No. 14-4008

In the

United States Court of Appeals for the Sixth Circuit

Susan B. Anthony List, *et al.*

Plaintiffs-Appellees,

v.

Steven B. Driehaus, *et al.*,

Defendant-Appellant.

On appeal from the United States District Court
for the Southern District of Ohio, No. 1:10-cv-720; 1:10-cv-754

Brief of *Amicus Curiae* Center for Competitive Politics in Support of Plaintiffs-Appellants and in Support of Affirmance

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April 6, 2015

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus* submits that it is a tax-exempt nonprofit corporation. It has no parent corporation nor is it publicly held.

Interest of *Amicus Curiae*

Founded in 2005, the Center for Competitive Politics ("CCP") is a § 501(c)(3) organization that works to defend the First Amendment rights of speech, assembly, and petition through litigation, research, and education. CCP was co-counsel in *SpeechNow.org v.* FEC, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*), and has filed *amicus curiae* briefs in many of the notable cases concerning campaign finance laws and restrictions on political speech, including *Citizens United v. FEC*, 558 U.S. 310 (2010) and *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434 (2014). CCP also served as *amicus curiae* when this case was before the U.S. Supreme Court.

Amicus confirms that listed counsel authored this brief in its entirety, and that no person contributed funds intended for the preparation or submission of this brief. All parties have consented to the filing of this brief.

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ARGUMENT

It is well established that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.'" *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). Consequently, the Supreme Court has long recognized that "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). We refuse, therefore, to suppress the right of the people "to praise or criticize governmental agents," lest we "muzzle[] one of the very [rights]…the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

Despite these unambiguous warnings, the state of Ohio permitted a nonprofit advocacy organization to be dragged before a state tribunal for its criticism of an incumbent officeholder.

Susan B. Anthony List ("SBA") characterized Rep. Steven Driehaus's vote in favor of the Affordable Care Act ("ACA") as a vote to permit public funding of abortions. Of course, SBA's interpretation of the ACA is just that—an interpretation. But it was not alone in that understanding; numerous organizations, such as the National Conference of Catholic Bishops, agreed. SECRETARIAT OF

PRO-LIFE ACTIVITIES, ABORTION IN THE AFFORDABLE CARE ACT, NATIONAL CONFERENCE OF CATHOLIC BISHOPS (2014).[1] Official government statements on the matter seem to concur.[2] And the fact that complex national policies are contestable is one reason we have election campaigns in the first place. *Whitney v. California*, 274 U.S. 357, 377 (Brandeis, J., concurring) ("If there be time to expose through discussion…falsehood and fallacies…the remedy to be applied is more speech, not enforced silence").

Nevertheless, Congressman Driehaus took issue with SBA's criticism. Rather than holding a press conference or broadcasting a response, he filed a formal complaint under Ohio's speech code. He even took steps to prevent SBA from disseminating its message, threatening, under the same measure at issue here, to sue an advertising company willing to rent it billboard space.

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[1] *Available at*: http://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/upload/Abortion-in-the-Affordable-Care-Act-Responses-to-Administration-Claims-GAO.pdf.

[2] The President's Executive Order on abortion funding under the ACA provides that "it is necessary to establish an adequate enforcement mechanism to ensure that Federal funds are not used for abortion services (*except in cases of rape or incest, or when the life of the woman would be endangered*)… ." Exec. Ord. No. 13535, 75 Fed. Reg. 15599 (Mar. 24, 2010) (emphasis supplied); *see also* U.S. Government Accountability Office, *Health Insurance Exchanges: Coverage of Non-excepted Abortion Services by Qualified Health Plans*, Sep. 15, 2014 at 1 ("PPACA prohibits the use of federal funds … to pay for 'non-excepted abortion services,' which, … are abortion services performed except where the pregnancy is the result of an act of rape or incest, or the life of the pregnant woman is endangered.").

Filing the complaint may have been a simple task for an incumbent member of Congress, but SBA suddenly found itself a defendant in a government proceeding. It necessarily faced public notoriety and the costs of hiring counsel and mounting a defense. As a result, another speaker, the Coalition Opposed to Additional Spending and Taxes ("COAST"), self-silenced rather than subject itself to the same, predictable burdens imposed upon SBA.

