No. 13-193

In the Supreme Court of the United States

SUSAN B. ANTHONY LIST and COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,
Petitioners,

v.

STEVEN DRIEHAUS, JOHN MROCZKOWSKI, BRYAN FELMET, JAYME SMOOT, HARVEY SHAPIRO, DEGEE WILHELM, LARRY WOLPERT, PHILIP RICHTER, CHARLES CALVERT, OHIO ELECTIONS COMMISSION, and JON HUSTED,
Respondents.

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

BRIEF OF *AMICUS CURIAE* 1851 CENTER FOR CONSTITUTIONAL LAW IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

I. To challenge a speech-suppressive law, must a party whose speech is arguably proscribed prove that authorities would successfully prosecute him for that speech, as the Sixth Circuit holds, or should the Court presume that a credible threat of prosecution exists absent desuetude or a firm commitment by prosecutors not to enforce the law, as seven other Circuits hold?

II. Did the Sixth Circuit err by holding, in direct conflict with the Eighth Circuit, that state laws proscribing "false statements" in elections are not subject to pre-enforcement review under the First Amendment so long as the speaker maintains that its speech is true, even if even if others who may enforce the law disagree?

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The Opinion of the United States Court of Appeals for the Sixth Circuit is found at *Susan B. Anthony List v. Driehaus*, 525 Fed.Appx. 415 (6th Cir. 2013). Two opinions of the United States District Court for the Southern District of Ohio that dismiss complaints filed by each of the two Petitioners is found at 805 F.Supp.2d 412 and 2011 WL 3296174.

IDENTITY AND INTEREST OF AMICUS

The 1851 Center for Constitutional Law is an Ohio non-profit corporation formed to promote and protect constitutional, human and civil rights.[1]

The 1851 Center works to preserve freedom of political speech, recognizing that such expression is fundamental to ensuring that citizens maintain sufficient information to oversee those who institute the public policy that can greatly impact their lives.

More specifically here, the 1851 Center has defended numerous Ohio citizens who have become entangled in one or more Ohio Elections Commissions hearings in response to wholly frivolous Complaints filed by their political rivals. In the course of these hearings, the 1851 Center has witnessed how OEC Complaints are used by the politically powerful to frighten average citizens from participating in the political process, and even critical core political speech itself.

[1] The undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than the 1851 Center, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of brief. All parties have consented to the filing of this brief.

Moreover, the 1851 Center has observed panels of unelected administrators without any legal expertise, much less First Amendment expertise, deliberate and rule on whether political value-laden statements are true or false, and mistaken or advertent.

The result of these statutes, alongside Ohio Elections Commission hearings and policies (which provide for considerable fines and even criminal prosecution), is to make political participation cost-prohibitive for Ohioans who are not professional politicians. This causes political stultification and stratification. This also paternalistically abridges the public's role as the *proper* arbiter of political claims and ideas.

Consequently, the 1851 Center is interested in overturning the Sixth Circuit Court of Appeals' Decision in this case, since providing citizens with a remedy to expeditiously vindicate their rights will result in the requisite "breathing space" Ohioans need to enter and participate in the political process (and advance changes in their government) once again.

In this case, it believes the constitution, and the American people, are served by protecting free political debate from content-based restriction such as Ohio's peculiar statutory scheme that appoints panels of politicians as arbiters of the truth of political statements, and removes such inquiry from a public marketplace of ideas. The notion of such an Orwellian scheme is antithetical to the Constitution's guiding principles of self-governance, individual liberties and, particularly, freedoms to both speak and hear political expression.

The 1851 Center for Constitutional Law is also interested in protecting fundamental constitutional protections by promoting review of government laws or other restrictions that threaten the free exercise of constitutional rights. It believes that refusal to review the constitutionality of a governmental restriction criminalizing political speech effectively extinguishes that right. Requiring a citizen to submit to criminal prosecution in order to test a statute's constitutionality not only encourages citizen disrespect of law, but discourages the free exercise of constitutional rights, especially including open political debate, that should instead be encouraged in a democratic society.

Of course, the Amicus encourages the Court to protect the free exercise of political discourse as urged by the Petitioners, in a way that permits citizens to vindicate First Amendment protections without the need to invite a criminal conviction.

