access to Clinic Entrances (FACE) Act, which provides a private right of action against someone who by “threat of force . . . intentionally . . . intimidates . . . any person because that person is or has been . . . providing reproductive health services.”³³⁸ Thus, unlike *Fullmer*’s ambiguous identification of large swaths of speech as true threats, *Planned Parenthood* began with specific utterances alleged to have a threatening meaning.

Planned Parenthood was handed down nearly a year before the Supreme Court provided its definition of true threats in *Virginia v. Black*.³³⁹

Thus, *Watts* was the only Supreme Court case that discussed the First Amendment in relation to true threats before [the Ninth Circuit] first confronted the issue. Apart from holding that *Watts*’s crack about L.B.J. was not a true threat, the Court set out

337. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1062, 1065 (9th Cir. 2002) (en banc).

338. *Id.* at 1062 (quoting 18 U.S.C. § 248(a)(1), (c)(1)(A) (2012)).

339. *Id.* at 1071 (“[D]efin[ing] ‘threat’ for purposes of [FACE] . . . requires a definition that comports with the First Amendment, that is, a ‘true threat.’ The Supreme Court has provided benchmarks, but no definition.”); *Virginia v. Black*, 538 U.S. 343, 343 (2003).

no standard for determining when a statement is a true threat that is unprotected speech under the First Amendment.³⁴⁰

Drawing from its own jurisprudence,³⁴¹ the Ninth Circuit held that

“threat of force” in FACE means what our settled threats law says a true threat is: a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person.³⁴²

The context was as follows:

On March 10, 1993, Michael Griffin shot and killed Dr. David Gunn as he entered an abortion clinic in Pensacola, Florida. Before this, a “WANTED” and an “unWANTED” poster with Gunn’s name, photograph, address and other personal information were published. The “WANTED” poster describes Gunn as an abortionist and invites participation by prayer and fasting, by writing and calling him and sharing a willingness to help him leave his profession, and by asking him to stop doing abortions; the “unWANTED” poster states that he kills children at designated locations and “[t]o defenseless unborn babies Gunn in [sic] heavily armed and very dangerous.” . . .

On August 21, 1993, Dr. George Patterson, who operated the clinic where Gunn worked, was shot to death. A

340. *Planned Parenthood*, 290 F.3d at 1074.

341. *Id.* at 1074–75.

342. *Id.* at 1077. Before providing this definition at the conclusion of the section of the opinion discussing the true threats test, the Ninth Circuit twice stated the definition of a true threat slightly differently.

As it has come to be articulated, the test is: “Whether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.”

Id. at 1074 (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)). On the next page, the court stated: “Under our cases, a threat is ‘an expression of an intention to inflict evil, injury, or damage on another’ . . . A true threat, that is one ‘where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the first amendment.’” *Id.* at 1075 (first quoting *United States v. Gilbert*, 884 F.2d 454, 457 (9th Cir. 1989); then quoting *Orozco-Santillan*, 903 F.2d at 1265–66).

“WANTED” poster had been circulated prior to his murder, indicating where he performed abortions and that he had Gunn perform abortions for his Pensacola clinic.

In July 1994, Dr. John Bayard Britton was murdered by Paul Hill after being named on an “unWANTED” poster that Hill helped to prepare. One gives Britton’s physical description together with his home and office addresses and phone numbers, and charges “crimes against humanity”; another also displays his picture and states that “he is considered armed and extremely dangerous to women and children. Pray that he is soon apprehended by the love of Jesus!!!” In addition to these items, a third version of the Britton “unWANTED” poster lists personal achievements and Britton’s “crimes against humanity,” also warning that “John Bayard Britton is considered armed and extremely dangerous, especialy [sic] to women and children.”³⁴³

“Because of context,” the court “conclude[d] that the . . . posters [were] not just a political statement,”³⁴⁴ but a true threat. The court held that

[t]he true threats analysis turns on the poster pattern. . . . [D]ifferences [from previous posters] in caption or words are immaterial because the language itself is not what is threatening. Rather, it is the use of the “wanted”-type format in the context of the poster pattern—poster followed by murder—that constitutes the threat. . . . After a “WANTED” poster on Dr. David Gunn appeared, he was shot and killed. After a “WANTED” poster on Dr. George Patterson appeared, he was shot and killed. After a “WANTED” poster on Dr. John Britton appeared, he was shot and killed. . . . In the context of the poster pattern, the posters were *precise in their meaning* to those in the relevant community of reproductive health service providers. . . .

To the doctor who performs abortions, these posters meant “You’re Wanted or You’re Guilty; You’ll be shot or killed.” . . .

[N]o one putting Crist, Hern, and the Newhalls on a “wanted”-type poster, or participating in selecting these particular abortion providers for such a poster or publishing it, could possibly

343. *Id.* at 1063–64 (alteration in original).

344. *Id.* at 1079.

believe anything other than that each would be seriously worried about being next in line to be shot and killed.³⁴⁵

As detailed herein, there was no such pattern in *Fullmer*.³⁴⁶ Moreover, *Fullmer* contains none of the specificity—and none of the careful analysis—present in *Planned Parenthood*. Having one's personal information published on the SHAC USA website conveyed no such

345. *Id.* at 1085–86 (emphasis added).

346. Indeed, according to the record, of the 166 individuals who had their home addresses published on the SHAC USA website, at least 28 had their addresses listed only *after* some form of protest—including both legal and illegal—took place at their homes. Notable among these are trial witnesses Elaine Perna and stalking victim Robert Harper. At least 41 people had their home addresses listed without ever experiencing any protest activity. Fifty-five others reportedly received only letters, calls, and emails, even though their addresses were published on the SHAC USA website. Gov't Ex. 1064A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report that activists had called Richelle Brown, Jeff Wells, Todd Galles, Leo Otero, Peter Babich, Scott Zion, and Margaret Aldred, and a list of these individuals' home addresses); Gov't Ex. 1144, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report that activists had sent postcards to Cindy and Mike Bechtel, G. and V. Boyd, C. Caffee, John and Vera Carsten, Beate and Jon Hammonds, Jim Horsburgh, James Kerr, Jailing Lin, Lin Liu, Chas F. Mai, Kyle McLain, Beth Morrison, L. Parmenter, Cindy Pelletier, Harold R. Phillips, H. Preston Pool, Mike Rhoades, James Roberts, Mike Rosson, Brandon Rouse, Richard C. Spring, David Steenson, Paula Stein, Dan Stout, Duane Underwood, Malcolm Wall, Bryan Wilson, Dee Wu, and Zhi Zhang, and a list of these individuals' home addresses); Gov't Ex. 1229, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report that activists had called Jose De Lasa, William Dempsey, Thomas Freyman, Miles White, and a list of these individuals' home addresses); Gov't Ex. 1252A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report that activists had called Tatsuya Hasegawa, John Martin Leonard, Jennifer Tung, and Thomas Freyman, and a list of these individuals' home addresses); Gov't Ex. 1263, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report that activists had sent emails to Eugen Groff, Adris Dull, Bill Cusworth, Donald F. Atkinson, Patrick Kelly, Debbie Newell, James T. Sisco, Donald Denbo, Douglas Hathaway, Eric P. Bone, and Rick Breseman, and a list of these individuals' home addresses). There were no reports of on-the-ground protest activity at these homes. Nineteen individuals reportedly experienced protest activity at their homes without there being any evidence that their addresses were ever published by SHAC USA. See Gov't Ex. 1013, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of protest activity at the homes of Michael Smith, John Windell, Dave Miller, Dave Palmisano, and Craig Maki); Gov't Ex. 1014A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of protest activity at the home of Howard Pien); Gov't Ex. 1072, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of protest activity at the home of Theresa Kusner); Gov't Ex. 1086, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of protest activity at the homes of "Smokey" and Craig Maki); Gov't Ex. 1139A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of protest activity in the neighborhoods of Martha Lobo, Joanne Gosling, and Stephen Rodgers); Gov't Ex. 1140, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of protest activity in and around the polling places of Stephen Rodgers, Pam Pastore, Martha Lobo, and Joanne Gosling); Gov't Ex. 1151, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov't Ex. 1151A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of protest activity at the home of Stephen Rodgers); Gov't Ex. 1193A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of protest activity at the home of Shankar Harihan); Gov't Ex. 1259, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report that activists had sent mail to the Tak and Harwood families); Gov't Ex. 1280, *Fullmer*, 584 F.3d 132 (No. 06-4211); Gov't Ex. 1280A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of protest activity at the homes of Edward Price and Charles Kirby); Gov't Ex. 2033, *Fullmer*, 584 F.3d 132 (No. 06-4211) (report of protest activity in Brad Hilsabeck's neighborhood); Trial Transcript, Day 3 at 111, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Andrew Baker about protest activity at his daughter's home).

