

Ohio's Truth Ministry vs. Cato's Truthiness Brief

Ilya Shapiro et al.***

Introduction to the Background

Believe it or not, Ohio has a law that *criminalizes* knowingly or recklessly making “false” statements about a political candidate or a ballot initiative with the intent to affect an election.¹ My colleagues and I could hardly believe it either when we first heard about this all-too-serious tomfoolery in the context of *Susan B. Anthony List v. Driehaus* (“SBA List”), an actual federal case that the Supreme Court heard this past term.² For dogged supporters of the First Amendment such as the Cato Institute, Ohio’s law seems like it was ripped from the pages of Orwell’s *1984*. What’s more, around 20 states have similar laws.³ We couldn’t let this darkening bog lie and quickly decided to get involved.

But that’s nothing special; in recent years, Cato has filed 30–40 amicus briefs every Supreme Court term (about half at the cert stage,

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** Olivia Grady helped outline the case background you see below; Trevor Burrus and Gabriel Latner co-authored the brief you see further below (and aren’t yet members of any bar so couldn’t have their names on it); P.J. O’Rourke didn’t tweak either my jokes or legal analysis in said brief; and Chief Justice John Roberts allowed the brief to be filed despite its footnote 15. All errors are, of course, their fault.

¹ Ohio Rev. Code Ann. § 3517.21(B) (LexisNexis 2014).

² *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014). Curiously, the case ascended to the Court around the time that President Obama’s infamous claim that the Affordable Care Act ensures that “if you like your health care plan you can keep it” was publicly adjudged to be the most blatant lie of his administration. See, e.g., Angie Drobnic Holan, Lie of the Year: ‘If You Like Your Health Care Plan, You Can Keep It,’ Politifact.com (Dec. 12, 2013), <http://www.politifact.com/truth-o-meter/article/2013/dec/12/lie-year-if-you-like-your-health-care-plan-keep-it>.

³ Aaron Marshall, Despite Laws against Lying, Tall Tales Have Become the Norm on the Campaign Trail, Experts Say, Cleveland Plain Dealer, Oct. 29, 2012, available at http://www.cleveland.com/open/index.ssf/2012/10/despite_laws_against_lying_tal.html.

half on the merits). What's special is the notice that our merits brief garnered.⁴ Although Cato lawyers and scholars have been central to debates over many issues—and our briefs are often referenced by legal analysts and occasionally cited by the Court—never before has one of our filings generated so much attention. Nor had I previously had the opportunity to share a byline with P.J. O'Rourke.⁵ It's thus the ridiculous background to the case and Cato's role in it—all illustrating an absurd law—that have inserted *SBA List* into this volume of the *Cato Supreme Court Review*, not its overarching importance or doctrinal innovation.

Indeed, *SBA List* ultimately concerned the ability of certain groups to challenge Ohio's "Pinocchio" law—whether they could get into court even though they aren't currently being prosecuted. The Supreme Court thus didn't reach any of the obvious constitutional defects with the law itself to rule unanimously in favor of these challengers. That consideration of ripeness and standing doctrine, while important for legal practitioners, doesn't normally merit inclusion in these pages.

Accordingly, instead of providing our typical 7,500–12,000-word analysis, for *SBA List* we've decided to simply give you an overview of the case—especially color from briefing and oral argument—before republishing our famous "funny brief" (in the pages that follow this introductory essay). I hope all this gives you not just a laugh, but also pause to reflect on how a democratic society could possibly allow such a law to be passed and enforced. We simply can't let the government determine who can speak, how much they can speak, and on what topic—particularly when it comes to our political discourse.

⁴ See, e.g., David Lat, *Best Amicus Brief Ever, Above the Law* (Mar. 3, 2014), <http://abovethelaw.com/2014/03/best-amicus-brief-ever>; *Is It Wise to Criminalise Lies?*, *The Economist* Mar. 8, 2014, available at <http://www.economist.com/news/united-states/21598683-challenging-buckeye-states-ban-political-mudslinging-it-wise-criminalise-lies>; Adam Liptak, *In Ohio, a Law Bans Lying in Elections. Justices and Jesters Alike Get a Say*, *N.Y. Times*, Mar. 25, 2014, at A16.

⁵ P.J. O'Rourke and Ilya Shapiro, *We Reserve the Right to Lie about Our Politicians*, *Politico Magazine*, Mar. 26, 2014, available at <http://www.politico.com/magazine/story/2014/03/supreme-court-lying-politicians-cato-amicus-105050.html>. See also Podcast: P.J. O'Rourke, Ilya Shapiro on Lying Politicians, *Constitution Daily*, National Constitution Center (Apr. 30, 2014), <http://blog.constitutioncenter.org/2014/04/podcast-p-j-orourke-ilya-shapiro-on-lying-politicians>.

Background

The Susan B. Anthony List (SBA List) and the Coalition Opposed to Additional Spending and Taxes (COAST) are conservative advocacy organizations. Both organizations wanted to target Congressman Steve Driehaus (D-OH) for supporting the Affordable Care Act (ACA)—claiming that this meant that Driehaus voted for taxpayer-funded abortion—but were unable to because of Ohio's false-statement statute. Any person can file a complaint alleging a false statement with the Ohio Truth Election Commission (OEC). To expedite the procedure during elections, however, complaints are first heard by a commission panel to determine whether probable cause exists. If the panel finds probable cause, and if the full commission then finds a violation with clear and convincing evidence, it may refer the case to a prosecutor, who has discretion to prosecute the case.