STATEMENT OF THE CASE

Ohio's Criminalization and Bureaucratic Policing of Political Speech

Under Ohio law, a citizen who knowingly or recklessly publishes a false statement about a political candidate commits a crime punishable by a prison term and fine of up to $5,000. Ohio Rev. Code §§3517.21(B), 3517.992(V). And uniquely, the statute's suppression and chilling of political speech is intensified by its reliance on, as the exclusive procedure to enforce Ohio Rev. Code §3517.21(B) an entirely *private* enforcement mechanism: Any person may file a complaint with the Ohio Elections Commission ("the Commission"), a 7-

member board of political party affiliates appointed by elected officials. Ohio Rev. Code §§ 3517.21(C); 3517.152(A).

For complaints raised within 60 days of an election, a 3-member panel of the probable cause supports referring the complaint to the full Commission. Ohio Rev. Code §§ 3517.154, 3517.156. If the panel dismisses the complaint, the complainant may ask the full Commission to reconsider. If the panel finds probable cause of a violation, the full Commission must hold a hearing on the merits within 10 days, unless the parties agree to extend the time. Ohio Rev. Code § 3715.155. If the Commission finds a violation, it must refer the matter for prosecution; and it may also issue a fine.

Use of the Statute to Suppress Political Speech

Political candidates from various parties have used this criminal scheme to deter, hinder, suppress, and penalize speech criticizing candidates, especially during critical periods of pre-election debate. The proceedings deter or preclude expression on key political issues, divert candidate attention from important public issues, and keep the public from hearing and considering political speech at key times in the pre-election process.

Proceedings at the OEC in This Case

In this case, for example, the Susan B. Anthony List ("SBA"), a citizen advocacy group, criticized Mr. Driehaus, a Democratic congressman, arguing that his vote for the Affordable Care Act ("ACA") constituted a vote "for taxpayer-funded abortion." SBA intended to

publish the claim on billboards, and a second advocacy group, COAST, intended to repeat the claim.

While the ACA didn't direct payment of federal funds for abortions, it established subsidies to pay insurance premiums for low-income citizens, including insurance to cover abortions. Thus SBA argued the ACA used taxpayer funds to finance abortions, while Driehaus claimed otherwise.

Rather than debating the issue before the voting public, Driehaus filed a complaint with the OEC accusing SBA of violating Ohio Rev. Code §3517.21(B)'s criminal prohibition against false political statements. He also threatened to sue a billboard company if it erected SBA's billboards, and the billboard company refused to publish SBA's statement. Solely in response to the threat of criminal proceedings started by Driehaus, both SBA and COAST refrained from publishing their arguments to the public.

At a hearing on Driehaus' complaint, an OEC panel voted 2-1 to find probable cause of a criminal violation, with the only Republican dissenting. Before the matter was heard, Driehaus was defeated in the election and dropped his complaint.

Proceedings at the Courts Below in This Case

SBA filed this lawsuit in the United States District Court for the Southern District of Ohio to challenge the Ohio statute as a violation of rights of free speech under the First Amendment to the Constitution. While state political/administrative proceedings remained pending, the District Court stayed this action under *Younger v. Harris*, 401 U.S. 37 (1971).

COAST filed a separate lawsuit in the same Court, alleging that Driehaus' action and threats of suit had chilled its intended political speech, which was virtually identical to SBA's.

After Driehaus lost the election, he dismissed his OEC proceedings. The SBA then amended its federal Complaint to allege that it wanted to make similar future statements, but was chilled from doing so. Driehaus counterclaimed that SBA's statements had defamed him.

The District Court consolidated the two suits and summarily dismissed the claims of both SBA and COAST. As to COAST, the Court reasoned that because no complaint was actually filed against COAST, any risk of prosecution was speculative, chill of COAST's speech – which was identical to SBA's -- was subjective, and COAST's injury was too attenuated to support a claim. The Court also determined that the chilling of SBA's speech was not a cognizable injury because the complaint against SBA had not been finally determined by the Commission.

A panel of the Sixth Circuit affirmed the District Court decision. It posited that injury from the statute could not be shown merely from a history of enforcement or an allegation of the statute's chilling effect, but required an imminent threat of future prosecution – something lacking because the Commission had not made a final adjudication on SBA's speech. Moreover, because the Petitioners had not admitted that they had or would lie or recklessly disregard truth in their political speech, they had not alleged an intention to disobey the statute so as to show injury.

