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

ILYA SHAPIRO
Counsel of Record
Cato Institute
1000 Mass. Ave. NW
Washington, DC 20001
(202) 842-2000
ishapiro@cato.org

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

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[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

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[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 logic[5]—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.

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[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 lies[9] is inconsistent with the First Amendment.

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[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 truthy—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.

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[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 birthplaces[14]—

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[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 attack[15] 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 truthy 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]

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[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

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[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

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[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 whole-heartedly 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,

ILYA SHAPIRO
Counsel of Record
Cato Institute
1000 Mass. Ave., NW
Washington, D.C. 2000
(202) 842-0200
ishapiro@cato.org

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