“precise . . . meaning,”³⁴⁷ including no way to discern whether one would be subjected to protected protest activity, unlawful acts, both, or nothing at all. Ultimately, the extent of the meaning conveyed by personal information published on the SHAC USA website was that “you might experience protest activity and that activity might be unlawful.” This is far too vague, and encompasses too great a likelihood that the “threatened” protest activity would be constitutionally protected, to be deemed a true threat.

The *Planned Parenthood* court did not lightly impart a threatening meaning to the WANTED/GUILTY posters. Indeed, it noted that the earlier, pre-pattern, posters may have been protected. The court stated that “[e]ven if the Gunn poster, which was the first ‘WANTED’ poster, was a purely political message when originally issued, and even if the Britton poster were too, by the time of the Crist poster, the poster format itself had acquired currency as a death threat for abortion providers.”³⁴⁸ By contrast, the *Fullmer* court was downright eager to deem the defendants’ speech threatening absent any pattern or other context that imparted a specific threatening meaning.

Notably, the *Planned Parenthood* court held that the Nuremberg Files website, which listed the names of approximately 200 individuals that the defendants deemed guilty of crimes related to abortion, was unprotected only insofar as the scorecard on the site reinforced the fear generated by the posters.³⁴⁹ “To the doctor who performs abortions, these posters meant ‘You’re Wanted or You’re Guilty; You’ll be shot or killed.’ This was reinforced by the scorecard in the Nuremberg Files [which kept track of those who had been injured or killed].”³⁵⁰

Standing alone, however, the court said that

[t]he Nuremberg Files are somewhat different [from the posters]. Although they name individuals, they name hundreds of them. The avowed intent is “collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity.” . . . However offensive or disturbing this might be to those listed in the Files, being offensive and provocative is protected under the First Amendment. But, in two critical respects, the Files go further. In addition to listing judges, politicians and law enforcement personnel, the Files separately categorize “Abortionists” and list the names of individuals who

347. *Planned Parenthood*, 290 F.3d at 1085.

348. *Id.* at 1079.

349. *Id.* at 1088.

350. *Id.* at 1085.

provide abortion services, including, specifically, [the plaintiffs]. Also, names of abortion providers who have been murdered because of their activities are lined through in black, while names of those who have been wounded are highlighted in grey. As a result, we cannot say that it is clear as a matter of law that listing [the plaintiffs] on both the Nuremberg Files and the GUILTY posters is purely protected, political expression.³⁵¹

The court held that “[i]n conjunction with the ‘guilty’ posters, being listed on a Nuremberg Files scorecard for abortion providers impliedly threatened physicians with being next on a hit list. To this extent only, the Files are also a true threat. However, the Nuremberg Files are protected speech.”³⁵² Being listed on the SHAC USA website was much more like being listed on the Nuremberg Files website alone than like being listed on both a GUILTY poster and the scorecard on the Nuremberg Files website, as those whose personal information was published on the SHAC USA website appeared as an undifferentiated mass.

III. THE INDIVIDUAL DEFENDANTS

*A. First Amendment As-Applied and AEPA Sufficiency of the Evidence*³⁵³

After concluding that “some of the speech on SHAC’s website . . . is not protected by the First Amendment,”³⁵⁴ the Third Circuit held that “any Defendant who created or disseminated that speech, or who personally participated in illegal activity, is likewise not protected by the First Amendment,”³⁵⁵ and proceeded to discuss each individual defendant in turn. This is yet another flaw in the court’s analysis. The First Amendment does not protect *persons*; it protects speech. Thus, *individuals* cannot be stripped of First Amendment protection; only particular *utterances* may be

351. *Id.* at 1080.

352. *Id.* at 1088.

353. While the analysis throughout this Article includes many unequivocal statements about the evidence in the record, to the effect that “there is no evidence of” certain things or “only such-and-such” evidence of other things, it is important to note that First Amendment protection does not depend on such complete absences. Those happen to be the facts in this case, and they demonstrate how poor the Third Circuit’s analysis was. However, if there was *some* or *some more* evidence where I have noted it was absent or lacking here, it does not follow that those small factual differences would pierce First Amendment protection. Nor must such evidence be as lacking for First Amendment protections to prevail in other cases.

354. *Fullmer*, 584 F.3d at 156.

355. *Id.*

deemed unprotected. Then—and only then—can speech be assessed in order to determine whether it (alone or coupled with other activity) meets the elements of a particular crime. The *Fullmer* court truly did treat the defendants themselves as *unprotected* by the First Amendment, linking them to unlawful conspiracies on the basis of single, or a small number of, instances of speech deemed by the court to be unprotected.³⁵⁶ Each defendant's *activities* are discussed below in order to show that, even if the court *had* conducted a proper analysis, there was insufficient evidence to convict them.

As discussed at length above,³⁵⁷ the court held that defendant Kjonaas's activities were unprotected because his "metaphorical fingerprints were all over several of SHAC's illegal activities," most clearly seen in his ability to have www.stephenskills.com taken down, and because of a phone call placed, on the day of a bombing, from a number registered to Kjonaas to a number registered to the activist later charged with the bombing.³⁵⁸ It bears repeating that neither taking down a website nor, on its face, placing a phone call constitute unprotected activity (even if it could be shown that Kjonaas was in fact the person who placed the call). Nonetheless, had Kjonaas actually engaged in unprotected acts, a proper analysis would then have gone on to determine whether his unprotected actions satisfied the elements of each charged offense—a difficult task when one is dealing with "metaphorical" activity. Instead, as discussed below,³⁵⁹ Kjonaas (as well as Gazzola) was ultimately convicted of violating the AEPA for his overall leadership of the SHAC campaign—the cardinal sin in *Claiborne Hardware*.³⁶⁰

"One of the more incriminating pieces of evidence against Gazzola," the court said in its First Amendment assessment of Gazzola's activities, "was her participation in [a] demonstration at the home of [Marsh employee] Robert Harper [at which she] threaten[ed] to burn down Harper's house and warn[ed] him that the police cannot protect him."³⁶¹ A

356. See e.g., *infra* text at note 382 through note 385 (discussing the court's holding that defendant Fullmer's distribution of the SHAC September Calendar, reproduced *supra* at text accompanying note 227, was sufficient to uphold his conviction for animal enterprise terrorism).

357. See *supra* at text accompanying note 144 through note 156.

358. *Fullmer*, 584 F.3d at 156–57. See *supra* note 153 (discussing this phone call further).

359. See *infra* at text accompanying note 372 through note 376.

360. See *supra* Part II(A)(i), especially text at note 90 through note 93.

361. *Fullmer*, 584 F.3d at 157. Cf. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927–29, 938–39 (1982) (among Charles Evers's speech deemed protected was his statement that, "[y]ou needn't go calling the chief of police, he can't help you none. You needn't go calling the sheriff, he can't help you none. . . . He ain't going to offer to sleep with none of us men." (quoting App. to Opinion of the Court, *Claiborne Hardware*, 458 U.S. 886, 938–39 (No. 81-202))).

more detailed description of Gazzola's "threat" can be found in *Commonwealth v. Gazzola*,³⁶² in which Gazzola and other attendees at the demonstration outside Harper's home were indicted for attempted extortion, threats, and conspiracy to commit both. As the Superior Court of Massachusetts explained,

[t]he closest that any of the defendants in this case came to uttering a true threat was in a chant, led by Gazzola In response to Gazzola shouting "what goes around comes around," the group replied "burn his house to the ground." The chant, repeated four times, was used during a single ten-second time period in a demonstration which lasted more than half an hour. It was not employed again, on that day or any other day. When those words were uttered, some members of the group were smiling or laughing, and police officers stood nearby, seemingly unconcerned. There was no one-on-one confrontation or personal encounter with the Harpers at any time. Finally and perhaps most important, there was no indication that any defendant had the present ability or intent to carry out the threat, nor did any lawless action ensue. Indeed, around the same time, Gazzola cautioned the group to stay off the sidewalk so as to be in compliance with [a] civil injunction [requiring that the civil defendants, who included SHAC USA and three of Gazzola's codefendants in the Massachusetts indictment, stay at least thirteen feet away from the Harper's property], suggesting an intent to conform to the law.³⁶³

The Massachusetts court conducted a thorough analysis of both the facts and the law, concluded that all of the protesters' behavior at the demonstration outside Harper's home, including the "burn his house to the ground" chant, was protected by the First Amendment, and dismissed all charges against Gazzola. The Third Circuit concluded otherwise.³⁶⁴

362. *Commonwealth v. Gazzola*, No. 02-11098, 2004 Mass. Super. LEXIS 28, at *15-16 (Mass. Sup. Ct. Feb. 6, 2004).