Ultimately, a three-member panel of the Commission determined—notably, on a 2-1 party-line vote—that SBA had likely intentionally lied about Driehaus's position. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2339 (2014). After successfully preventing an organization from speaking about his conduct in office, the election passed, and Rep. Driehaus quietly withdrew his complaint, its purpose accomplished. *Id.* at 2340.

The Supreme Court has stated that a state may not use "'procedural device[s]'" to "deter[]…speech which the Constitution makes free." *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986) (Brennan, J., plurality opinion) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). Nevertheless, even without a final ruling by the Ohio authorities, the 2010 complaint imposed concrete and substantial costs upon SBA. These included the expense of legal representation, the time and attention of its officers, the distraction from its mission, and the reputational harm imposed by the State of Ohio declaring it a

likely liar. These costs are separate from the final penalties Ohio's statute allows. Each is a result of the process itself and is imposed on a speaker even if, as is often the case, the complaint is dismissed after the election by the OEC or by the complainant himself.

Despite this history, Appellants claim that Ohio's "truth in politics" statute imposes no First Amendment harms because it is cabined by "a variety of procedural safeguards" which "ensure that legitimate speech is protected." App.-Def. Br. at 43. One of these safeguards, in their view, is that there must be a "[c]omplete exhaustion of Commission proceedings prior to any potential criminal prosecution." *Id*. (citing Ohio Rev. Code §§ 3517.153(C); 3517.21(C). But in Ohio, the Commission proceedings *themselves* deprive speakers of their fundamental rights. *Driehaus*, 134 S. Ct. at 2345 ("We take the threatened Commission proceedings into account because administrative action, like arrest or prosecution, may give rise to harm sufficient to justify pre-enforcement review"). In fact, the Commission's proceedings only compound the constitutional harm, regardless of whether a speaker intends to speak the "truth," a county prosecutor eventually chooses to indict, or a defeated complainant quietly withdraws his complaint once the sound and fury of a campaign has passed.

I. In Ohio, the Commission process imposes an unconstitutional penalty.

Ohio permits nearly anyone to invoke the authority of its Elections Commission, and to do so on the slightest pretext. A complainant may be "any person"—even a political opponent—and "must merely attest that" the targeted party knowingly made a "false" statement. Brief of Ohio Attorney General Michael DeWine as *Amicus Curiae* In Support of Neither Party, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2537 (No. 13-193) at 8 ("DeWine Br.").[3] "Unlike an enforcement brought by state officials, there is not even a promise or presumption that this power to file a complaint will be used 'responsibly.'" *Id*. (citation omitted).[4]

"Indeed, when a complaint is filed, a probable cause hearing must be held, and there is no system for weeding out frivolous complaints." *Susan B. Anthony List v. Ohio Elections Comm'n*, 2014 U.S. Dist. LEXIS 127382 at *9 (emphasis and quotation marks removed). Moreover, complaints filed in close proximity to an

[3] *Available at*: http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-193_np_amcu_oag.authcheckdam.pdf.

[4] It appears that many complainants may be cynically bringing complaints shortly before an election for the sole purpose of damaging a political opponent by engineering a probable cause finding that a speaker "likely lied." The Attorney General of Ohio found, after "a review of the Commission's files…that a great many charges that result in a finding of probable cause are dismissed by the complainant after the election." DeWine Br. at 6.

election *must* be reviewed within three days. "At these expedited hearings, the Commission is not required to allow any evidence, testimony, or argument to be presented, and the hearing may be conducted without the respondent present or even notified." DeWine Br. at 5.