Rep. Driehaus first threatened legal action against SBA List during the 2010 federal election campaign, which resulted in an advertising company refusing to put up an SBA List billboard. Later that year, Driehaus filed a complaint with the OEC asserting that SBA List's advertisement violated Ohio's false-statement statute. On October 14, 2010—three weeks before the election—a panel found that there was probable cause and referred Driehaus's complaint to the full commission. Four days later, SBA List filed this case in federal district court seeking declaratory and injunctive relief and a temporary restraining order to enjoin the OEC proceeding. The OEC hearing was then postponed till after the election, which Driehaus subsequently lost, at which point he withdrew his complaint. The following month, SBA List amended its complaint to allege that the OEC proceedings chilled its speech and that, because the group was planning to make the same or similar speech in future elections, it feared further actions against it.

Similarly, COAST wanted to criticize Driehaus by writing emails, blogposts, and press releases, as well as publicizing the fact that he had filed the OEC complaint against SBA List. COAST didn't publish these materials, however, and instead sued the commission about a week before the 2010 election, claiming that the SBA List proceedings chilled its own speech. The district court consolidated the two cases and granted defendants' motions to dismiss based on standing and ripeness, as well as the mootness of the SBA List proceeding.

SBA List and COAST appealed those rulings to the U.S. Court of Appeals for the Sixth Circuit, which affirmed the lower court's decision on ripeness grounds.

SBA List and COAST then filed a cert petition, asking the Supreme Court to determine when an individual can sue for a First Amendment violation based on a law that restricts speech. They presented the questions whether a party must prove that authorities would certainly and successfully prosecute him to challenge a speech-suppressive law and whether the Sixth Circuit erred when it held that state laws proscribing "false" political speech are not subject to pre-enforcement First Amendment review so long as the speaker maintains that its speech is true. Petitioners' first argument was that the Sixth Circuit failed to follow seven other circuits by imposing substantial hurdles to the review of speech-suppressive laws. Second, the Sixth Circuit's finding was inconsistent with First Amendment jurisprudence, which allows pre-enforcement review when a law chills speech.⁶ Finally, the Sixth Circuit's ruling chills speech in its most important area—the political arena—and leaves no remedy for the speaker's political injury.

Remarkably, Driehaus waived his right to respond to the petition. The Ohio attorney general, however, filed a brief opposing the petition on behalf of the OEC and other state defendants, arguing that a First Amendment challenge isn't ripe when plaintiffs have alleged only a generalized and subjective chill of their speech and don't face any threat of actual criminal prosecution. The brief made several further counterpoints, including that the OEC has only the narrow function of recommending cases to prosecutors, rather than actual enforcement authority.

On January 10, 2014, the Supreme Court took the case. In its opening brief, SBA List argued that it faces a "credible threat of prosecution" under Ohio's law because the OEC had already found probable cause that behavior SBA List regularly engages in runs afoul of the law—and pre-enforcement First Amendment challenges are allowed where there's a "credible threat of prosecution." Moreover, the Sixth Circuit's jurisprudence is contrary to established First Amendment

⁶ See *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979); *Virginia v. Am. Booksellers Ass'n. Inc.*, 484 U.S. 383 (1988); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

precedent. For example, the Sixth Circuit, unlike the Supreme Court, requires a plaintiff to show a particularized threat or certainty of prosecution. Finally, the Sixth Circuit's approach impairs free speech in its most important context—politics—by forbidding meritorious challenges to laws that suppress speech.

Many organizations filed amicus briefs in support of the petitioners, including Cato (joined by our own H.L. Mencken research fellow, P.J. O'Rourke). As you'll see below, in our brief we style the question presented as whether a state government can criminalize political statements that aren't 100 percent truthful. We point out that truthiness—"a 'truth' asserted 'from the gut' or because it 'feels right' without regard to evidence or logic"—is an important part of political discourse because it allows the public to hear responses to allegations, thus creating a "self-correcting marketplace of ideas."⁷ Moreover, the Supreme Court already held in *United States v. Alvarez* that truthiness and even outright lies are protected by the First Amendment.⁸ Finally, the public interest in truthful political discourse is best served by satirists and pundits because it's through humor that political dishonesty is best exposed—and if politicians' lies aren't exposed by satirists or fact-checkers, they certainly won't be by the OEC.

In a development perhaps even rarer than a nationally renowned satirist joining a Supreme Court brief, Ohio Attorney General Mike DeWine filed two briefs. In a maneuver reminiscent of Robert Bork's "Cerberus-headed" actions in the seminal 1976 campaign-finance case of *Buckley v. Valeo*, DeWine filed an amicus brief as Ohio's chief law officer that questioned the constitutionality of Ohio's law—even as he continued representing the OEC.⁹ In his amicus brief, DeWine

⁷ Truthiness, Wikipedia, <http://en.wikipedia.org/wiki/Truthiness> (last visited Aug. 4, 2014) (describing the term's coinage by Stephen Colbert during the pilot of his show in October 2005). See also Truthiness, Dictionary.com, <http://dictionary.reference.com/browse/truthiness> (last visited Aug. 4, 2014); Brief for the Cato Institute and P.J. O'Rourke as Amicus Curiae Supporting Petitioners at 7, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014) (No. 13-193).

⁸ 132 S. Ct. 2537, 2544–45 (2012).

⁹ See Marty Lederman, The Return of the Robert Bork "Dueling Briefs" Strategy: *Buckley v. Valeo*, *Susan B. Anthony List*, and Ohio Attorney General DeWine, SCOTUSblog (Mar. 17, 2014), <http://www.scotusblog.com/2014/03/commentary-the-return-of-the-robert-bork-dueling-briefs-strategy-buckley-v-valeo-susan-b-anthony-list-and-ohio-attorney-general-dewine>.

argued that the Ohio statute may chill constitutionally protected speech at critical times immediately before elections and may be intentionally used by private actors in order to gain a campaign advantage without ever proving the falsity of the statement at issue. In addition, a probable-cause finding that an individual has made a false statement right before an election would be extremely harmful politically, and this harm can't be remedied after the election. Curiously, the brief is styled as supporting neither party and, rather than calling for the Sixth Circuit to be reversed, coyly concludes that its review of the statute "may be helpful to the Court in considering the questions presented in this case."¹⁰

Turning to the Ohio attorney general's brief as a party, DeWine's more conventional brief first argued for ripeness as a constitutional and prudential limit on the judiciary: Adequate allegations of a future injury are needed to establish a present controversy and ensure that the case allows the court to resolve the claims. In this case, the brief explained, the plaintiffs' allegations lack concrete form and their threatened injury is too indirect. Moreover, SBA List and COAST allege only a past injury from Driehaus's complaints, and their allegations of future injury are too speculative.