363. *Gazzola*, 2004 Mass. Super. LEXIS 28, at *15-16.

364. In a footnote, the Third Circuit explained that

Gazzola was arrested and charged in the Commonwealth of Massachusetts for this specific protest activity outside of Robert Harper's home. The Massachusetts court dismissed the charges on First Amendment grounds. Gazzola's counsel raised this issue in the District Court when he moved for a new trial following Gazzola's conviction in this case. After a hearing during which both parties were fully heard, the District Court concluded that the Massachusetts court's ruling was on a narrow set of facts, limited only to Gazzola's conduct outside Robert

In what is perhaps the most question-begging statement in an opinion rife with question-begging, the Third Circuit noted that it “[found] it hard to see how threatening to burn down someone’s house is ‘political hyperbole’ such that it might be protected by the First Amendment in the first place.”³⁶⁵ In characteristic fashion, the court turned the First Amendment on its head. The court’s incredulosity notwithstanding, threatening to burn down someone’s house *is* protected in the first place—speech and expressive conduct are presumptively protected and only lose that protection if a proper constitutional analysis shows that the expression falls into an unprotected category.³⁶⁶ That analysis looks something like what the

Harper’s home, and that the state court did not consider the entire course of conduct, including involvement in the website and other protests, at issue in this case. We agree with the District Court on this issue.

Fullmer, 584 F.3d at 157 n.11. Yet again, the court misstated the facts. The record is clear that Gazzola was never arrested on the Boston charges. Transcript of Charging Conference at 7–8, *Fullmer*, 584 F.3d 132 (No. 06-4211). Further, the Third Circuit’s reasoning is highly improper. First, the district court made no such statement that the Massachusetts court ruling was distinguishable on the facts. That was *the government’s* position during the teleconference hearing on this matter. Transcript of Teleconference, Sept. 26, 2006, re: Boston ruling on First Amendment (Gazzola) at 2–3, *Fullmer*, 584 F.3d 132 (No. 06-4211). All the district court stated was, first, at the beginning of the teleconference, before either party had been heard, “Oh, no, [the teleconference hearing]’s not going to alter anything.” *Id.* at 2. Then, after the parties had been heard, the court stated, “I did carefully consider [the Massachusetts] opinion. I recognize that Judge Sanders[’s] . . . consideration of [Gazzola’s] words was actually discussed in the context of the civil rights demonstrations of the ‘60s, the Ku Klux Klan’s statements, the AACCP [sic] demonstrations with Charles Evers statements. And in that context, she made her ruling” and “[t]he Court has considered it. I am satisfied that the defendants’ [sic] guilt and sentencing were appropriate and reasonable.” *Id.* at 8–9. More to the point, in assessing whether Gazzola’s speech outside Robert Harper’s home fell into a category of unprotected speech, the Massachusetts court could have considered whatever *context* it deemed relevant in determining whether the speech conveyed a threatening meaning. In *Virginia v. Black*, for example, the Supreme Court considered the entire history of cross burning in order to determine the various meanings of that particular expression. See *Virginia v. Black*, 538 U.S. 343, 352–57 (2003) (reviewing the history of cross burning, beginning with its origin in the 14th century and up “[t]o this day”). Thus, the Third Circuit’s explanation here amounts to *disagreement* with the Massachusetts court about which facts were relevant and, thus, disagreement with the Massachusetts court’s conclusion that Gazzola’s speech did not constitute a true threat. But a statement is either a threat when it is uttered or it is not. For a court in an entirely separate case (and separate jurisdiction) to summarily reject an earlier court’s determination of what an utterance meant certainly throws speakers into doubt about whether or not their speech will be protected. Here, for example, which court should Gazzola heed in the future? Given the consequences, of course, she is more likely to heed the Third Circuit’s holding and limit—i.e., chill—her speech. See Complaint for Declaratory and Injunctive Relief at 38, *Blum v. Holder*, 930 F. Supp. 2d 326 (D. Mass. 2013) (No. 11-12229-JLT) (arguing that the *Fullmer* court’s holding chilled Gazzola from engaging in protected protest activity).

365. *Fullmer*, 584 F.3d at 157.

366. See *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63, 66, 67 (1989) (citing and quoting *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326, n.5 (1979)) (holding that expressive materials are afforded special Fourth Amendment protection because First Amendment materials are “presumptively protected”); see also Brief for Thomas Jefferson Ctr. for the Prot. of Free Expression as Amici Curiae

Superior Court of Massachusetts conducted, like the Ninth Circuit conducted in *Planned Parenthood*, and like the Supreme Court conducted in *Black*: a close analysis of the relevant context, an explanation of why that context imparted a specific threatening meaning to a particular utterance, and an explanation as to why a victim's fears of that particular utterance were reasonable. In *Fullmer*, by contrast, the Third Circuit merely asserted, without support, that "from the record"³⁶⁷ Harper's fears were reasonable because he "was keenly aware of what was happening, and what had happened, to others who had been targeted during the campaign to close Huntingdon, including the physical assault on Brian Cass."³⁶⁸ However, as discussed above,³⁶⁹ such "keen awareness" could just as easily have *lessened* Harper's fears, given the dearth of physical violence, SHAC USA's stated opposition to physical violence, and the fact that the overwhelming majority of SHAC protest activity—including the protest outside Harper's home—was constitutionally protected.

Not that it matters. Though the court essentially hung Gazzola's conviction on the chant outside Robert Harper's house, it went on to say that

*[e]ven assuming Gazzola had not made these threats . . . the record establishes that [she] was instrumental in the planning and execution of SHAC's illegal activities. She repeatedly employed illegal tactics as one of the strategies used to further SHAC's overall goal of closing Huntingdon.*³⁷⁰

There are no record citations and no mention of specific illegal activities that Gazzola supposedly planned and executed. From the record,

Supporting Respondents at 1, *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (No. 11-210) ("It is a hallmark of First Amendment law that expression is presumptively protected unless it falls within one of several carefully prescribed exceptions." (citing *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2733 (2011))); *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid." (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)); *id.* at 124 (Kennedy, J., concurring in judgment); *Consol. Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 536 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972))).

367. *Fullmer*, 584 F.3d at 157. Notably, the record contains seven printed volumes, in a Joint Appendix of over 3,900 pages that includes a 575-page trial transcript printed with four pages of transcribed testimony per Appendix page (bringing the printed volumes to an approximate, whopping 6,200 pages), and dozens of audio and videotapes.

368. *Id.* Robert Harper did not mention Cass by name. *See supra* note 287 (discussing Harper's testimony regarding the Cass beating).

369. *See supra* text accompanying note 250 through note 328.

370. *Fullmer*, 584 F.3d at 157 (emphasis added).

all that is known is that Gazzola *employed* illegal tactics *by talking about them* through publishing the SHAC USA website. Whether she was denied First Amendment protection for leading the chant outside Robert Harper's home, for planning and executing unspecified acts, or for the combination of the two, the court's analysis fell woefully short of the "precision of regulation" required by *Claiborne Hardware*.³⁷¹

Given the court's unsupported—and unsupportable—statements regarding Kjonaas's and Gazzola's involvement in illegal activity, it is unsurprising that, when it assessed the sufficiency of the evidence that Kjonaas and Gazzola had violated the AEPA, the court was only able to say that they held leadership positions in the campaign and took efforts to conceal their activity. According to the court, the following was "ample circumstantial evidence from which the jury could have inferred" Kjonaas's and Gazzola's agreement to "participate in the conspiracy and further its unlawful goals."³⁷²

Kjonaas and Gazzola had leadership positions in SHAC, an organization that clearly engaged in unprotected activity via its website. Kjonaas and Gazzola were instrumental in the coordination of all of SHAC's activities, both legal and illegal. There is also overwhelming evidence of their constant attempts to evade law enforcement and cover their tracks: use of encryption devices and programs to wipe their computer hard drives; attributing illegal activities to fake organizations and activists; and the use of pseudonyms. While alone this evidence is not enough to demonstrate agreement, when viewed in context, it is circumstantial evidence of their agreement to participate in illegal activity.³⁷³

These activities hardly equate to a federal terrorism conspiracy—particularly in a First Amendment context. Use of encryption, organizational shell games, and the use of pseudonyms are not evidence of unlawful activity *unless there is evidence that these activities concealed some substantive crime*. Indeed, anonymous speech is protected by the First

371. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982).