SUMMARY OF THE ARGUMENT

Freedom to engage in political discourse is a paramount right that serves as a cornerstone of our system of government. Any attempt by the government to limit or punish persons for engaging in such discourse is reviewed with exacting scrutiny. Here, the State of Ohio enacted a statute that criminalizes political speech. The criminalization of speech, by itself, is more than sufficient cause for concern. From a practical perspective, however, the greater concern is the ability to use the adjudicatory authority granted to the Ohio Elections Commission as a tool to harass and intimidate political foes. As set forth below, savvy politicians have advanced their campaigns and intimidated political foes by filing claims before the Ohio Elections Commission. Many of the claims have no legitimate chance of being affirmed by the Ohio Elections Commission. But regardless of whether claims before the Ohio Elections Commission are affirmed or rejected, the cost of defending against such claims and the impact on campaigns causes harm to the candidates targeted by the claims. This harm is particularly intimidating to political novices and serves to deter them from entering the arena of politics. For these reasons, the amicus requests that the Court reverse the judgment below and protect the freedom to engage in political discourse.

ARGUMENT

I. THE RIGHT TO OPEN POLITICAL DISCOURSE IS A CORNERSTONE OF OUR SYSTEM OF GOVERNMENT AND LIMITATIONS OF THAT RIGHT ARE REVIEWED WITH EXACTING SCRUTINY

Freedom to advance one's political issues, or to speak out in criticism of government and those who would occupy positions of governance, is a crucial check against abuse of state authority, underpinning a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[2] This unique American system allows for vigorous discussions:

> [D]iscussion of public issues … integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure the unfettered exchange of ideas for the bringing about of political and social changes desired by people."[3]

This principled protection of political speech represents a profound trust in the ultimate wisdom of the American people and in their capacity to determine

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[2] *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

[3] *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 346 (1995) (internal citations omitted).

truth.[4] Thus when a law polices core political speech, American courts apply "exacting scrutiny" and reject the law unless it is "narrowly tailored to serve an overriding state interest."[5]

In *United States v. Alvarez*, this Court ruled that even false statements are protected by the First Amendment. "This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee."[6] In addition, all of the justices agreed that laws restricting false statements in the political context would be subject to strict scrutiny.[7]

As explained in *N.A.A.C.P. v. Button*, "The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'"[8] Indeed, "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials – and especially one

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[4] *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. 530, 536 (1980).

[5] *McIntyre* 514 U.S. at 347.

[6] *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012).

[7] *Id.*

[8] *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) paraphrasing *N.A.A.C.P. v. Button*, 371 U.S. 415, 445 (1963).

that puts the burden of proving truth on the speaker."[9] This Court subsequently explained that our citizens, and not the government, is tasked with controlling the bounds of political debates and determining truth:

> *In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues.*[10]

Protections afforded to political speech are exceptionally strong, given that "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs* * *of course includ(ing) discussions of candidates* * *"[11] This reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[12] In fact, the "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."[13]

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[9] *New York Times Co.*, 376 U.S. at 271 (1964).

[10] *Buckley v. Valeo* (1976), 424 U.S. 1, at 57, 96 S.Ct. 612.

[11] *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966).

[12] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964).

[13] *Buckley v. Valeo* (1976), 424 U.S. 1, 96 S.Ct. 612.

Citizens United boldly reinforced those principles by clarifying that (1) "the First Amendment does not permit laws that force speakers to retain a campaign finance attorney * * * before discussing the most salient points of our day;" and (2) "political speech must prevail against laws that would suppress it, whether by design or inadvertence."[14]

In *Massachusetts Citizens for Life,* the Supreme Court explained as follows:

> PAC disclosure "regulations may create a disincentive for such organizations to engage in political speech. Detailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. * * * Furthermore, such duties require a far more complex and formalized organization than many *small groups* could manage. * * * Such persons might well be turned away by the prospect of complying with all the requirements imposed by the Act [and] it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it."[15]

Thus "the administrative costs of complying with such increased responsibilities may create a disincentive for the organization itself to speak,"[16] and

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[14] *Citizens United,* 130 S.Ct. at 898.

[15] *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), at 255.

[16] *Id*., *at* 255, fn 7.

the fact that the statute's practical effect may "discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities."[17]

II. IGNORING THE PROTECTIONS RECOGNIZED BY THIS COURT, OHIO CREATES A MECHANISM FOR A COMMISSION TO REGULATE POLITICAL SPEECH

Against the First Amendment's sweeping protection for political speech, Ohio maintains an administrative and criminal scheme that, on the premise of policing only intentionally false speech, subjects core political speech to harassment through burdensome adjudication and potential criminal sanctions.