And so the battlefield was set, with oral argument set for April 22, 2014, two months before the end of the Supreme Court term.

At the Supreme Court

The petitioners, represented by seasoned advocate Michael Carvin, first argued that they had a ripe and justiciable controversy because the OEC panel found that their speech likely violated Ohio's false-statement law, thus meeting the "credible threat of enforcement" test. Justices Ruth Bader Ginsburg and Sonia Sotomayor questioned, however, whether COAST had a credible threat of enforcement since no one had filed a complaint against it.¹¹ Carvin replied that they both had standing because unlike an important precedent calling for courts to abstain from deciding certain cases, the speech of SBA List

¹⁰ Brief for Ohio Attorney General Michael DeWine as Amicus Curiae in Support of Neither Party at 22, SBA List, 134 S. Ct. 2334. The brief is signed not by DeWine himself—as the brief of the state defendants is—but by Erik Jaffe and Bradley Smith, friends of Cato whose writing has appeared in these pages.

¹¹ Transcript of Oral Argument at 4–7, Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334 (2014) (No. 13-193).

and COAST here was the same.¹² Unconvinced that COAST faced a credible threat of enforcement, Justice Sotomayor then asked why this case was different from a recent First Amendment-standing case called *Clapper v. Amnesty International*.¹³ Carvin responded that both petitioners, unlike the *Clapper* petitioners, had actually been harmed by the OEC hearing.

The justices next focused on how the OEC or petitioners could avoid hearings on frivolous claims. Justice Ginsburg suggested that petitioners could have sought an advisory opinion, but Carvin found that to be a non-starter because, in the first place, the “ministry of truth has no ability to judge . . . political speech as falsity.”¹⁴ Moreover, “it would be cutting off [their] nose to spite [their] face” to voluntarily invoke this procedure.¹⁵

Petitioners’ counsel also argued that this case is special because its subject matter is political speech, which not only is at the core of the First Amendment but also is unique for being most important during the period of an election campaign. Because of the short time frame, one cannot complete a challenge to restrictions on political speech before the election to which it is relevant, so facially unconstitutional laws continue to exist and impose serious burdens on speakers. This essentially becomes a “capable of repetition yet evading review” exception to the mootness doctrine.¹⁶ The justices finally asked about the “credible threat of prosecution,” which petitioners defined as: “if the enforcement agency has previously announced that your speech probably violates the law at issue, then you have a credible threat of future enforcement if you repeat that speech.”¹⁷

The United States, arguing as amicus and represented by assistant to the solicitor general Eric Feigin, called for partial affirmance—supporting SBA List’s right to make a facial First Amendment claim against the false-statement law and challenge the OEC’s enforcement of it, but rejecting certain ancillary claims and defendants. The government first argued that the two critical factors for justiciability

¹² *Younger v. Harris*, 401 U.S. 37 (1971).

¹³ *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013).

¹⁴ Tr. of Oral Arg. at 9, SBA List, 134 S. Ct. 2334.

¹⁵ *Id.* at 13.

¹⁶ *Roe v Wade*, 410 U.S. 113, 125 (1973).

¹⁷ Tr. of Oral Arg. at 17, SBA List, 134 S. Ct. 2334.

in this case were the OEC's probable-cause finding and petitioners' intent to repeat their speech. Chief Justice John Roberts then asked whether a probable-cause determination was needed for standing. Feigin argued that without a probable-cause finding, the likelihood of an enforcement proceeding would be too speculative. Roberts seemed skeptical of this response, because, under the law, any person could trigger an enforcement action. Moreover, petitioners aren't going to argue that their speech is false and invite prosecution. Justice Elena Kagan followed up by asking whether it would be enough if Rep. Driehaus had written a letter threatening enforcement. Feigin replied that a letter would be enough to bring suit against Driehaus only. Kagan challenged the government's rule about the need for some tangible threat of prosecution by pointing out that there might be some statements that "given this process, it's just going to require too much fortitude to resist the temptation to bring this in front of this Commission."¹⁸ The government responded that this would still be too speculative, but since this is a "private attorney general statute," the threat-of-prosecution standard might be relaxed.¹⁹

The respondents, valiantly represented by Ohio solicitor general Eric Murphy, argued that the Sixth Circuit should be affirmed because the petitioners had not established a credible threat of criminal prosecution, and any other injury is not impending. Chief Justice Roberts quickly asked whether the state would take action against petitioners if they repeated their speech in the next election, to which Murphy conceded that he didn't have the authority to disavow such a potential action.²⁰ It was all downhill from there.

Justice Antonin Scalia offered that the petitioners are complaining not just about the current possible criminal prosecution but also about future commission hearings during election season. Ohio's lawyer replied that the complaint about future hearings is speculative because SBA List was challenging specific congressmen.²¹ That is, petitioners targeted only pro-life Democrats who originally voted against the ACA but then later changed their vote.

¹⁸ *Id.* at 24.

¹⁹ *Id.* at 25.

²⁰ *Id.* at 29–30.

²¹ *Id.* at 30–31.