372. *Fullmer*, 584 F.3d at 161. The court spoke conclusorily. The question is whether there was an unlawful conspiracy. This flawed reasoning is the result of the court assessing the extent, rather than the nature, of the defendants' involvement in the SHAC campaign.

373. *Id.*

Amendment.³⁷⁴ Concealing an individual or organizational identity when engaging in political activity—particularly when one is facing repression³⁷⁵—is a way of *protecting* one’s First Amendment rights, not a reason to deny them. Moreover, this is a prime example of the Third Circuit’s treatment of persons, rather than utterances, as unprotected by the First Amendment, as well as its treatment of the SHAC campaign as an unlawful whole: what Kjonaas and Gazzola *actually did* is “not enough,” but “in context” of the SHAC campaign, it is sufficient “evidence of their agreement to participate in illegal activity.”³⁷⁶

Defendant Conroy was deemed unworthy of First Amendment protection for being SHAC USA’s webmaster, specifically because the SHAC USA website advertised electronic civil disobedience. “Given [Conroy’s] level of control over the website,” the court wrote, “our conclusion that SHAC’s website coordinated electronic civil disobedience alone requires the conclusion that Conroy’s actions in this regard do not warrant First Amendment protection.”³⁷⁷ However, the proper next step in an assessment of the sufficiency of the evidence regarding defendant Conroy would be to determine whether his actions with regard to the electronic civil disobedience in particular satisfied the elements of the Animal Enterprise Protection Act. Instead, the court concluded that evidence that Conroy

designed and maintained multiple websites affiliated with SHAC [and] frequently posted on these websites detailed information regarding when and how SHAC supporters could participate in illegal campaign activities [and] postings [that] at times included warnings and threats of violence against SHAC’s targets [was] strong circumstantial evidence [supporting] the conclusion that Conroy agreed to participate in the conspiracy.³⁷⁸

This analysis suffers from the same problems as the court’s assessment of the sufficiency of the evidence against defendants Kjonaas and Gazzola:

374. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 343, 344 (1995) (acknowledging the “respected tradition of anonymity in the advocacy of political causes” and “the First Amendment’s protection of anonymity”).

375. *See, e.g., supra* note 151 (discussing dozens of SLAPP suits filed against SHAC USA).

376. *See also infra* text at note 455 through note 462 (discussing *context* further). *Cf. supra* at text accompanying note 138 through note 143 (discussing the Third Circuit’s treatment of defendant Harper’s activities as both lawful and sufficient evidence of his participation in an unlawful conspiracy).

377. *Fullmer*, 584 F.3d at 157.

378. *Id.* at 161. *See supra* note 372 (noting that the court spoke conclusorily when it referred to “the” conspiracy).

it amounts to a claim that Conroy had a leadership role in the campaign, namely designing and maintaining the website. Nowhere in the opinion did the court support its assertions that Conroy published “threats” or information about how to participate in illegal activities. Other than a general reference to posts about electronic civil disobedience and leaked Bank of New York business records,³⁷⁹ the court did not identify which posts it held Conroy liable for or why those posts in particular satisfied the elements of the charged offense under the Animal Enterprise Protection Act. Bare assertions that Conroy designed and maintained the website *might* have sufficed if the court had adequately established that the website incited violence or contained true threats, that those unprotected posts met the elements of the charged offense, *and* that Conroy had participated in the publication of those—versus constitutionally protected—posts. However, given the court’s bungled handling of both incitement and true threats, and the absence of evidence that Conroy specifically participated in the publication of unprotected speech, general evidence that Conroy controlled the website is insufficient to establish that he agreed to participate in an unlawful conspiracy. His general involvement with a website that—at worst—contained both protected and unprotected expression is insufficient to satisfy the “precision of regulation” required.³⁸⁰

As if criminalizing leadership of a collective political effort were not problematic enough, the court doubled down when it assessed the sufficiency of the evidence against defendants Harper, Stepanian, and Fullmer. The court hung their convictions for conspiring to violate the AEPA on their general organizing in Seattle, Long Island, and New Jersey, respectively, as well as isolated acts in furtherance of the SHAC campaign.

The court’s assessment of the evidence against defendant Harper is discussed above.³⁸¹

Defendant Fullmer’s conviction for violating the AEPA was upheld because of his distribution of the SHAC calendar, which included “Black Fax Mondays,” discussed above.³⁸² The court stated that “Fullmer, via the e-mail address *malignantx@aol.com*, personally coordinated electronic civil disobedience via internet message boards. It is inconceivable that he could now argue that he never agreed to participate in illegal activity—he personally orchestrated it.”³⁸³ Needless to say, the court’s conclusion that

379. *Fullmer*, 584 F.3d at 164.

380. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982).

381. *See supra* text at note 138 through note 143.

382. *See supra* text at note 223 through note 230.

383. *Fullmer*, 584 F.3d at 161.

distributing the SHAC calendar is sufficient evidence to convict Fullmer of terrorism is highly problematic. First, it rests upon a misconstrual of *Brandenburg* in assessing Fullmer's speech.³⁸⁴ More importantly, even if the court had correctly deemed distribution of the SHAC calendar to be unprotected speech, this amounts to a conclusion that engaging in a single act of unprotected speech is sufficient evidence to convict an individual of a federal terrorism conspiracy. This strips protection from the person, rather than his speech, and it highlights the danger of alleging a conspiracy in the sensitive area of First Amendment freedoms.³⁸⁵

The evidence against Stepanian deemed sufficient to convict him of violating the AEPA was that he "had a leadership position within SHAC[;] alluded to his coordination of illegal activity in a phone call with Kjonaas when he explained to Kjonaas that he could not explain over an unprotected phone line what protest activity he had planned for the following weeks in New York and New Jersey[;] worked with Kjonaas to attribute illegal activity to sham organizations[; and] led an illegal protest at Deloitte and Touche."³⁸⁶

The court's First Amendment assessment recounted Stepanian's activity as follows:

In a recorded telephone conversation with Gazzola, Stepanian described a protest he coordinated inside the New York offices of Deloitte and Touche, Huntingdon's auditor. After security refused to admit Stepanian into the building, he followed a delivery person inside, and spoke to the office manager. The office manager ejected Stepanian from the building, at which time other protestors threw paper and plastered the inside of the building with stickers. Although Stepanian clearly accepted responsibility for this action in the phone call with Gazzola, the protest was nonetheless attributed to "New York activists." Stepanian himself provided strong circumstantial evidence of his planning and execution of illegal protest activity in a phone conversation with Kjonaas.³⁸⁷ When Kjonaas asked Stepanian

384. See *supra* text at note 223 through note 230 (discussing the court's holding that defendant Fullmer's speech was not protected under *Brandenburg*).

385. See *supra* note 165 (discussing minor illegal acts and conspiracy theory under the AEPA and AETA).

386. *Fullmer*, 584 F.3d at 162.

387. Gov't Ex. 5038A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (transcript of telephone conversation between defendant Kjonaas and defendant Stepanian).

Stepanian: Um . . . (Pause) But, um . . . I'm really excited about like tryin' to be like a three days of action . . . in New York and New Jersey, I think I have it

what his plans were, Stepanian replied that he could not share the information over the phone, presumably for fear that the phone was wiretapped.³⁸⁸

Stepanian's speech in and regarding the web posting that reported the demonstration at Deloitte & Touche was protected by the First Amendment. Not only is an accurate byline not required for the First Amendment to protect speech, but the court's attempt to render the report as somehow nefarious because it was attributed to "New York activists"³⁸⁹ rather than to Andrew Stepanian is yet another indicator that the court was looking for bad acts in absolutely everything the defendants did. As the court itself stated when describing the parties in the case, "Andrew Stepanian was a SHAC activist who coordinated protests in New York."³⁹⁰ Why it is at all inappropriate—much less evidence of illegal activity—to report that the protest write up was "[r]eceived from NY activists"³⁹¹ is inconceivable. In fact, why *wouldn't* a protest report published on a website that reports on a global campaign describe protest activity in terms of location rather than individuals? Most people reading the SHAC USA website had probably never heard of Andrew Stepanian. Finally, as the court noted, several people—i.e., New York activists—participated in this protest, not only Stepanian.