Pursuant to Ohio Rev. Code 3517.154(A)(1), "Upon the filing of a complaint with the Ohio Elections Commission, which shall be made by affidavit of any person, on personal knowledge, … setting forth a failure to comply with or a violation of any provision … the commission shall proceed in accordance with sections 3517.154 to 3517.157 of the Revised Code," which require at least one hearing; and additional hearings where probable cause is determined.

Therefore, regardless of the statement's truthfulness, the respondent must attend at least one hearing in Columbus, Ohio. The scheme fails to offer prompt judicial review or other safeguards to mitigate the chilling effect on political speech. To the contrary, a complaint may be filed by "any person" based on a subjective belief that another's political rhetoric is false

[17] *Id*. at 255.

(a foregone conclusion for much legitimate political debate), and statutory administrative procedures subject the speaker to a series of evidentiary hearings and investigation, all at the whim of a political body, often during a pre-election period when communication is most urgent. Thus, the forum for evaluating truthfulness is transferred from the public marketplace to a board of administrators.

Further, a Hobson's choice arises: the speaker may abandon a contested message in hopes of settling the dispute and addressing other important issues before an election (an unfortunate but reasonable option chosen by COAST in this case); or alternatively, the speaker may divert significant time and other resources to defend the speech before the administrative body, at the expense of diverting resources from actually spreading any message, and at a risk of criminal charges.

Under either alternative, the message at issue, along with others, is undermined, either because the speaker "volunteers" silence or resources are diverted from speech. Regardless of the speaker's choice, vibrant public debate is curtailed. Meanwhile, this has phenomena has a particularly debilitating effect on a small-time, grass-roots, or non-professional political speaker, whose limited time or resources may become entirely consumed by defending himself at the OEC hearing.

Regardless of the statutes' suppression of political speech, the Court of Appeals for the Sixth Circuit has ruled that the issue is not eligible for Federal Court's review because neither SBA nor COAST were successfully prosecuted for violating the law.

According to the position articulated by the Sixth Circuit, the Petitioners cannot challenge the constitutionality of the speech-restrictive statute until they are prosecuted and either admit a violation of the statute or are adjudicated guilty. Only then will the threat of jeopardy become sufficiently imminent to justify standing based on a cognizable risk of prosecution for political speech.

Until then, a speaker facing the filing of a complaint, being subjected to multiple hearings before a political tribunal, receiving findings of probable cause of a violation, and diverting resources away from speech to defend against the charge, exhibits mere subjective concerns, according to the Sixth Circuit. The speaker's responsive action to refrain from speech is equally subjective and does not constitute standing to challenge the scheme.

This restrictive approach invites an untenable level of government control over the content of political criticism of the government. It invites political operatives to file complaints that will subject a speaker to multiple hearings, under threat of criminal prosecution, unless the speaker abandons an election-related message. After the election, when the speech can no longer influence public action, the complaint can simply be dropped without penalty to the complainant – as in this case.

However, this Court has ruled that, when challenging a government restriction on First Amendment grounds, a speaker secures standing when

he shows a "credible threat of prosecution."[18] More precisely, a person faces a credible threat of prosecution, and earns standing, when the person shows that a state regulation arguably infringes on a constitutional right, when the person's actions could be construed to violate the state restriction.[19] This Court has pointedly instructed that a speaker need not "undergo a criminal prosecution" before challenging a constitutionally-restrictive law.[20]

The Ohio regime stifles free political debate during elections, when free exchange of ideas is most crucial. In addition, politically self-interested parties use the OEC as a weapon against their opponents to chill their speech during a campaign, knowing that just one such action can entirely hobble political novices. Given the absence of any meaningful state mechanism to guard free political speech, standing in federal courts is necessary.

Despite the unequivocal logic behind the decisions of this Court in *McIntyre* and *Massachusetts Citizens for Life*, Ohio courts have affirmed the implementation of the Ohio statute. The court declared explained that it disagreed with the council challenging the OEC, "the Council, however, argues that these requirements (and the administrative costs they entail), when imposed on a small entity with only '*de minimis* forays into express advocacy' discourages its speech and, therefore,

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[18] *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979).

[19] *Id.*

[20] *Doe v. Bolton*, 410 U.S. 179, 188 (1973).

burdens its First Amendment rights. We disagree."[21] To the contrary, as set forth below, the practical impact of Ohio statute and its implementation by the OEC restricts political speech and violates the protections afforded by this Court.

