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, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF PETITIONERS

ALLEN DICKERSON
Counsel of Record
ANNE MARIE MACKIN
TYLER MARTINEZ
ZAC MORGAN
CENTER FOR COMPETITIVE POLITICS
124 S. West St., Ste. 201
Alexandria, VA 22314
adickerson@campaignfreedom.org
(703) 894-6800
Counsel for Amicus Curiae

March 3, 2014

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 2005, the Center for Competitive Politics ("CCP") is a 501(c)(3) organization that seeks to educate the public about the effects of money in politics and the benefits of increased freedom and competition in the electoral process. CCP works to defend the First Amendment rights of speech, assembly, and petition through scholarly research and both state and federal litigation. *Amicus* has participated in many of the notable cases concerning campaign finance laws and restrictions on political speech, including *Citizens United v. FEC,* 558 U.S. 310 (2010) and *SpeechNow.org v. FEC,* 599 F.3d 686 (D.C. Cir. 2010).

SUMMARY OF ARGUMENT

There is more than one way to impose a First Amendment harm. Ohio's statute, which criminalizes false speech (as determined by the State), is one way. But even without such a determination, and the criminal sanctions that follow, an organization's speech can be effectively chilled through judicial process itself. Such is the case here: because one organization was hauled into court, forced to spend its energy and resources defending a meritless complaint, and had its reputation assailed with the imprimatur of a state

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[1] No party has contributed, monetarily or otherwise, to the preparation or filing of this brief, which was authored entirely by counsel for *amicus*. Pursuant to Rule 37 of this Court, all parties have filed blanket consents to the filing of *amicus* briefs in this case.

agency and a sitting member of Congress, it has (wisely) chosen not to speak in the future. And another organization, which watched this process from the sidelines, has decided to stay there.

Ohio's statute, in short, imposes predictable transaction costs on core political speech, or at least any political speech with which others may disagree.

The Sixth Circuit has done the same. By refusing to open its doors to pre-enforcement challenges, it has further increased the expense of public speech in Ohio, and consequently lowered the likelihood that individuals and groups will speak.

This Court has recognized that the manner in which lower courts conduct themselves, including how discovery practice impacts the cost of pre-enforcement litigation, may *itself* constitute a First Amendment injury. Such an injury is especially apparent where, as here, the burden imposed (costly legal fees) bears no relation to a cognizable governmental interest. For, as this Court determined only last Term, there is no sufficient governmental interest in preventing false political speech. Consequently, Ohio's enforcement regime, and the Sixth Circuit's deference thereto, imposes a fresh and independent First Amendment harm upon Petitioners, a harm that should be remedied by allowing them to immediately seek review of the offending state statute.

ARGUMENT

I. Even where Ohio's ban on false campaign speech does not result in criminal sanctions, the inevitable and costly need to defend oneself in an administrative proceeding itself works a First Amendment injury.

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

This case asks whether such widely-cited and well-respected words reflect principles of law, enforceable before impartial courts.

Susan B. Anthony List ("SBA") criticized an incumbent politician for his vote in favor of the Affordable Care Act, characterizing that vote as a

use of the public fisc to fund abortion. Cert. Pet. at 2. While SBA's interpretation of the Affordable Care Act is just that—an interpretation—the fact that complex national policies are contestable is precisely why we have election campaigns. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies…the remedy to be applied is more speech, not enforced silence").

Not so in Ohio.

The incumbent in this case took issue with SBA's criticism. Ohio law allowed him to fire back by filing a formal complaint under the state's speech code. Cert. Pet. at 2. He even took steps to curtail SBA's preferred avenue of speech, threatening, under the same speech control measure at issue here, to sue an advertising company willing to rent billboard space to SBA. *Id.* at 3.

Filing the complaint may have been an easy task for the incumbent, but "SBA was forced to divert its time and resources…to hire legal counsel to defend itself before the OEC." *Id.* As a result, another speaker, Petitioner Coalition Opposed to Additional Spending and Taxes ("COAST"), self-silenced rather than subject itself to the same, predictable costs imposed upon SBA List by a sitting member of the Congress. *Id.* at 4.