With regard to Stepanian's "work[] with Kjonaas to attribute illegal activity to sham organizations," the Third Circuit's own description of what, presumably,³⁹² it is referring to belies this claim. Earlier in the opinion, while introducing each defendant, the court said, "[w]hen

planned out now how it's gonna go the first day in New Jersey, the second day.
(Pause) A home demo in New York and, uh . . . and a conference. And the third day a big . . . demo in New York.

(Pause)

Kjonaas: What's gonna happen in Jersey?

(Pause)

Stepanian: Um . . . I, I can't say over the phone.

Id. The audio recording of the conversation (Gov't Ex. 5038, *Fullmer*, 584 F.3d 132 (No. 06-4211)) was entered into evidence, however the transcript was not. *See supra* note 142; *see also* Trial Transcript, Day 7 at 16, *Fullmer*, 584 F.3d 132 (No. 06-4211) (court advising jury, "[n]ow, I think the government is going to hand out to you transcripts. . . . [W]henever in a trial a transcript is handed out to assist as a listening device for a wire tap [sic] . . . the actual evidence is the recording, what you hear").

388. *Fullmer*, 584 F.3d at 158.

389. *Id.*

390. *Id.* at 150.

391. Gov't Ex. 1177, *Fullmer*, 584 F.3d 132 (No. 06-4211).

392. The court provided only one record citation, to a quotation from a speech delivered by defendant Harper, when discussing the sufficiency of the evidence against the defendants.

discussing organizing a national protest, Stepanian explained that he wanted to attribute it to an ‘amorphous collective’ that no one would recognize, rather than attach SHAC’s name to it.”³⁹³ The court itself described the activity Stepanian wished to attribute to the collective as *legal* protest activity—“a national protest”—and the evidence supports this characterization.³⁹⁴ At most, the evidence suggests that Stepanian was seeking to exceed limitations, imposed by an injunction, on the number of protesters permitted at a demonstration. Unsurprisingly then, though this conversation was recorded by the FBI, giving them advance notice of Stepanian’s plans, there is no further evidence that any illegal acts occurred or were thwarted that can be traced to this conversation. Nor is there any evidence that the injunction was violated.³⁹⁵

Similarly, and as with the court’s criminalization of Kjonaas’s and Gazzola’s efforts to conceal their activities, Stepanian’s reluctance to share his protest plans over the phone is, at best, “strong circumstantial evidence of his planning and execution of illegal protest activity”³⁹⁶ only if there was some underlying criminal act. Again, however, the conversation was

393. *Fullmer*, 584 F.3d at 150 (quoting Gov’t Ex. 5038A, *Fullmer*, 584 F.3d 132 (No. 06-4211)).

Stepanian: “I wanna make it, that like we call for a national protest, but it doesn’t have to be SHAC making the call. Like it’s, it’s like the coalition to smash HLS for New York or something.

ADL and SHAC can take on little responsibilities within it, but that call comes from, an amorphous collective, that no one really knows what it is.

Kjonaas: Yeah.

Stepanian: [B]ut then we’re gonna need some of SHAC’s resources to get the . . . (pause) call out to everyone. . . .

Kjonaas: Can do.

Stepanian: I’m just saying though that if like . . . for example . . . the coalition wanted to do some sort of rally . . . (pause) at, say, Baker’s home or something, it’ll be like so many people . . .

Kjonaas: Um hum.

Stepanian: . . . there, that it violates the injunction, that you don’t want like . . . (pause) SHAC to go and like say, “This is a SHAC demo, here!”

Gov’t Ex. 5038A, *Fullmer*, 584 F.3d 132 (No. 06-4211) (transcript of telephone conversation between defendant Kjonaas and defendant Stepanian). The audio recording of the conversation (Gov’t Ex. 5038, *Fullmer*, 584 F.3d 132 (No. 06-4211)) was entered into evidence, however the transcript was not. *See supra* note 142.

394. *Fullmer*, 584 F.3d at 150; Gov’t Ex. 5038A, *Fullmer*, 584 F.3d 132 (No. 06-4211).

395. As with Stepanian’s single act of trespass, discussed *supra* at text accompanying note 162 through note 166, had there been a violation of the injunction, contempt of court hardly rises to the level of a federal terrorism conspiracy, nor should the combination of these two arguably illegal acts. *See CHANG supra*, note 165, at 113.

396. *Fullmer*, 584 F.3d at 158.

recorded by the FBI, yet there is no further evidence that any illegal acts occurred or were thwarted in New Jersey that can be traced to this conversation.³⁹⁷

Thus, the court's First Amendment and sufficiency of the evidence assessments of defendant Stepanian's activity combined all of the problems present in those assessments of each other defendant. Stepanian's activity was deemed unprotected and criminal because of speech that the court should have protected, because of his "leadership position," and because of a minor unlawful infraction (trespass).³⁹⁸

B. Stalking Charges

In its analysis of SHAC USA's, Kjonaas's, Gazzola's, and Conroy's convictions for interstate stalking, the court underscored its treatment of the entire SHAC campaign as unlawful. The court treated the defendants' involvement in the campaign and publication of the website as the basis for these convictions and continued to treat the same speech as both protected and as the basis for conviction.

SHAC USA, Kjonaas, Gazzola, and Conroy were convicted of three counts of interstate stalking against Marsh employees Sally Dillenback, Marion Harlos, and Robert Harper as well as one count of conspiracy to stalk.³⁹⁹ The government was required to show, either, that the defendants "used a facility of interstate commerce" to "engage in a course of conduct with the intent to place a person in reasonable fear of death or serious bodily injury either to that person or to a partner or immediate family member" and that "the course of conduct actually put that person in" such fear, or, that the defendants aided and abetted others who did so.⁴⁰⁰ The

397. Which, again, raises the question: what if there had been? What if, for example, Stepanian had been planning an act of civil disobedience and did not want to discuss such illegal activity on the phone for fear of the act being disrupted or prevented in advance? Should that tie him to a federal animal enterprise terrorism conspiracy, in addition to any minor charges resulting from the civil disobedience itself?

398. *Fullmer*, 584 F.3d at 158 (considering whether Stepanian's activity was protected by the First Amendment); *id.* at 162 (deeming Stepanian's activity sufficient to convict him of violating the AEPA).

399. The conspiracy count did not identify particular victims of the alleged stalking. Superseding Indictment at 23–24, *United States v. Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2 (D.N.J. Sept. 16, 2004), *aff'd sub nom.* *United States v. Fullmer*, 584 F.3d 132 (3d Cir. 2009).

400. *Fullmer*, 584 F.3d at 163. "[W]ith regard to 'aiding and abetting,' a defendant is punishable as the principal if the government establishes, beyond a reasonable doubt, that either the defendant committed the stalking or 'aid[ed], abet[ted], counsel[ed], command[ed], induce[d] or procure[d]' the substantive act of stalking by another person." *Id.* (quoting 18 U.S.C. § 2 (2012)).

court's analysis of the stalking charges was as cursory as its analysis of the rest of the evidence.

In discussing Gazzola's stalking charges, for example, the court did not state that Gazzola did *anything*—much less anything unprotected—with regard to Sally Dillenback or Marion Harlos. Once again, the court hung everything on the chant Gazzola led outside Robert Harper's home. This was ten seconds of speech, in which the crowd, not Gazzola, stated the alleged threat, “burn his house to the ground,”⁴⁰¹ that the court used to support not only Gazzola's conviction for terrorism, but also four counts of stalking, a violent crime.⁴⁰² The entirety of the court's discussion of the stalking evidence against Gazzola is as follows:

Gazzola personally stood outside of Robert Harper's house and threatened to burn it down, and warned that the police could not protect him. All of the stalking victims—Sally Dillenback, Marion Harlos, and Robert Harper—testified that they were aware that they had been targeted. Dillenback testified that she received an e-mail in which someone asked her how she would feel if someone “cut open her son and filled him with poison.”⁴⁰³ All the stalking victims testified that they were afraid for their safety, and the safety of their families, because they knew what had happened to Brian Cass and others who preceded them in this campaign.⁴⁰⁴

Once again, the court misstated the facts. Robert Harper was the only stalking victim whose testimony made clear he knew about the assault on Cass.⁴⁰⁵ Marion Harlos made a passing reference to having heard of “physical attacks on individuals,”⁴⁰⁶ and Sally Dillenback did not mention

401. See *supra* text at note 363 (quoting the Superior Court of Massachusetts's description of the chant).

402. *Fullmer*, 584 F.3d at 163–64.

403. Dillenback's trial testimony was the first I had heard of this email. See also *supra* note 312 (noting that, similarly, I learned only at trial about posters hung at Andrew Baker's daughter's home).