III. OHIO'S ADMINISTRATIVE SPEECH-POLICING REGIME INVITES MANIPULATION, RESULTING IN POLITICALLY SAVVY ACTORS USING THE OEC AS A SWORD TO HINDER POLITICAL OPPONENTS

In *Citizens United v. Federal Election Commission,* this Court stated, "the First Amendment does not permit laws that force speakers to retain a campaign finance attorney … before discussing the most salient points of our day" and "political speech must prevail against laws that would suppress it, whether by design or inadvertence."[22] Under clear United States Supreme Court and Sixth Circuit precedent, "regulations that are triggered solely by speech are in fact regulations of speech."[23]

Despite these rulings, Ohio's statute allows a politically-interested party to file a complaint against someone, no matter whether the respondent's speech is

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[21] *Corsi v. Elections Comm.*, 2012 -Ohio- 4831.

[22] *Citizens United v. Federal Election Commission*, 558 U.S. 310, 324 (2009).

[23] *Commonwealth Brands, Inc. v. U.S.* Not Reported in F. Supp. 2d, 2009 WL 3754273 (W.D. Ky. 2009). On appeal, the Sixth Circuit endorsed this reasoning. See *Discount Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509, C.A.6 (Ky.) 2012.

true or not. As a result of the complaint, the respondent must attend at least one hearing and hire an attorney since, as a candidate running for office, the respondent does not want to be associated with wrongdoing.

John Stuart Mill, explains how a respondent should not be held liable for this type of mistake:

> [T]o argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion … all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct.[24]

In contrast to these principles, Ohioans have consistently faced commission hearings and even potential fines and criminal penalties in response to clearly-protected core political speech. The recent cases below document just some of those instances, and illustrate that at stake here are the First Amendment right of virtually an Ohioan who wishes to engage in political debate, even at the smallest levels of government. And far from being an unexpected side effect of the law, the OEC boasts that politically savvy actors will "continue to hone their message and…will

[24] John Stuart Mill, *On Liberty* (Oxford: Blackwell, 1947) at 47.

even plan to use the Commission as a part of their activities."[25] A well-oiled political machine may, indeed, have the attorneys and knowledge to use the OEC as part of their strategy. However, political novices do not have the money, time, or experience to navigate the waters of the OEC. As the cases below demonstrate, that disadvantage creates an environment that discourages political novices from entering the political arena, and in some cases from even communicating about politics at a very basic level.

In *Massey v. Wilson,* an individual running for township trustee, using the statute, initiated Ohio Elections Commission proceedings against nine separate Ohioans by simply filing a complaint-affidavit alleging that these nine citizens chatted amongst themselves about the individual being a "pornographer" and "sex offender."[26] (Massey, while on duty as a police officer, had apparently routinely transmitted nude photographs of himself to various area women.) The OEC promptly scheduled and held a probable cause hearing, requiring these nine Ohioans to hire an attorney and drive to Columbus, Ohio, three hours from their homes in Northeast Ohio, to attend the hearing and defend themselves. Only after each respondent endured this burden were the charges dismissed as "frivolous."

Consequently, without judicial intervention, even truthful chatter and gossip risks being burdened and suppressed by the OEC's adjudicatory process. This chilling effect is hardly consistent with the robust

[25] http://elc.ohio.gov/History.stm (retrieved on 02/26/2014)

[26] *Massey v. Wilson*, OEC Case No. 2011E-077, (2011).

public debate on candidates that our founding fathers envisioned, particularly when the complainant need not even appear at the hearing to accomplish the end of chilling and stifling the speech of his political opponents. Without an avenue for judicial intervention, not even private gossip about local candidates' sex scandals is safe for discussion.

Likewise, in *Mann v. Yarbrough,* a campaign affiliate of established Congressman Pat Tiberi brought a claim to hinder the campaign of Tiberi's Republican Party primary opponent, William Yarbrough. Specifically, Mann claimed, amongst other things, that Yarbrough was too "libertarian" to be a "Republican," and thus made a false claim when indicating to the county board of elections that he was a "member of the Republican party."[27] Yarbrough moved for dismissal of the Complaint, and succeeded, but only after hiring an attorney, attending and testifying at two hearings, and incurring considerable expense and distraction during an ongoing campaign.