After a finding of probable cause—which, as occurred here, need not be a panel's unanimous or bipartisan view—the full Commission must meet within ten days to hold a hearing concerning the complaint. *Driehaus*, 134 S. Ct. at 2338. Here, "Driehaus noticed depositions of three SBA employees[,] as well as individuals affiliated with similar advocacy groups. He also issued discovery requests for all evidence that SBA would rely on at the Commission hearing, as well as SBA's communications with allied organizations, political party committees, and Members of Congress and their staffs." *Driehaus*, 134 S. Ct at 2339. This process alone poses constitutional injury, for "[i]mplicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private." *Perry v. Schwarzenegger*, 591 F.3d 1126, 1142 (9th Cir. 2010). Consequently, the federal courts have found that similarly invasive "discovery…ha[s] the practical effect of discouraging the exercise of First Amendment rights." *Perry*, 591 F.3d at 1132 (protecting internal campaign communications from discovery under a First Amendment analysis). And, of course, the opportunity for political opponents to

bring claims and compel discovery for partisan purposes is obvious. *Am. Fed. of Labor-Congress of Indus. Organizations v. FEC*, 333 F.3d 168, 177 (D.C. Cir. 2003) (observing that compelled disclosure of the "confidential internal materials" of an organization "places a political association at a disadvantage relative to its opponents").

After discovery, the full Commission is convened to determine if a respondent has violated the false statements law. The Commission is not composed of experts in the fields of fraud or libel, nor do its members need to be lawyers. In some cases, the Commission has demonstrated a limited grasp of its own statutory responsibilities. Petition for Writ of *Certiorari*, *Corsi v. Ohio Elections Comm'n*, 134 S. Ct. 163 (No. 12-1442) at 6 (multiple commissioners, during an open hearing on whether a defendant had violated Ohio's PAC laws, voicing uncertainty as to the statutory PAC definition).[5] Put simply, the Commission's findings, despite the imprimatur of state authority, are hardly infallible. *Steve Buehrer for Congress v. Ohio Elections Comm'n*, No. 07CVF12-17565 (Ohio C.P., Nov. 17, 2009) (OEC finding reversed, as "[t]here was *no evidence* before the Commission that the statement was false…") (emphasis supplied). After all, while few speakers are willing and able to bear the costs of contesting an adverse Commission determination, those that do often win reversals. *Service Employees International*

[5] *Available at*: http://www.campaignfreedom.org/wp-content/uploads/2013/06/Corsi-v.-OEC.pdf

Union District 1199 v. Ohio Elections Comm'n, 822 N.E.2d 424 (Ohio Ct. App. 2004) (OEC finding reversed, 18 months after election); *Flannery v. Ohio Election Comm'n*, 804 N.E.2d 1032 (Ohio Ct. App. 2004) (OEC finding reversed, nearly two years after election); *Committee to Elect Straus Prosecutor v. Ohio Elections Comm'n*, 2007 Ohio App. LEXIS 4797 (Ohio Ct. App. 2007) (affirming trial court reversal of OEC findings, two years and eleven months after election). Unfortunately, judicial vindication only occurs well after voters have gone to the polls, and long after Ohio's official declaration of "falsity" has faded from public memory.

If Appellants prevail, irreparable damage will be done to "our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Buckley*, 424 U.S. at 14 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Fundamentally, a system that leaves potential speakers to the tender mercies of partisan commissioners, county prosecutors, and public complaints "'offers no security for free discussion...[and will force speakers] to hedge and trim.'" *Buckley v. Valeo*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945). "And while the [parties] in this case represent relatively large non-profit organizations, for an individual pamphleteer or blogger…the threat of prosecution can be terrifying." DeWine Br. at 21. Such outcomes are, in part, why "[t]he First Amendment does not permit laws that force

speakers to retain a campaign finance attorney…or seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United v. FEC*, 558 U.S. 310, 324 (2010).[6]

Ohio law imposes real, concrete, and predictable costs upon speakers. These costs are not solely the result of a final determination by the Ohio Elections Commission or any criminal prosecution. Rather, they are inherent in Ohio's complaint-driven, procedurally-unsound approach to regulating the truth or falsity of speech. They are unavoidable so long as Ohio continues to dabble in this sensitive area.

II. Under any level of constitutional review, these burdens must be appropriately tailored to a sufficiently important governmental interest.