And who can blame COAST? As a result of the complaint, SBA List was forced to defend itself at an hearing where partisan commissioners applied the

State's power to "determine[] and proclaim[] to the electorate the truth of various campaign allegations." Opp. to Cert. Pet. at 6 (internal quotation and citation omitted); Cert. Pet. at 2-4. Ultimately, a three-member panel of the Commission determined—notably, on a 2-1 vote—that SBA had likely intentionally lied about the incumbent's position. Cert. Pet. at 3-4. After successfully preventing an organization from speaking about his conduct in office, the incumbent lost the election, and, its purpose accomplished, quietly withdraw his complaint. *Id.*; Opp. to Cert. Pet. at 8.

Demonstrably, Ohio's challenged statute imposed real costs upon SBA List in 2010. These include the expense of legal representation, the time and attention of its officers, the distraction from its mission, and the reputational harm of the State of Ohio declaring it a likely liar. These costs have not changed SBA's mission and ideals—it still wishes to speak out in criticism of legislators who voted for the Affordable Care Act. But, given the harm done to it in 2010, SBA List will understandably refrain from speaking absent a guarantee that it will not again be subjected to these costs. Such an ongoing, obvious, and repeatable harm demands meaningful judicial review. This is especially true where, as here, the process itself has deterred a separate group from speaking at all.

Note that none of these costs includes the penalties Ohio's statute allows; each of them is a result of the process itself. And this Court has stated

that a State may not use "'procedural device[s]'" to "deter[]…speech which the Constitution makes free." *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986) (Brennan, J. for the plurality) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). Respondents claim that Petitioners may not obtain judicial review unless they suffer a future finding of probable cause by the full Ohio Elections Commission, indictment by a county prosecutor based on that finding, and conviction at trial. But even without such a final determination, the harm is already very real, the speech already silenced, and the prospect for future harassment apparent.

a. These burdens are exacerbated by the Sixth Circuit's refusal to review Ohio's system. That refusal works an independent First Amendment harm, and results in foreseeable and preventable chill to substantial political speech.

Just seven years ago, this Court expressly noted that obstacles to judicial review of speech-suppressing laws can themselves "constitute[] a severe burden on political speech." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468 n. 5 (2007) ("*WRTL II*"). There, a nonprofit corporation challenged a federal statute banning corporate speech. Although the case was decided on the merits, this Court noted in its controlling opinion that the lower court had imposed an unconstitutional burden by, *inter alia*, permitting extensive discovery and granting the government five depositions regarding the speaker's intent. *Id.* This imposition of onerous

procedural burdens before a putative speaker can obtain final judicial review of a ban on speech, in and of itself, *burdens speech*. Moreover, such impediments deter other speakers from engaging in public debate.[2]

The constitutional harm is not only the costs required to vindicate fundamental rights. It is also that those costs occur *to no purpose.* The *WRTL II* Court noted that the costs of discovery violated the First Amendment because the government sought discovery on a factor—the intent of the speaker—that was legally irrelevant. *WRTL II*, 558 U.S. at 468. ("No reasonable speaker would choose to run an ad covered [by such rules]…if its only defense to a criminal prosecution would be that its motives were pure").

Absent this Court's intervention, political debate will be gravely stunted in the state of Ohio. Respondents seek to evade judicial review of a speech regulation regime that—by its very nature—levies manifest transaction costs on participation in the public debate. If Respondents prevail, and drastically narrow the rights of speakers to raise pre-enforcement challenges to Ohio's "truth in politics" regime, irreparable damage will be done to "our 'profound national commitment to the principle that debate on public issues should be uninhibited,

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[2] The point is hardly novel. *See Gibson v. Florida Legislative Investigation Comm.,* 372 U.S. 539, 546 (1963) (finding "it is an essential prerequisite" that a state justify under strict scrutiny "the validity of an investigation which introduces into the area of [the] constitutionally protected right[] of speech").