Simultaneously, Yarbrough was forced to deal with another Tiberi campaign supporter who filed a separate OEC Complaint asserting that Yarbrough acted to mislead voters when he created the website www.TiberiTragedy.com to satirize Congressman Tiberi's voting record, when "the website … does not appear to promote the Tiberi campaign, but instead is in opposition to his election."[28] This Complaint was also dismissed, but again, not until after Yarbrough

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[27] *Mann v. Yarbrough*, OEC Case No. 2012E-002, Complaint of Robert J. Mann.

[28] OEC Case No. 2011E-088, Complaint of Bryan M. Griffith.

spent considerable time and expense on it. In each case, a means of judicial interdiction would have permitted Yarbrough to continue his speech in the midst of a hard-fought campaign.

In these cases, and numerous other similar cases, as candidates were coerced or diverted from delivering their message, Ohio's voting public was prevented from hearing and evaluating political speech at critical times in the election cycle.

Likewise, *L. George Distel v. Kathy Magda*,[29] the campaign committee for Magda, a political novice, distributed literature with Magda's name followed by "Ashtabula County Treasurer," without the words "for" or "elect." She did not have campaign experience, lacked financial support, and her only campaign staffer was her husband. Upon learning of the error, she apologized and changed the literature. An ally of her opponent recognized the political opportunity and filed a complaint at the OEC, alleging that Magda "knowingly and intentionally" misled voters. An OEC panel found in violation of §3517.21(B), despite referring to the error as a "common mistake." The case is currently pending on appeal.

This is anything but an isolated incident. Just one week prior to the filing of this brief, the agents of an incumbent Republican state representative filed the identical claim against a grass-roots primary challenger, alleging a violation of the statute and initiating a burdensome OEC legal proceeding where the primary challenger published literature stating

[29] *L. George Distel v. Kathy Magda,* OEC Case No. 2012E-028.

"Dan Fogt, State Representative," rather than "Dan Fogt *for* State Representative."[30]

Unlike well-funded political machines, citizens like Magda and Fogt prepare their campaign literature on a shoestring budget, and do not have lawyers on staff to help them navigate OEC rules before speaking. Rather, enforcement of the Ohio statute by the OEC is a threat to political novices and dissuades them from public service and political activities.

The threat applies not only to honest mistakes, but is even a threat where there is no misleading statement. In *John Schneider v. Alternatives to Light Rail Transit and Stephan Louis*, John Schneider, brought a claim against Alternatives to Light Rail Transit (ALRT) and Stephan Louis.[31] Schneider claimed that ALRT and Louis were in violation of the Ohio statute based on Louis's stating, "[t]he Federal Transit Administration rates it one of the worst plans in the country,"[32] referring to a proposal regarding Cincinnati's light rail system.

The statement was based on the rating system located on Federal Transit Administration's ("FTA") website.[33] Although FTA's website did not specifically use the word "worst" when rating the light rail systems, "[t]he FTA's report is unambiguous… [I]t

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[30] *See* Complaint of Brittany Warner, OEC Case No. 2014-E-05.

[31] *John Schneider v. Alternatives to Light Rail Transit and Stephan Louis* 2002E-065, Affidavit of Complaint.

[32] *Id.*

[33] *Schneider v. ALRT and Louis*, Deposition of Louis at 47.

rates the various cities and it puts them in various categories. And our system rates one of the worst out of all the submissions to the FTA according to the FTA."[34] In addition, although FTA did not explicitly compare the transit systems to one another, a person can easily compare them with each other using the data given by FTA.[35]

After two hearings in Columbus featuring arguments and testimony, the OEC found only a partial violation.[36] Schneider used the statute as a weapon to draw attention away from the issue and to chill his opponent's speech for years afterward in their ongoing dispute about the costs and benefits of a transit system.

Likewise, in *Thomas W. Blumer v. Bob McEwen*, Thomas Blumer filed a complaint against Bob McEwen for using the titles, "Congressman," "Special Envoy for Presidents," "U.S. Representative to the European Parliament," and "Six-term Ohio Congressman" during his campaign.[37] McEwen had held all of these positions in the past and because it was common to refer to a past elected official by his former title, he argued it was appropriate to use these titles on his campaign literature.

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[34] *Id.* at 57.

[35] *Id.* at 58.

[36] *Thomas W. Blumer v. Bob McEwen*, 2005E-087, OEC Violation Findings Letter.

[37] *Blumer v. McEwen*, Complaint.