Justice Anthony Kennedy then asked whether there was a serious First Amendment concern with the law—one of the few merits-based questions during the generally technical argument—but Murphy reminded him that the issue here was standing.²² Justice Stephen Breyer retorted that the harm was the chilling of speech (a First Amendment concern), but Murphy gamely offered that the chilling of speech wasn't a harm because of *Golden v. Zwickler*.²³ Justice Ginsburg jumped in here to distinguish *Golden* because the plaintiff there attacked a specific candidate, not an issue, and he wasn't planning on similar speech in the future. Murphy countered that the *Golden* plaintiff was planning on leafleting in the future but didn't mention specific candidates, just like in this case.²⁴

Justice Kagan argued next that the probable-cause finding is a harm because voters don't know that it represents a low standard of proof, that "[t]here are voters out there . . . [who] think probable cause means you probably lied."²⁵ Murphy similarly replied that petitioners didn't make that argument in the lower courts, and they had told their supporters what a probable-cause finding meant. Chief Justice Roberts then mentioned that the billboard company refused to put up their billboard and that the state's involvement in the probable-cause finding is more meaningful than a possible private defamation suit. As Justice Scalia put it, "The mere fact that a private individual can chill somebody's speech does not say, well, since a private individual can do it, you know, the ministry of truth can do it."²⁶

Justice Sotomayor then asked how many cases were fully prosecuted, and Ohio's lawyer replied that only five referrals had been made—in an attempt to show how unlikely criminal prosecution is.²⁷ Chief Justice Roberts responded that many of the proceedings must have been mooted, although Murphy didn't have data on that front. Justice Samuel Alito then mused that the statistics that respondents

²² *Id.* at 32.

²³ 394 U.S. 103, 109 (1969) (dismissing challenge to an electoral leafleting ban as nonjusticiable because plaintiff's "sole concern was literature relating to the Congressman and his record," and it was "most unlikely that the Congressman would again be a candidate").

²⁴ Tr. of Oral Arg. at 34–35, SBA List, 134 S. Ct. 2334.

²⁵ *Id.* at 36.

²⁶ *Id.* at 38.

²⁷ *Id.* at 39–40.

provided show a system that limits speech without much of an opportunity for judicial review, with thousands of complaints and few prosecutions. Respondents answered that they are arguing about this case only and that, since the law is unambiguous, petitioners need to allege more than just the possibility of prosecution.²⁸

Finally, Justice Breyer expressed concern that elections are coming up, and people need to know what they can say, so perhaps the Court needed to get into the merits. Respondents' counsel suggested that, if he lost and the Supreme Court remanded to the district court, that court could ask the Ohio Supreme Court to clarify the scope of the law. Chief Justice Roberts joked that respondents' suggestion to involve another court system would really "speed things up."²⁹ Justice Alito asked what narrowing construction could possibly be consistent with *United States v. Alvarez*.³⁰ Justice Scalia jokingly replied that the statement at issue would have to be "really false."³¹ Murphy attempted to distinguish *Alvarez* because that case was "about false statements in the abstract," but Alito corrected him by noting that *Alvarez* concerned "hard factual statements."³²

On rebuttal, petitioners' counsel argued against Ohio's suggestion of a certification to the state supreme court because that would cause further delay and not solve the questions regarding the constitutionality of the statute. Carvin asked the Court instead to follow *Citizens United* when deciding whether to remand the case for a First Amendment facial challenge because a remand causes further constitutional injury from delay when "our entire point is it's unconstitutional for us to [have to] say, 'Mother, may I?' before we speak."³³

²⁸ *Id.* at 44.

²⁹ *Id.* at 47.

³⁰ 132 S. Ct. 2537 (2012) (striking down the Stolen Valor Act, which criminalized false statements about having won military honors).

³¹ Tr. of Oral Arg. at 48, SBA List, 134 S. Ct. 2334.

³² *Id.* at 48.

³³ *Id.* at 53 (citing *Citizens United v. FEC*, 558 U.S. 310, 329 (2010)).

The Ruling

To nobody's surprise, the justices unanimously reversed the Sixth Circuit decision and held that a pre-enforcement challenge here was both ripe and justiciable.³⁴ Justice Clarence Thomas delivered the opinion of the Court, first deciding that SBA List and COAST alleged a credible threat of enforcement that amounts to an Article III injury. After all, both petitioners want to make statements in future elections that are similar to the statements made by SBA List in the 2010 election, and because this is political speech, it is "affected with a constitutional interest."³⁵ In addition, the intended speech is arguably proscribed by the Ohio statute because the OEC already made a probable-cause finding about the speech—which also makes the threat of enforcement substantial. Further, anyone can file a complaint—including political opponents—making it more likely that a complaint will be filed. Therefore, the Court concluded that the combination of the burdensome OEC proceedings (which occur regularly) and the additional threat of criminal prosecution was enough to get SBA List and COAST their day in court.

I imagine that the lower courts, now sufficiently chastened, will strike down Ohio's law on remand—and we'll never hear of such nonsense again. Still, *SBA List* now joins the motley pantheon of Supreme Court curiosities: little, bizarre cases that will be remembered fondly for the sunlight they brought to absurd legal practices. And if Cato's brief contributed in some small way to this sunlit disinfectant, all the better.³⁶

* * *

The "Best Amicus Brief Ever"

Since its founding, this country has held as one of its cardinal principles the right of the people to castigate and mock their leaders. The monarchic culture that the Founders chose to break from

³⁴ *SBA List*, 134 S. Ct. 2334, 2347 (2014).

³⁵ *Babbitt*, 442 U.S. at 298.

³⁶ For a recent (post-decision) local take on Ohio's law, see Scott Blackburn, *Ohio's False Statement Law Impedes Political Discourse*, *Cleveland Plain Dealer*, Aug. 1, 2014, available at http://www.cleveland.com/opinion/index.ssf/2014/08/ohios_false_statement_law_scot.html.

recognized a speech-crime known as *lèse-majesté*: any speech or action that insulted the monarchy or offended its dignity was an act of treason. Lest European monarchs grow too proud, however, they would appoint court jesters. These “licensed fools” were granted a special dispensation permitting them to mock their monarchs without fear of death. Like the slave riding behind a Roman general, the fool’s role was to remind the king that he too was mortal.