robust, and wide-open.'" *Buckley*, 424 U.S. at 14 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Fundamentally, leaving potential speakers to the tender mercies of partisan commissioners, county prosecutors, or the desire of an incumbent to "correct the record" "'offers no security for free discussion...[and will force speakers] to hedge and trim.'" *Buckley v. Valeo*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

Such outcomes are, in part, why "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney…or seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United v. FEC*, 558 U.S. 310, 324 (2010). This is also true where procedural rules force speakers to retain counsel and submit to burdensome state enforcement procedures time after time *rather* than seeking a single declaratory ruling.

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

Content-based restrictions are "presumed invalid" unless the government demonstrates their constitutionality. *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). Even under "exacting scrutiny," the government must "demonstrate[] a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgement of

associational freedoms." *Buckley*, 424 U.S. at 25 (internal quotations and citations omitted).

Indeed, the more novel the restriction, the greater the burden on the government to properly tailor its regulation. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). This case presents a restriction on the expression of ideas based on regulating "truth"—an area of speech that this Court has recently placed outside of the scope of government regulation. Consequently, the burdens imposed by the statute, and by the Sixth Circuit's refusal to intervene, cannot, as a matter of logic, be appropriately tailored to an interest that does not exist.

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

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, *or its content*." *United States v. Alvarez*, 132 S. Ct. 2537, 2543-2544 (plurality op.) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)) (quotation marks omitted) (emphasis added). Regulating speech as "true" or "false" is obviously content-based. And content-based restrictions are "presumed invalid"." *Id.* (citing *Ashcroft v. ACLU*,

542 U.S. 656, 660 (2004)). Last Term, this Court rejected just such a restriction.

Significantly, that case, *United States v. Alvarez,* held that "the First Amendment requires that the Government's chosen restriction on the speech at issue be actually necessary to achieve its interest." *Id.* at 2549 (internal citation and quotation omitted). Because the government lacked any evidence that false claims to have won significant military decorations in fact resulted in honor dilution, this Court found no "causal link between the Government's stated interest and the Act." *Id.* Thus, the law failed exacting scrutiny. *Id.* at 2551. This holding is consistent with other cases examining restrictions on First Amendment rights which lack an appropriate government interest. *See, e.g. SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) ("[S]omething…outweighs nothing every time.") (internal citation and quotation omitted).

If the Stolen Valor Act's attempt to preserve the honor of our nation's highest award could not bear the burden it imposed upon the First Amendment, then Ohio's law certainly cannot: it regulates *political* speech. This Court has held for decades that "there is practically universal agreement that a major purpose of…[the First] Amendment was to protect the free discussion of governmental affairs,… of course includ[ing] discussions of candidates…."*Buckley*, 424 U.S. at 14 (quoting and applying *Mills v. Alabama*, 384 U.S. at 218 (1966)) (brackets in *Buckley*). In the balance, the speech in this case is closer to the core of the First Amendment

than the speech in *Alvarez*. Yet, because the asserted government interest is nonexistent given *Alvarez*, Ohio's interest in deterring false statements is simply not enough to justify its regulation of political speech.

The government in *Alvarez* also failed to show why counterspeech was an insufficient check on false statements. The plurality put it strongest: "[t]he Government has not shown, *and cannot show*, why counterspeech would not suffice to achieve its interest." *Alvarez*, 132 S. Ct. at 2549 (emphasis added). Rather than banning false speech, "the dynamics of free speech, of counterspeech, of refutation, can overcome the lie." *Id.* Thus, "[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth." *Id.* at 2550.

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

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Dated: March 3, 2014

Respectfully Submitted,

ALLEN DICKERSON
Counsel of Record
ANNE MARIE MACKIN
TYLER MARTINEZ
ZAC MORGAN
CENTER FOR COMPETITIVE POLITICS
124 S. West St., Suite 201
Alexandria, Virginia 22314
adickerson@campaignfreedom.org
(703) 894-6800