Despite this traditional understanding, after two hearings in Columbus featuring arguments and testimony, the OEC found a violation of the statute.[38] Like Schneider v. ALRT, even though the statements did not mislead the public, Blumer used the statute as a weapon against his opponent.

In another similar, complainants Flick, Haley, and Davenport brought four claims against McComb for alleged false statements.[39] They claimed that McComb's statements about the City of Lebanon voting to spend over $300,000 on a historical house and McComb's offering to give them this house for free were false.[40]

After hearings in Columbus featuring arguments and testimony, the OEC found no violation, which means McComb had to endure four attacks on speech that was true. Because Flick, Haley, and Davenport each had intimate knowledge of the events referenced by McComb, they knew the statements were true. Nonetheless, they used the OEC to intimidate McComb.

Even where alleged misconduct is minor (such as calling oneself an "organic farmer"), successfully defending a claim at the OEC is financially costly and time consuming. In *William B. Morand v. Lee*

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[38] *Blumer v. McEwen*, OEC Violation Findings Letter.

[39] *Flick v. McComb*, 2011E-052, *Haley v. McComb*, 2001E-062, *Haley v. McComb*, 2001E-067, *Davenport v. McComb*, 2001E-045

[40] *Id.*

Speidel,[41] a candidate for township trustee claimed that his opponent published campaign literature falsely accusing him of "[b]urdening the homeowner with debt to finance commercial building projects" and being "abusive to women." The original complaint was filed before the election. After losing the election, the complainant continued the OEC action and filed a second complaint, Case No. 2005E-005, alleging additional statements that he deemed to be untruthful. The Commission found probable cause to proceed with respect to various statements, including the respondent's statement that he was an "organic farmer." While the respondent grew organic crops, the parties litigated the issue of whether the respondent was an organic "farmer" because he did not sell the crops for a profit but fed them to animals on his own farm. The complaint was ultimately dismissed in its entirety after the respondent dedicated thousands of dollars and numerous hours to his defense.

Appeals of incorrect OEC decisions create even greater costs to candidates. For instance, in *Flannery v. Ohio Elections Commission*,[42] an incumbent Secretary of State asked that signs be posted in polling centers containing the word "vote" followed by his name. Flannery said the action was a crime. After two hearings, the OEC found that four of Flannery's statements violated §3517.21(B). On appeal to an Ohio trial court, the OEC decision was overturned, and the OEC lost another appeal. In the end, even though Flannery was innocent of violating §3517.21(B), he was

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[41] *William B. Morand v. Lee Speidel*, OEC Case No. 2003E-064

[42] *Flannery v. Ohio Elections Commission,* 804 N.E.2nd 1032 (Ohio App. 2004)

forced to prepare and finance OEC hearings and further litigation before state courts simply to defend legitimate political speech for an election that concluded years earlier.

Perhaps because its decisions are rendered by majority vote of a politically-interested panel, incorrect OEC decisions are not uncommon. In *Latta for Congress Committee v. Club for Growth PAC*,[43] a Republican congressional candidate complained that Club for Growth PAC violated §3517.21(B) when it said the candidate "has a record of supporting higher taxes, including voting for the 2003 tax hike Buehrer opposed and a $1 billion tax hike in 1998" and "also supported a $1 billion tax hike in 1998 that was later rejected by 80% of the voters in a referendum." After two hearings, the OEC found a violation of §3517.21(B). Once again, Ohio courts overturned the OEC decision. The OEC's inability to apply the proper standards stalled political debate and effectively punished a party for legitimate speech by forcing that party to participate in and successfully appeal the OEC proceeding.

CONCLUSION

In *Cantwell v. Connecticut*, this Court declared:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to

[43] *Latta for Congress Committee v. Club for Growth PAC,* OEC Case No. 2007-E03

> vilification of men who have been, or are prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.[44]

Nonetheless, Ohio's statute boldly stifles political speech. It's chilling impact, as evidenced by the numerous OEC proceedings detailed above, is a detriment to society as a whole:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'[45]

Because of this statute, people must refrain from speaking because of the potential threat of litigation. The net effect is censorship. By allowing this statute to stand as is, without the option of judicial intervention, citizens of Ohio are in essence being stripped of their First Amendment Right and are prevented from hearing an unfettered debate of the issues.

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[44] *Cantwell et al. v. State of Connecticut*, 310 U.S. 296, 309 (1940).

[45] *Samuel Roth v. United States*, 354 U.S. 476, 484 (1987).

Respectfully Submitted,

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