Why did we write the brief? Because in America, *lèse-majesté* is not a crime; we each have the right to be as foolish as we wish. Ohio’s law threatens that sacred right, undermining the First Amendment’s protection of the serious business of making politics funny.³⁷

³⁷ For more on why we filed the brief, see Ilya Shapiro, Trevor Burrus & Gabriel Latner, Truthiness and the First Amendment, 16 U. Pa. J. Const. L. Height. Scrutiny 51 (2014), available at <https://www.law.upenn.edu/live/files/3381-shapiro16upajconstlheightscrutiny512014pubpdf>.

No. 13-193

IN THE
Supreme Court of the United States

SUSAN B. ANTHONY LIST, ET AL.,
Petitioners,

v.

STEVEN DRIEHAUS, ET AL.,
Respondents.

**On a Writ of Certiorari
to the United States Court Of Appeals
for the Sixth Circuit**

**BRIEF OF *AMICI CURIAE* CATO INSTITUTE
AND P.J. O'ROURKE IN SUPPORT OF
PETITIONERS**

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QUESTION PRESENTED

Can a state government criminalize political statements that are less than 100% truthful?

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INTEREST OF *AMICI CURIAE*¹

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

P.J. O'Rourke is America's leading political satirist and an H.L. Mencken Research Fellow at the Cato Institute. Formerly the editor of the *National Lampoon*, he has written for such publications as *Car and Driver*, *Playboy*, *Esquire*, *Vanity Fair*, *House & Garden*, *The New Republic*, *The New York Times Book Review*, *Parade*, *Harper's*, and *Rolling Stone*. He is now a contributing editor at *The Atlantic* and *The Weekly Standard*, a member of the editorial board of *World Affairs*, and a regular panelist on NPR's *Wait, Wait . . . Don't Tell Me*. O'Rourke's books have been translated into a dozen languages and are worldwide bestsellers. Three have been *New York Times* bestsellers: *Parliament of Whores*, *Give War a Chance*, and *All the Trouble in the World*. He is also

¹ Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* made a monetary contribution its preparation or submission. Also, *amici* and their counsel, family members, and pets have all won the Congressional Medal of Honor.

the author of *Eat the Rich*, *Peace Kills*, and *Don't Vote: It Just Encourages the Bastards*.

This case concerns *amici* because the law at issue undermines the First Amendment's protection of the serious business of making politics funny.

INTRODUCTION AND SUMMARY OF ARGUMENT

"I am not a crook."

"Read my lips: no new taxes!"

"I did not have sexual relations with that woman."

"Mission accomplished."

"If you like your healthcare plan, you can keep it."

While George Washington may have been incapable of telling a lie,² his successors have not had the same integrity. The campaign promise (and its subsequent violation), as well as disparaging statements about one's opponent (whether true, mostly true, mostly not true, or entirely fantastic), are cornerstones of American democracy. Indeed, mocking and satire are as old as America, and if this Court doesn't believe *amici*, it can ask Thomas Jefferson, "the son of a half-breed squaw, sired by a Virginia mulatto father."³ Or perhaps it should

² Apocryphal.

³ Monticello.org, *Son of a Halfbreed Indian Squaw (Quotation)*, <http://www.monticello.org/site/son-half-breed-indian-squaw-quotation> (last visited Feb. 28, 2014).

ponder, as Grover Cleveland was forced to, “Ma, ma, where’s my pa?”⁴

In modern times, “truthiness”—a “truth” asserted “from the gut” or because it “feels right,” without regard to evidence or logic⁵—is also a key part of political discourse. It is difficult to imagine life without it, and our political discourse is weakened by Orwellian laws that try to prohibit it.

After all, where would we be without the knowledge that Democrats are pinko-communist flag-burners who want to tax churches and use the money to fund abortions so they can use the fetal stem cells to create pot-smoking lesbian ATF agents who will steal all the guns and invite the UN to take over America? Voters have to decide whether we’d be better off electing Republicans, those hateful, assault-weapon-wielding maniacs who believe that George Washington and Jesus Christ incorporated the nation after a Gettysburg reenactment and that the only thing wrong with the death penalty is that it isn’t administered quickly enough to secular-humanist professors of Chicano studies.

⁴ Answer: “Gone to the White House, ha ha ha!”
Elisabeth Donnelly, *Ye Olde Sex Scandals: Grover Cleveland’s Love Child*, The Awl, <http://www.theawl.com/2010/02/ye-olde-sex-scandals-grover-clevelands-love-child>.

⁵ Wikipedia.com, *Truthiness*, <http://en.wikipedia.org/wiki/Truthiness> (last visited Feb. 28, 2014) (describing the term’s coinage by Stephen Colbert during the pilot of his show in October 2005). *See also* Dictionary.com, *Truthiness*, <http://dictionary.reference.com/browse/truthiness> (last visited Feb. 28, 2014).

Everybody knows that the economy is better off under [Republican/Democratic] ⁶ presidents—who control it directly with big levers in the Oval Office—and that:

President Obama is a Muslim.

President Obama is a Communist.

President Obama was born in Kenya.

Nearly half of Americans pay no taxes.⁷

One percent of Americans control 99 percent of the world's wealth.

Obamacare will create death panels.

Republicans oppose immigration reform because they're racists.

The Supreme Court is a purely political body that is evangelically [liberal/conservative].⁸

All of the above statements could be considered “truthy,” yet all contribute to our political discourse.

Laws like Ohio's here, which criminalize “false” speech, do not replace truthiness, satire, and snark with high-minded ideas and “just the facts.” Instead, they chill speech such that spin becomes silence. More importantly, Ohio's ban of lies and damn lies⁹ is inconsistent with the First Amendment.