Content-based restrictions are "presumed invalid" unless the government can carry its burden and demonstrate their constitutionality. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660 (2004). Even under an intermediate or "exacting" analysis, the government must "demonstrate[] a sufficiently important

[6] Defendants also posit that Ohio's regime survives because the state vests the Commission with the ability to grant "advisory opinions, with corresponding civil immunity, to address whether a specific set of circumstances violates Ohio's false statement law." App.-Def. Br. at 44. Of course, Appellants ignore the political absurdity of an organization going before the Commission and asking whether its construction of a candidate's position on an issue is actually a lie. Further, as the *Citizens United* Court properly observed, requiring a speaker to obtain the State's permission before exercising its First Amendment liberties imposes a constitutional harm. *Citizens United*, 558 U.S. at 324.

interest and employ[] means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (*per curiam*) (internal quotations and citations omitted).

Moreover, the more novel the restriction, the greater the government's burden. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). This case concerns the regulation of ideas based upon their "truth"—a content-based distinction that the Supreme Court has recently, in a similar context, declared invalid. Because the substantial burdens imposed by Ohio's statute are not appropriately tailored to an interest that, if it exists at all, is minimal, Ohio's speech regulations cannot survive any level of scrutiny.

a. The Supreme Court has emphasized the general lack of a governmental interest in preventing false speech. Campaign speech of questionable veracity is best countered by a system that encourages *more* speech, not less.

"[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." *United States v. Alvarez*, 132 S. Ct. 2537, 2543-2544 (plurality op.) (citation and quotation marks omitted). Regulating speech as "true" or "false" is obviously content-based, as the Supreme Court held just three Terms ago while overturning a federal ban on "false" speech.

That case, *United States v. Alvarez*, held that "the Government's chosen restriction on the speech at issue [must] be actually necessary to achieve its

interest." 132 S. Ct. at 2549 (internal citation and quotation omitted). Because the government lacked any evidence that false claims to have won significant military decorations resulted in honor dilution, the *Alvarez* Court found no "causal link between the Government's stated interest and the Act." *Id.* Thus, the law failed exacting scrutiny. *Id*. at 2551. This holding is consistent with other cases where a restriction on First Amendment rights lacked an appropriate connection to the asserted governmental interest. *See, e.g. SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) (*en banc*) ("[S]omething…outweighs nothing every time.") (internal citation and quotation omitted).

If the Stolen Valor Act's attempt to preserve the honor of our nation's highest awards could not bear the burden it imposed upon the First Amendment, then Ohio's law certainly cannot. It regulates *political* speech, and "there is practically universal agreement that a major purpose of…[the First] Amendment was to protect the free discussion of governmental affairs…of course includ[ing] discussions of candidates…." *Buckley*, 424 U.S. at 14 (quoting and applying *Mills v. Alabama*, 384 U.S. at 218) (brackets in *Buckley*). On balance, the speech in this case is closer to the core of the First Amendment than was the speech in *Alvarez*.

The government in *Alvarez* also failed to show why counterspeech was an insufficient check on false statements. The plurality put it strongest: "[t]he Government has not shown, *and cannot show*, why counterspeech would not

suffice to achieve its interest." *Alvarez*, 132 S. Ct. at 2549 (emphasis supplied). Rather than banning false speech, "the dynamics of free speech, of counterspeech, of refutation, can overcome the lie." *Id*. Thus, "[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth." *Id*. at 2550.

The First Amendment stands for the principle that the best solution to false statements is for someone else to counter with the truth. And as Justice Holmes recognized nearly a century ago, the truth will survive the lie. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting) ("the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market…That at any rate is the theory of our Constitution.").

If all this is true in the context of clear and unambiguous lies, it is all the more true in the context of arguably true statements, ambiguous political views, political spin, and characterizations of dizzyingly-complex legislation.

CONCLUSION

The First Amendment protects Americans' ability to voice their political beliefs without fear of sanction. Nevertheless, Ohio has constructed a vast speech-policing apparatus which is slow, invasive, occasionally incompetent, and whose

very existence chills speech. The judgment of the District Court, which would finally put an end to Ohio's unconstitutional experiment, should be affirmed.

Respectfully Submitted,

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April 6, 2015

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I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 3,044 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: April 6, 2015

/s/ Allen Dickerson
Allen Dickerson

Certificate of Service

I hereby certify that on April 6, 2015, I electronically filed the foregoing using the court's CM/ECF system which will automatically generate and send by email a Notice of Docket Activity to all registered attorneys currently participating in this case, constituting service on those attorneys.

/s/ Allen Dickerson
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