404. *Fullmer*, 584 F.3d at 163–64.

405. Trial Transcript, Day 5 at 204, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Robert Harper). Harper did not mention Cass by name, but details of the attack he described correspond to the attack on Cass. See *supra* note 287 (discussing Harper's testimony regarding the Cass beating).

406. Trial Transcript, Day 6 at 54, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Marion Harlos). Harlos provided no further details to indicate whether she believed there had been physical attacks because she knew of the assault on Cass or because she had (inaccurate) information that SHAC activists in the United States had engaged in physical attacks. Harlos did not state what information led her to believe there had been physical attacks, what those attacks consisted of or when and where they had taken place, or how she had come to this belief.

knowledge of physical attacks at all.⁴⁰⁷ Also again, mere awareness that one had been targeted for protest by the SHAC campaign, coupled with bald assertions of fear—without any assessment of their reasonableness—were deemed sufficient evidence to convict.

More fundamentally, how did this evidence establish that Gazzola “used a facility of interstate commerce” to “engage in a course of conduct with the intent to place” Sally Dillenback or Marion Harlos “in reasonable fear of death or serious bodily injury” to themselves or their families, or that Gazzola aided and abetted others who did so?⁴⁰⁸ It mentions *no* course of conduct on Gazzola’s part with regard to those victims.⁴⁰⁹ Putting aside a number of other shortcomings in the court’s analysis,⁴¹⁰ Gazzola was convicted of stalking Sally Dillenback and Marion Harlos not only in the absence of *sufficient* evidence, but in the absence of *any* evidence.⁴¹¹

Kjonaas’s stalking convictions are similarly problematic. The court identified seven pieces of evidence to support Kjonaas’s convictions for stalking Dillenback, Harlos, and Harper:

(1) “SHAC invoked Brian Cass’s injuries to instill fear in others targeted by the campaign.”⁴¹² This is discussed above.⁴¹³

(2) “SHAC activists constantly used ultimatums when they targeted individuals, threatening ‘or else’ if the companies failed to sever their ties with Huntingdon.”⁴¹⁴ The Constitution requires that the court assess the meaning of such rhetoric to determine whether it was unprotected or merely hyperbole.⁴¹⁵ Instead, as with the chant used by Gazzola at the protest

407. Trial Transcript, Day 6 at 66–97, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Sally Dillenback).

408. See *supra* text at note 361 through note 369 (discussing First Amendment issues regarding the chant at Robert Harper’s home).

409. Counts three through five, regarding Sally Dillenback, Marion Harlos, and Robert Harper, were substantive—not conspiracy—stalking charges. Superseding Indictment at 25–27, *Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2 (D.N.J. Sept. 16, 2004).

410. For example, a single incident outside Robert Harper’s home is not a *course of conduct*.

411. While at some point I had presumably come across her name among more than 150 that were posted on the SHAC USA website, when I was indicted I had no idea who Marion Harlos was and could not recall ever having heard of her before. This hardly seems to satisfy even the most minimal *mens rea* requirement for stalking someone.

412. *Fullmer*, 584 F.3d at 163.

413. See *supra* text accompanying note 253 through note 296.

414. *Fullmer*, 584 F.3d at 163. This is merely a paraphrase, without any cited evidence, of the kind of speech that was generally used in the campaign (I have not come across any evidence of SHAC activists ever using the specific phrase “or else”) to reference protest activity generally, not illegal activity specifically, and there is certainly no evidence that such rhetoric was used to reference physical injury in particular.

415. See *supra* text at note 235 through note 240 (noting that, usually, a true threats analysis determines whether speech that is threatening on its face is a *true threat* for constitutional purposes).

outside Robert Harper's home, the court merely took such speech at face value.

(3) "[F]ollowing the Chiron bombing, Kjonaas noted the escalation in the 'severity' of the campaign and warned that Huntingdon and Chiron should be 'very worried'."⁴¹⁶ Again, the court did not bother to undertake a constitutional analysis of this speech. Most crucially, though, the Chiron bombing occurred approximately eight months *after* the stalking conspiracy ended.⁴¹⁷ The Chiron bombing happened in August 2003.⁴¹⁸ Marsh ended its relationship with Huntingdon, the protests against the company stopped, and the period during which the alleged stalking took place ended in December 2002.⁴¹⁹ Whatever its constitutional meaning, Kjonaas's commentary on the Chiron bombing in August 2003 could not have placed people in fear of death or serious bodily injury, or aided and abetted others who did so, in or before December 2002. Unsurprisingly then, and more to the point, no stalking victim testified to having any knowledge of this act.

(4) "The SHAC website boasted that 'anonymous activists' had arranged for an undertaker to collect a target's body."⁴²⁰ Similarly, this post came months after the campaign against Marsh and the alleged stalking conspiracy ended.⁴²¹ Thus, again, no stalking victim testified to having any knowledge of this act.

416. *Fullmer*, 584 F.3d at 163.

417. Superseding Indictment at 23–27, *United States v. Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2 (D.N.J. Sept. 16, 2004), *aff'd sub nom.* *United States v. Fullmer*, 584 F.3d 132 (3d Cir. 2009).

418. *Fullmer*, 584 F.3d at 148; Trial Transcript, Day 9 at 178, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Sharon Jude Serra) (testifying that the Chiron bombing occurred on August 28, 2003).

419. Gov't Ex. 1175, *Fullmer*, 584 F.3d 132 (No. 06-4211); *Fullmer* 584 F.3d at 144 (citing evidence that Marsh dropped Huntingdon in December 2002 and the protests stopped in "early 2003"); Superseding Indictment at 23–27, *Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2.

420. *Fullmer*, 584 F.3d at 163.

421. I happen to personally remember when this incident was reported on the SHAC USA website. However, the date of the incident is unclear from the record, as the government presented evidence thematically, by company, rather than chronologically. A webarchive.org capture of the SHAC USA homepage on July 28, 2003 shows that the incident was reported in the SHAC news postings on July 4, 2003. STOP HUNTINGDON ANIMAL CRUELTY/USA, <https://web.archive.org/web/20030728013016/http://www.shacamerica.net/> (last visited May 30, 2016). The exhibit itself states that the undertaker was summoned on June 24th. Gov't Ex. 1227A, *Fullmer*, 584 F.3d 132 (No. 06-4211). Especially in light of the Third Circuit's use of evidence that existed only after the end of a campaign against a particular company to convict defendants for activity against targets of that campaign, the lack of chronological clarity is another reason weighing heavily in favor of the defendants' acquittal.

(5) “[T]he ‘Top 20 Terror Tactics’ mentions physical attacks and threats to kill and injure as effective means of protest.”⁴²² Here, the court used speech it had previously declared protected⁴²³ as a basis for upholding Kjonaas’s conviction.

(6) “The website discussed Andrew Baker’s ‘bloody’ California bungalow, with the line, ‘You can run, but you can’t hide!’”⁴²⁴ The court must do more than assert that the website contained these words, in a post that merely discussed the fact that Baker had a home in Los Angeles as well as New York City.⁴²⁵ Once again, the court must actually assess the speech to determine whether it was unprotected or merely hyperbole.⁴²⁶

(7) “[T]he SHAC website celebrated extreme acts of vandalism by posting photographs of overturned vehicles and houses splattered with red paint.”⁴²⁷ Putting aside that, yet *again*, the court did not demonstrate that this “celebration” was unprotected,⁴²⁸ stalking requires that victims fear “serious bodily injury or death,”⁴²⁹ not vandalism.

As with Gazzola, there is no evidence that Kjonaas had the requisite intent to do, or to aid and abet others in doing, anything in with regard to the stalking victims in particular. Under the court’s reasoning, the evidence relied on to uphold Kjonaas’s stalking convictions could be used to convict him of stalking *any* person targeted for protest by the SHAC campaign.

422. *Fullmer*, 584 F.3d at 163. It is unclear why the court claimed that the list “mentions” those two tactics “as effective means of protest.” As the court itself acknowledged, the list was compiled and originally published by “an organization that defends the use of animals in medical research and testing,” and there is no evidence that SHAC USA editorialized on the “effectiveness” of the tactics listed therein. *Id.* at 140. See Gov’t Ex. 1004, *Fullmer*, 584 F.3d 132 (No. 06-4211) (showing the posting itself). Regardless, such editorializing would be protected under *Brandenburg*.

423. *Fullmer*, 584 F.3d at 155.

424. *Id.* at 163.