⁶ Circle as appropriate.

⁷ 47 percent to be exact, though it may be higher by now.

⁸ Again, pick your truth.

⁹ *Amici* are unsure how much torture statistics can withstand before they too run afoul of the law.

This Court has repeatedly held that political speech, including and especially speech about politicians, merits the highest level of protection. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 196 (1992) (“the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.”). Indeed, quite recently this Court held that the First Amendment protects outright lies with as much force as the truth. *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

It is thus axiomatic—not merely truthful—that speech may only be restricted or regulated where doing so is necessary to further a compelling state interest. But the government has no compelling interest in eliminating truthiness from electioneering and, even if such an interest existed, such laws are unnecessary because any injury that candidates suffer from false statements is best redressed by pundits and satirists—and if necessary, civil defamation suits. Nor is the government well-suited for evaluating when a statement crosses the line into falsehood.¹⁰

Ohio's law blatantly violates the First Amendment and directly conflicts with *Alvarez*. This Court should terminate it with extreme prejudice.

¹⁰ Two Pinocchios out of five is OK, but three is illegal?

ARGUMENT

I. TRUTHINESS, INSINUATIONS, AND ALLEGATIONS ARE A VITAL PART OF POLITICAL SPEECH

In the hotly contested election of 1828, supporters of John Quincy Adams called Andrew Jackson a “slave-trading, gambling, brawling murderer.” Mac McClelland, *Ten Most Awesome Presidential Mudslinging Moves Ever*, Mother Jones, (October 31, 2008).¹¹ Jackson’s supporters responded by accusing Adams of having premarital sex with his wife and playing the role of a pimp in securing a prostitute for Czar Alexander I. *Id.*

During Thomas Jefferson’s presidency, James T. Callender, a pamphleteer and “scandalmonger,” alleged that Jefferson had fathered numerous children with his slave Sally Hemings.¹² Callender’s allegations would feature prominently in the election of 1804, but it wasn’t until nearly two centuries later that the allegations were substantially confirmed.¹³

More recently, we’ve had discussions of draft-dodging, Swift Boats, and lying about birthplaces¹⁴—

¹¹ Available at <http://www.motherjones.com/mojo/2008/10/ten-most-awesome-presidential-mudslinging-moves-ever>.

¹² Monticello.org, *James Callender*, <http://www.monticello.org/site/research-and-collections/james-callender>.

¹³ Monticello.org, *Thomas Jefferson and Sally Hemings: A Brief Account*, <http://www.monticello.org/site/plantation-and-slavery/thomas-jefferson-and-sally-hemings-brief-account>.

¹⁴ While President Obama isn’t from Kenya, he is a Keynesian—so you can see where the confusion arises.

not to mention the assorted infidelities that are a political staple. Any one of these allegations, if made during an Ohio election, could be enough to allow a complaint to be filed with the Ohio Election Commission (OEC) and thus turn commonplace political jibber-jabber into a protracted legal dispute.

When political barbs become legal disputes, the public is denied an important part of political speech, namely, responses to those allegations. “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.” *Whitney v. California*, 274 U.S. 357, 377 (1927). Inflammatory, insulting, and satirical speech is more likely to produce a response, thus making the back-and-forth of politics a self-correcting marketplace of ideas—except, of course, when candidates can tattle to the government, which then takes away their ~~toys~~ speech.

This case began when Rep. Steven Driehaus responded to an advocacy group’s political attack¹⁵ by filing a complaint with the OEC. Cert. Pet. at 2. Resources that could have been spent responding to the petitioner’s truthiness were thus redirected to a bizarre legal fight. And this caused a ripple effect: The Coalition Opposed to Additional Spending and Taxes felt sufficiently chilled by Driehaus’s actions to refrain from engaging in the campaign at all. *Id.* at

¹⁵ Driehaus voted for Obamacare, which the Susan B. Anthony List said was the equivalent of voting for taxpayer-funded abortion. *Amici* are unsure how true the allegation is given that the healthcare law seems to change daily, but it certainly isn’t as truthful as calling a mandate a tax.

4. Ohio's law thus ultimately weakened the vibrancy of the state's political discourse.

Supporters of Ohio's law believe that it will somehow stop the lies, insults, and truthiness, raising the level of discourse to that of an Oxford Union debate.¹⁶ Not only does this Pollyannaish hope stand in the face of all political history, it disregards the fact that, in politics, truths are *felt* as much as they are *known*. When a red-meat Republican hears "Obama is a socialist," or a bleeding-heart Democrat hears, "Romney wants to throw old women out in the street," he is feeling a truth more than thinking one. No government agency can change this fact, and any attempt to do so will stifle important political speech.

II. THIS COURT HAS ALREADY HELD THAT TRUTHINESS, INSINUATIONS, AND ALLEGATIONS ARE PROTECTED BY THE FIRST AMENDMENT

1. Many campaign statements cannot easily be categorized as simply "true" or "false." According to Politifact.com, President Obama's claim that "if you like your health-care plan you can keep it" was true five years before it was named the "Lie of the Year."¹⁷

¹⁶ *Amici's* counsel has been to an Oxford Union debate; the level of discourse is not always that high.

¹⁷ Compare Politifact.com, *Obama's Plan Expands Existing System*, Oct. 9, 2008, <http://www.politifact.com/truth-o-meter/statements/2008/oct/09/barack-obama/obamas-plan-expands-existing-system>, with Politifact.com, *Lie of the Year: 'If you like your health care plan, you can keep it'*, Dec. 12, 2013, <http://www.politifact.com/truth-o-meter/article/2013/dec/12/lie-year-if-you-like-your-health-care-plan-keep-it>.

More importantly, even if such a categorization *could* be made, false (and truthy) speech is protected by the First Amendment, especially if it's political.