425. *Id.* at 143 (quoting Gov’t Ex. 1043, *Fullmer*, 584 F.3d 132 (No. 06-4211)).

426. This is a good example of how understanding the context in which speech occurs is crucial to assessing its threatening meaning and the speaker’s intent. Blood imagery is used in the animal rights movement to refer to the blood of the *animals* who are killed.

427. *Fullmer*, 584 F.3d at 163.

428. Indeed, the court acknowledged earlier in the opinion that this speech “does not run afoul of the *Brandenburg* standard. . . . [M]erely posting information on unlawful acts that have already occurred, in the past, does not incite future, imminent unlawful conduct.” *Id.* at 155.

429. Moreover, “serious” bodily injury is a subset of all bodily injury. It is defined elsewhere in the criminal code as “bodily injury which involves—(A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty[.]” 18 U.S.C. § 1365(h)(3) (2012). This is distinguished from “bodily injury” which “means—(A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of the function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary” *Id.* § 1365(h)(4).

Ultimately, the court's analysis of Kjonaas's stalking convictions focused entirely on the content of the speech published on the SHAC USA website, but failed to establish that—or even to discuss whether⁴³⁰—that speech was unprotected.

Conroy's stalking convictions make crystal clear that the court deemed the defendants' general leadership of the SHAC campaign and publication of the SHAC USA website sufficient to satisfy the elements of the stalking charges. The court made summary reference to the content of the speech on the SHAC USA website—"threats that people associated with Huntingdon would be treated like Brian Cass, photos of extreme vandalism, ultimatums, and threats"⁴³¹—which suffers from all of the same objections listed above regarding Kjonaas's stalking convictions. More fundamentally, the evidence supporting Conroy's stalking convictions amounts to the fact that he administered the SHAC USA website, generally, and was involved in the campaign during the time the alleged stalking occurred. "Conroy's involvement as website administrator," the court concluded, "made the stalking, if not the entire campaign, possible."⁴³² General administration of a website that the court itself stated contained both protected and unprotected speech was deemed sufficient evidence to convict Conroy of stalking particular individuals.

Finally, the court did not assess the reasonableness of the stalking victims' professed fears. Sally Dillenback and Marion Harlos in particular responded to the protest activity rather dramatically, purchasing a "semi-automatic shotgun" and moving, respectively.⁴³³ An assessment of the reasonableness of their fears is particularly important, given evidence that Marsh engaged private security on these victims' behalf, and that the

430. See *supra* text at note 200 through note 201, and text at note 297 through note 298 (noting that the court identified "posts that coordinate electronic civil disobedience and disseminate the personal information of individuals employed by Huntingdon and affiliated companies," in particular, as unprotected speech (quoting *Fullmer*, 584 F.3d at 164)). But see text at note 299 through note 302 (noting that the court also suggested that all of defendants' "speeches, protests, and web postings" were true threats).

431. *Fullmer*, 584 F.3d at 164.

432. *Id.*

433. Trial Transcript, Day 6 at 86, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Sally Dillenback); Trial Transcript, Day 6 at 55, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Marion Harlos). Reasonable fear is also required to establish a true threat. Karst, *supra* note 238. Non-stalking witnesses (if we presume them to be the unidentified victims of unspecified true threats) also reacted dramatically to SHAC protest activity. See, e.g., Trial Transcript, Day 2 at 220, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Carol Auletta) ("My husband wanted to buy a gu[n]"—though Auletta was never subjected even to vandalism at her home—"and the police talked him out of that.").

victims had close interaction with law enforcement.⁴³⁴ Sally Dillenback, for example, testified that her local police department provided “extra security measures,”⁴³⁵ including “several other officers”⁴³⁶ in addition to the permanent police officer stationed at her children’s schools, and that, “Marsh provided [her] family with 24[-]hour security surveillance, people sitting outside of [her] home. And they also put extra security in [her] house. They put a full security system in, cameras, alarmed windows, screens, beams across [her] backyard to detect any intruders.”⁴³⁷

Marion Harlos testified that Marsh installed external security cameras, an internal security system, and motion detectors on all of her windows.⁴³⁸ Marsh also provided 24-hour security, 7 days a week, at her home.⁴³⁹ Marsh’s Risk Manager, Ian Bradbrook, testified that when the company was first subjected to SHAC protest activity in the United States, Marsh “consulted with [its] security advisers [and] immediately contacted the individuals whose information was listed on the website to . . . counsel them on what to expect and what that meant.”⁴⁴⁰ Marsh’s security team “used the web site basically as indicative of a potential hacker of one of our colleagues or of offices. Something would be posted, we’d try to take preventive action.”⁴⁴¹ Marsh’s security groups personally responded to incidents at employees’ homes across the country, and Bradbrook

434. See Trial Transcript, Day 6 at 143–44, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Marsh Risk Manager Ian Bradbrook) (testifying that Marsh responded to incidents occurring at employees’ homes by hiring “external security people, . . . provid[ing] security systems, including cameras and alarms and lights [and] brief[ing] the individuals . . . and ensur[ing] they had appropriate contact numbers both locally for the authorities and with the company, with our legal group and with management so that we could react to any incidents.”); Trial Transcript, Day 6 at 73, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Sally Dillenback) (noting that there was a “security officer that was assisting [her family] with this problem”).

435. *Id.* at 74.

436. *Id.* at 80.

437. *Id.* at 79.

438. Trial Transcript, Day 6 at 55, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Marion Harlos).

439. *Id.* There was similar evidence that non-stalking protest targets, too, had extensive interaction with private security and law enforcement. See Trial Transcript, Day 6 at 18, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Dard Hunter) (“We were provided 24-hour armed security . . . We had to have law enforcement work with our schools . . .”); Trial Transcript, Day 5 at 174, 179, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Michael Rogan) (testifying that he was visited by the FBI and “crisis management consultants”); see also Trial Transcript, Day 6 at 155, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Ian Bradbrook) (describing the costs to Marsh of dealing with the SHAC campaign, stating that “[w]e had the security upgrades for colleagues’ homes including 24-hour guarding”).

440. See Trial Transcript, Day 6 at 118, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Ian Bradbrook).

441. *Id.* at 122.

personally visited with Marsh's employees.⁴⁴² In the case of Marion Harlos, Bradbrook and the Marsh security team made "a corporate decision that [the company] should move her residence."⁴⁴³ A leaked internal Marsh memorandum that was distributed "throughout the U.S."⁴⁴⁴ advised recipients to, among other precautions, "[c]ontact [their] local police department and make them aware that the firm is a target of the SHAC group. Ask the police if providing them with the 'Anticipated Tactics UK' document would be helpful."⁴⁴⁵ The memorandum also recommended that "employees remain out of sight[,] . . . not look out of the windows, move the curtains, ect. [sic]" and "[t]elephone the Police at 911" if there was a demonstration outside the office.⁴⁴⁶ The memo also noted that

Marsh & McLennan has established a hotline that is staffed in London 24 hours a day, 7 days a week by Control Risks Group, a consulting firm specializing in handling groups such as SHAC.

The hotline is available at all times to provide advice & counsel to the Company & employees from anywhere in the world.⁴⁴⁷

Thus, there is a substantial question as to how much Marsh's and law enforcement's actions, and their characterization of and warnings about⁴⁴⁸ SHAC protesters, contributed to these victims' fears.

C. Count 6

Count 6 repeated and realleged portions of the activity alleged in Count 1 against defendants SHAC USA, Kjonaas, Gazzola, Conroy, and Harper.⁴⁴⁹ It also added four overt acts: (1) the SHAC website posted the names, addresses, phone, and fax numbers of "various officers of" Stephens

442. *Id.* at 121.

443. *Id.* at 121–22.

444. *Id.* at 155.

445. Gov't Ex. 1167, *Fullmer*, 584 F.3d 132 (No. 06-4211).

446. *Id.*

447. *Id.*

448. *See, e.g.*, Trial Transcript, Day 5 at 197, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of Robert Harper) (testifying that the first time he heard of SHAC was when "[a]n email went throughout [the Marsh] office saying ['beware']"); *see also* Trial Transcript, Day 6 at 23, *Fullmer*, 584 F.3d 132 (No. 06-4211) (testimony of non-stalking victim Martha Lobo that the first time she heard about SHAC was receiving a general e-mail "warning" staff about SHAC).

449. Superseding Indictment at 28, *United States v. Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2 (D.N.J. Sept. 16, 2004), *aff'd sub nom.* *United States v. Fullmer*, 584 F.3d 132 (3d Cir. 2009).