In *United States v. Alvarez*, this Court held that there is no “general exception to the First Amendment for false statements.” 132 S. Ct. at 2544. In that case, the speech was entirely false, and there was no reasonable way to interpret it as truthful. Yet if *Alvarez* confirmed that the First Amendment protects even blatant lies made in the process of campaigning for office, surely it protects spin, parody, and truthiness.

In declaring unconstitutional an equivalent ban on false campaign speech, the Washington Supreme Court held that the government's claimed interest in prohibiting false statements of fact was invalid, in part because it “presupposes the State possesses an independent right to determine truth and falsity in political debate, a proposition fundamentally at odds with the principles embodied in the First Amendment. Moreover, it naively assumes that the government is capable of correctly and consistently negotiating the thin line between fact and opinion in political speech.” *Rickert v. Pub. Disclosure Comm'n*, 168 P.3d 826, 849-850 (Wa. 2007).

This Court has held that as “neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798.” *N.Y. Times v. Sullivan*, 376 U.S. 254, 273 (1964). By the same logic, false and defamatory statements about politicians' backgrounds—including their

voting records—are also constitutionally protected. Statements that are merely false, and not inherently defamatory, must therefore also be protected.

Ohio’s law explicitly prohibits not merely *defamatory* falsehoods, but *all of them*—including the sort of self-promoting lies that this Court held to be constitutionally protected in *Alvarez*. And not only does it make no distinction between defamatory and non-defamatory statements, but the petitioners’ allegation could not have been inherently defamatory given that more than 78 percent of Americans favor legal abortion in at least some cases.¹⁸

2. This case began with a claim—“Steve Driehaus voted to fund abortions”—that certainly could have caused consternation if uttered at a bar or dinner party. Surreally, it ended up before the U.S. Supreme Court. Even worse, there is no question whether Driehaus voted for the bill at issue; the only dispute is whether that bill actually provides federal funding for abortions—which is a question of legal, economic, and even theological interpretation.

Statements of this kind—call them truthiness, spin, smear, or anything else—are as politically important as their factually pure counterparts. Democracy is based on the principle that the people elect representatives who reflect their beliefs and values, and whom they trust. Beliefs drive democracy—not some truth as adjudged by Platonic guardians—and there is no law that could make it

¹⁸ Gallup.com, *Abortion*,

<http://www.gallup.com/poll/1576/abortion.aspx> (last visited Feb. 28, 2014) (latest poll, from May 2013: 26 percent favoring legal abortion always, 52 percent sometimes, 20 percent never).

otherwise. Those voters who believed that the Patient Protection and Affordable Care Act provides federal funding for abortion-on-demand (as many do) were told by the Susan B. Anthony List that one candidate had voted in favor of that law. The voters' *beliefs* were more important and relevant than the technical truths about the underlying legislation.

The Ohio law extends far beyond disputes over interpretation or implication. Its broad language also criminalizes rhetorical hyperbole and political satire. If, instead of a billboard reading "Driehaus voted for federally funded abortion," the petitioners had erected a billboard that said "Driehaus is a baby killer" the law would apply with equal effect. All the statute requires is: (1) that the statement be false; (2) that the speaker knew the statement was false, or spoke with reckless disregard for the truth; and (3) that the statement was made with the intent of impacting the outcome of the election. Ohio Rev. Code § 3517.21(B) It is thus apparently illegal in Ohio for an outraged member of the public to call a politician a Nazi or a Communist—or a Communist Nazi, for that matter. That is no exaggeration: the law criminalizes a misstatement made in "campaign materials," which includes "public speeches." *Id.*

And it is irrelevant that the law is limited to cases where the statements were made "knowingly" or with reckless disregard for the truth. It would not be a total defense to any charge under the law to simply state, "I honestly thought this was true." Instead, some fact-finder (whether the OEC, a judge, or a jury) will have to determine (1) whether the statement was false, and (2) whether the defendant knew it was false, or spoke recklessly.

The law also stifles, chills, and criminalizes political satire. For example, it is a crime in Ohio for a late-night talk-show host to say: “Candidate Smith is a drug-addled maniac who escaped from a mental institution.” Even satirists and speakers that are clearly attempting primarily to entertain their audiences are subject to prosecution if they intend or expect their statements to impact how the audience perceives a candidate. A publication like *The Onion*—which regularly puts words in political figures’ mouths, or makes up outlandish stories about them—could be violating Ohio law by making people think at the same time it makes them laugh.

3. This law is a paradigmatic example of a content-specific speech restriction that the First Amendment protects against. Why should a false or exaggerated statement about a politician attract government sanction, when that same statement made about another public figure would not?

In *Alvarez* this Court expressed its concern that upholding the Stolen Valor Act “would endorse government authority to compile a list of subjects about which false statements are punishable.” 132 S. Ct. at 2547. Yet that is precisely what Ohio’s legislature has done. While one subsection serves as a catch-all prohibition on all “false” statements made about a candidate, Ohio Rev. Code § 3517.21(B)(10), the majority of the section is devoted to a *specific* list of subjects about which false statements are punishable, including: a candidate’s education (2), work history (3), criminal record (4-5), mental health (6), military service (7), and voting record (9).

But wait, there’s more! Refraining from stating (arguable) falsehoods is not enough to stay clear of

violating the law. For example, the regulation of statements concerning a politician's criminal record requires speakers to actively take steps to avoid even the possibility of misinterpretation. If an Ohio political candidate has been indicted a dozen times on corruption and racketeering charges, you *cannot* lawfully say "Candidate Smith has been repeatedly indicted for corruption" without also saying how those indictments were resolved. Ohio Rev. Code § 3517.21(B)(5). Even if this Court were to reverse itself and hold that false statements are outside the scope of First Amendment protection, there is no question that truthful statements about candidates' criminal records are "at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

There is no reason why speech about these topics should be subject to regulation by the state, or why they should only be regulated for the benefit of politicians as opposed to other public figures—like actors, religious leaders, and famous athletes—who are often lied about. *See, e.g., Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (the First Amendment protects magazine accusing religious leader of a sexual relationship with his mother); *Beckham v. Bauer Publ'g Co.*, 2011 U.S. Dist. LEXIS 32269 (C.D. Cal. Mar. 17, 2011) (a newspaper asserting that famous soccer player had cheated on his wife with a prostitute was protected by both the First Amendment and anti-SLAPP statutes); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (protecting false statements about police officers' conduct). Nor are Ohio politicians so particularly thin-skinned that they require protection that politicians in other states do not. *See, e.g., Judge Dismisses Libel Suit*

Against Tenn. Senator, Associated Press, Apr. 26, 2013 (unreported case regarding allegations that a politician's opponent had been arrested on drug charges).¹⁹ "Politics are politics, and it's a big boys' and big girls' game. That's just the way it is." *Id.* (judge's comments in dismissing the suit).

Those cases where the courts have allowed libel suits based on spurious statements about celebrities further demonstrate that the appropriate remedy when it comes to lies about public figures is, if anything, a civil suit. *See, e.g., Burnett v. Nat'l Enquirer*, 144 Cal. App. 3d 991 (Cal. Ct. App. 1983) (publisher can be held civilly liable for defamatory and false speech); *Eastwood v. Nat'l Enquirer*, 123 F.3d 1249 (9th Cir. 1997) (fabrication of public figure's interview answers civilly actionable).

This Court has also limited the remedies states can provide to subjects of false speech. It would be incoherent if states were allowed to apply criminal sanctions—as Ohio attempts to do here—for conduct to which this Court has held the Constitution only permits the attachment of compensatory liability. *See Gertz v. Robert Welch*, 418 U.S. 323 (1974) (even when the subject of false statement is not a public official, liability for anything beyond actual damages can only be established by proof of actual malice).

While the mere fact that the courts have not recognized an exception to the First Amendment in the past does not mean that such an exception does not exist, this Court requires that those advocating

¹⁹ Available at <http://www.firstamendmentcenter.org/judge-dismisses-libel-case-against-tenn-senator>.

for such an exception show “persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.” *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2734 (2011). In *Alvarez*, this Court held that the government had not proven a longstanding tradition of restricting false statements made by or about a political candidate. 132 S. Ct. at 2548. If the historical record provides evidence for any longstanding tradition in this regard, it is the venerable practice of politicians’ lying about themselves and each other with complete impunity.

III. THE PUBLIC INTEREST IN POLITICAL HONESTY IS BEST SERVED BY PUNDITS AND SATIRISTS

This country has a long and estimable history of pundits and satirists, including *amici*, exposing the exaggerations and prevarications of political rhetoric. Even in the absence of the First Amendment, no government agency could do a better job policing political honesty than the myriad personalities and entities who expose charlatans, mock liars, lambaste arrogance, and unmask truthiness for a living.

Just two terms ago, this Court agreed wholeheartedly with that sentiment:

The 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.* See *Whitney v. California*, 274 U. S. 357, 377 (1927) (Brandeis, J., concurring) (“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”). The theory of our Constitution is “that the best test of truth is the power of the thought to get itself accepted in the competition of the market,” *Abrams v. United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting). The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. *And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse.* These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.

Alvarez, 132 S. Ct. at 2550 (emphases added).

As Chief Judge Kozinski argued when *Alvarez* was before the Ninth Circuit, a prohibition on lying devalues the truth: “How can you develop a reputation as a straight shooter if lying is not an option? Even if untruthful speech were not valuable for its own sake, its protection is clearly required to give breathing room to truthful self-expression, which is unequivocally protected by the First Amendment.” *United States v. Alvarez*, 638 F.3d 666, 675 (9th Cir. 2011).

No one should be concerned that false political statements won’t be subjected to careful examination. As this Court said in *Brown v. Harlage*,

“a candidate’s factual blunder is unlikely to escape the notice of, and correction by, the erring candidate’s political opponent. The preferred First Amendment remedy of ‘more speech, not enforced silence,’ thus has special force.” 456 U.S. 45, 61 (1982). Recent technological advancements mean that statements by or about candidates will not just attract the attention of his or her opponents— instantly—but that of investigative journalists and professional fact checkers.

Politicians who are caught lying about themselves or others regularly attract more attention from the press than the subject of the original lie. The typical outcome is that the lie or cover up becomes more important than the original accusation or offense. And that dynamic predates smartphones and their latest “apps.” The impeachment of President Clinton was not based on any sexual activities he might have engaged in with Monica Lewinsky, but over the attempt to cover it up. Similarly, President Nixon’s resignation was prompted by his obfuscations rather than his orchestration of a third-rate burglary. And if this Court isn’t yet convinced of this point, *amici* have but two words more on the subject: Anthony Weiner.

If Ohio’s concern is that there are abundant lies being told in campaigns that escape media notice— and cannot be proven in a civil defamation suit— wouldn’t that same lack of evidence hamstring prosecution under Ohio Rev. Code § 3517.21? Anyone who could fabricate enough evidence to mislead all of the fact-checkers and investigators who scrutinize his fables could surely evade a charge under this law.

Adding further penalties will not dissuade successful and talented liars. The only way that such a law could offer the public greater protection from untruthful speech—accepting for the sake of argument that such protection is lawful, desirable, and necessary—would be if it adopted lower standards of proof than those required by civil defamation suits or newspaper editors.

There is no lie that can be told about a politician that will not be more damaging to the liar once the truth is revealed. A crushing send-up on *The Daily Show* or *The Colbert Report* will do more to clean up political rhetoric than the Ohio Election Commission ever could.

CONCLUSION

Criminalizing political speech is no laughing matter, so this Court should reverse the court below.

Respectfully submitted,

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