Inc. along with a “hint” about dialing *67 before dialing the number and that “it is ‘[g]reat for sending black faxes!’”; (2) “the SHAC Website posted a calendar of events which included what it termed black fax Mondays . . . and provided facsimile numbers for various targeted companies”; (3) the SHAC website directed visitors to a “section . . . where they could obtain black faxes”; (4) defendant Harper “gave a presentation to a group of people in Seattle, Washington[,] wherein he explained how to send black faxes noting that ‘it knocks out the entire line of communication’ of the recipients of the black faxes.”⁴⁵⁰ Count 6 fails under the incitement test for all of the reasons discussed above.⁴⁵¹

CONCLUSION: WHAT HAPPENED (AND HOW)?

Ultimately, the operating theory behind *Fullmer* amounts to “bad things happened.” As one attempts to understand the Third Circuit’s reasoning for denying First Amendment protection to the defendants’ speech and upholding their convictions for animal enterprise terrorism and other charges, it becomes increasingly clear that the court failed to apply the careful analysis required by the strictissimi juris doctrine and, instead, allowed the presence of unlawful activity to color the entire collective effort. The result is that, ultimately, there is no principled distinction between the activity underlying the defendants’ convictions and the activities of any other person involved in speech and expressive activity as part of the SHAC campaign.⁴⁵² The only difference is the extent, not the nature, of the *Fullmer* defendants’ involvement: the defendants were leaders of an effort that was tinged—too much for the court’s comfort—with personal protest and unlawful activity. The court used sufficient evidence of the defendants’ involvement *in the campaign* as sufficient evidence that they were involved in an *unlawful conspiracy*.

More than any other, one paragraph encapsulates the court’s operating theory:

With regard to the individual Defendants in this case, they attribute the illegal activity of the Huntingdon protestors to

450. *Id.* at 29–30, *Stop Huntingdon Animal Cruelty*, No. 3:04-cr-00373-AET-2 (first alteration in original).

451. *See supra* Part II(B)(i); *see also supra* text at note 138 through note 139 (discussing the court’s description of all of defendant Harper’s activity, including advocating and explaining electronic civil disobedience, as lawful).

452. *Cf.* Charles Evers’s leadership of the *Claiborne Hardware* boycott, discussed *supra* at text accompanying note 91 through note 102.

“anonymous activists” or unaffiliated organizations, and now argue that they cannot be held responsible for the illegal acts of others. However, there was ample evidence at trial to demonstrate that Kjonaas, Gazzola, Conroy, Stepanian, Harper and Fullmer *coordinated and controlled SHAC’s activities*, both legal and illegal. Direct action, electronic civil disobedience, intimidation and harassment were *part and parcel of SHAC’s overall campaign*, and these individual Defendants employed those tactics because they were effective. The record also supports a jury inference that these individual Defendants personally participated in illegal protests, in addition to orchestrating the illegal acts of others. *They personally took credit for the success of the direct action campaigns* as companies discontinued their business dealings with Huntingdon, one by one. Kjonaas and Gazzola, in particular, *worked the phones at SHAC headquarters*, confirming that various companies had severed ties with Huntingdon. As soon as Kjonaas or Gazzola received written confirmation, the protests stopped—strongly suggesting that they, on behalf of SHAC, had *substantial control over the entire campaign*. In addition, the individual Defendants *held up the successes* of the illegal campaigns as an example to other companies they targeted, in furtherance of their conspiracy to violate the AEPA.⁴⁵³

In short, unlawful activity was a significant part of the SHAC campaign, and the defendants were leaders of that campaign. Only with this rationale—and by improperly concluding that such facts warranted denying defendants First Amendment protection—can activity such as answering phones, taking credit for successful campaigns, and calling off protest activity be deemed an unlawful conspiracy. The location of the paragraph within the opinion is telling: it appears out-of-place, in the middle of the court’s as-applied First Amendment analysis, right between its incitement and true threats assessments.⁴⁵⁴ However, it is unclear what role the paragraph plays in this analysis—other than revealing the court’s improper belief that leadership of the SHAC campaign itself constituted the crimes of animal enterprise terrorism, stalking, and harassment via telecommunications.

453. United States v. Fullmer, 584 F.3d 132, 155–56 (3d Cir. 2009) (emphasis added). See also *supra* note 372 (noting that the court spoke conclusorily when it referred to “the” and “their” conspiracy).

454. *Fullmer*, 584 F.3d at 155–56.

A few key misconstruals of the law allowed this, most notably the Third Circuit's incorrect use of *context*. As discussed above,⁴⁵⁵ context is all-important for determining whether a particular utterance is a true threat; identical speech may be protected by the First Amendment or unconstitutionally threatening depending on the meaning imparted to it via context. The Third Circuit's crucial error was that it did not limit the use of context to the category of true threats but used it as a First Amendment threshold throughout the entire opinion. That is, context was used not to determine the substantive meaning of particular speech, but to assess the overall protection of speech and protest activity within the SHAC campaign. Speech and expressive activity that would otherwise be protected were deemed unprotected and unlawful because they took place *in the context of* the SHAC campaign.⁴⁵⁶ This is the only way to understand the rationale behind the court's conclusion that defendants' "speeches, protests, and web postings" were true threats because they were "all tools to further their effort,"⁴⁵⁷ as well as conflicting holdings such as "[defendant] Harper's personal conduct does not cross the line of illegality"⁴⁵⁸ and "[f]rom [the] constellation of evidence [against defendant Harper] the jury could reasonably conclude that [he] conspired with others and shared the purpose of causing unlawful physical disruption and damage to property at Huntingdon."⁴⁵⁹ Such conflation has no place under the First Amendment. As *Claiborne Hardware* makes clear, the "presence"⁴⁶⁰ of protected activity is the "context"⁴⁶¹ that requires "precision of regulation."⁴⁶²

455. See *supra* text at note 243 through note 244.

456. See, e.g., *Fullmer*, 584 F.3d at 156 ("[T]heir actions meet the standard of a 'true threat' . . . because viewed in context, the speeches, protests, and web postings, were all tools to further their effort."); see also *id.* ("[W]e find that [a speech Defendant Kjonaas delivered] is protected speech However, when we view the speech in context . . . the speech informs us of his state of mind."); *id.* at 157 ("These are only representative samples of Kjonaas's direction and coordination of the direct action campaign, but viewed in context, we do not find that his First Amendment rights have been violated."); *id.* at 161

While there is no direct evidence that the Defendants expressly agreed to participate in the conspiracy and further its unlawful goals, . . . when viewed in context [Kjonaas's and Gazzola's leadership positions in SHAC, instrumental role in coordinating SHAC's activities, and efforts to cover their tracks] is circumstantial evidence of their agreement to participate in illegal activity.

Id.

457. *Id.* at 156.

458. *Id.* at 158.

459. *Id.* at 162.

460. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916–17 (1982).

461. *Id.* at 916.

462. *Id.*

The court should have been extremely cautious proceeding where a conspiracy had been alleged in the sensitive area of First Amendment freedoms. Unlike ordinary lawful activity that can become criminal in the course of an unlawful act—such as purchasing ski masks for use in a bank robbery—the activity to which the First Amendment attends is not only legal, it is *protected* and cannot be criminalized. What the court should have done was assess what each defendant did, whether or not those acts were protected, and, if not, whether they satisfied the elements of each offense. Instead, the court pointed to relatively few acts by each defendant, relied on general claims of overall involvement and leadership, and treated legal, protected protest activity as the basis of the defendants’ convictions because it occurred within the SHAC campaign.

Finally, it is extremely important that this was a federal criminal terrorism case. *Fullmer* was not a civil suit like *Planned Parenthood* or *Claiborne Hardware*, and it did not impose short jail sentences (90 days, some suspended) and four-figure fines (\$2,500 with \$1,000 suspended) like *Black*.⁴⁶³ The state brought its full force to bear upon a group of activists for their speech, charged them as terrorists, threatened them with decades in prison and ultimately sent them there for several years, and held them liable for over a million dollars in restitution. *Fullmer* was a prosecution every bit as chilling and unconstitutional as the early prosecutions of communists, socialists, and anti-war agitators—and the near-silence of free speech advocates, particularly of First Amendment scholars, is deafening.

When [violence and threats of violence occur] in the context of constitutionally protected activity . . . ‘precision of regulation’ is demanded. Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.

Id. at 916–17 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

463. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1062 (9th Cir. 2002) (en banc); *Claiborne Hardware*, 458 U.S. at 889; *Virginia v. Black*, 538 U.S. 343, 350 (2003).