

## TRUTHINESS AND THE FIRST AMENDMENT

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### I. INTRODUCTION TO THE INTRODUCTION

Believe it or not, Ohio has a law that *criminalizes* knowingly or recklessly making “false” statements about a political candidate or a ballot initiative.<sup>1</sup> We could hardly believe it too, when we first heard about this all-too-serious tomfoolery in the context of *Susan B. Anthony List v. Driehaus*, a federal lawsuit which the Supreme Court agreed to hear during its 2013–14 term.<sup>2</sup>

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.<sup>3</sup> We couldn’t let this barking dog lie, and quickly decided to get involved, first by joining the Institute for Justice’s excellent brief at the cert stage, and then by going our own way on the merits.

But that’s nothing special; in recent years, Cato has filed 30–45 amicus briefs every Supreme Court term (about half at the cert stage, half on the merits). What is special is the attention that our merits brief has garnered.<sup>4</sup> Although Cato lawyers and scholars have been central to debates over

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1 OHIO REV. CODE ANN. § 3517.21(B) (West 1995).

2 525 F. App’x 415 (6th Cir. 2013), *cert. granted*, 134 S.Ct. 895 (2014) (No. 13-193), to be argued Apr. 22, 2014, with a decision expected by the end of the term in June. 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 *infra* note 36.

3 Aaron Marshall, *Despite Laws Against Lying, Tall Tales Have Become the Norm on the Campaign Trail, Experts Say*, THE PLAIN DEALER, Oct. 27, 2012 (updated Oct. 29, 2012), available at [http://www.cleveland.com/open/index.ssf/2012/10/despite\\_laws\\_against\\_lying\\_tal.html](http://www.cleveland.com/open/index.ssf/2012/10/despite_laws_against_lying_tal.html).

4 See, e.g., David Lat, *Best Amicus Brief Ever*, ABOVE THE LAW (Mar. 3, 2014, 1:27 PM), <http://abovethelaw.com/2014/03/best-amicus-brief-ever/>; *Is It Wise to Criminalize Lies?*, ECONOMIST, Mar. 8, 2014, available at <http://www.economist.com/news/united-states/21598683-challenging-buckeye-states-ban-political-mudslinging-it-wise-criminalise-lies>.

many issues, and our briefs are often referenced by legal analysts (and occasionally cited by the Court), never before has one of our briefs generated this much attention. While well aware that a brief ought to stand on its own—and that a joke that needs explaining isn't funny—this brief was sufficiently different from our usual output that we thought it merited some modest explanation before re-publishing as a law review article (with light edits for context).

While humor isn't unheard of at the Supreme Court, it's generally assumed to be the sole province of the Justices. Whether it's Justice Thomas poking fun at a particular Ivy League law school<sup>5</sup> or all the Justices trying to wrap their heads around whether isolating a gene is more like (a) making a baseball bat, (b) mining gold, or (c) baking cookies,<sup>6</sup> laughter often interrupts oral arguments.<sup>7</sup> Nor are the Court's opinions devoid of creative non-fiction; Chief Justice Roberts has used Bob Dylan lyrics to illustrate his rulings<sup>8</sup> and once issued an opinion written in the style of a pulp-noir detective novel.<sup>9</sup>

Indeed, despite humor being so prevalent at the Court that it has been the subject of several studies,<sup>10</sup> the Court's official *Guide for Advocates* cautions that “[a]ttempts at humor usually fall flat.”<sup>11</sup> So why risk making fools of ourselves by breaking with custom to write a brief that, while funny enough in parts—and particularly in footnotes—probably won't generate invitations to host a late-night talk show or emcee the White House Correspondents' Dinner?<sup>12</sup>

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- 5 Nick Wing, *Clarence Thomas Joke Revealed in its Entirety in Complete Supreme Court Transcript*, HUFFINGTON POST (Jan. 24, 2013, 7:36 PM), [http://www.huffingtonpost.com/2013/01/24/clarence-thomas-joke\\_n\\_2541601.html](http://www.huffingtonpost.com/2013/01/24/clarence-thomas-joke_n_2541601.html).
  - 6 Transcript of Oral Argument at 4:8, 35:9, 37:22, *Ass'n for Molecular Pathology v. Myriad Genetics*, 133 S.Ct. 2107 (2013) (No. 12-398).
  - 7 Boston University law professor Jay Wexler actually tracks the number of times “[laughter]” appears in oral argument transcripts. See generally *Supreme Court Humor*, <http://www.jaywex.com/pages/Supreme%20Court%20Humor%20Page.htm> (last visited Mar. 21, 2014).
  - 8 *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 301 (2008) (Roberts, C.J., dissenting).
  - 9 *From the Chief Justice, a Novel Dissent*, WASH. POST, Oct. 15 2008 (quoting *Pennsylvania v. Dunlap*, 129 S.Ct. 448 (2008)), available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/14/AR2008101402818.html>.
  - 10 See, e.g., Tal Koplan, *Supreme Court, Now With More Humor*, POLITICO (Oct. 29, 2013, 6:42 PM), <http://www.politico.com/blogs/under-the-radar/2013/10/supreme-court-now-with-more-humor-176233.html>; Ryan A. Malphurs et al., *Too Much Frivolity Not Enough Femininity: A Study of Gender and Humor at the U.S. Supreme Court*, SOC. SCI. RES. NETWORK, Oct. 3, 2013, available at <http://ssrn.com/abstract=2335613>; Adam Liptak, *A Taxonomy of Supreme Court Humor*, N.Y. TIMES, Jan. 25, 2011, at A16, available at <http://www.nytimes.com/2011/01/25/us/25bar.html>.
  - 11 CLERK OF THE COURT, SUPREME COURT OF THE U.S., GUIDE FOR COUNSEL IN CASES TO BE ARGUED BEFORE THE SUPREME COURT OF THE UNITED STATES 11 (2013), available at [http://www.supremecourt.gov/oral\\_arguments/guideforcounsel.pdf](http://www.supremecourt.gov/oral_arguments/guideforcounsel.pdf).
  - 12 One of us (Shapiro) has appeared on *The Colbert Report*, but he of course played the straight man. See *The Colbert Report* (Comedy Central television broadcast July 8, 2010), available at

Most important to our decision was the fact that this was really the only case where such a brief could not only be appropriate, but effective. As Canadians,<sup>13</sup> we look to one of our own for explanation: Marshall McLuhan's idea that "the medium is the message." Faced with a law that threatened to silence political humorists, we could have simply cataloged highlights from the greats in the genre—from Twain and Mencken to Stewart and Colbert. But the visceral experience of making someone laugh is infinitely more powerful than merely describing to them the academic concept of humor.

So why did we do it? We did it because we could. We did it because 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 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. We just had to show how silly that is.

## II. INTRODUCTION

"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,<sup>14</sup> his successors haven't 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

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<http://thecolbertreport.cc.com/videos/zjdl0i/automatics-for-the-people—ilya-shapiro—jackie-hilly>.

<sup>13</sup> Only two of us are truthfully—as opposed to truthily—Canadian, but the third is from Colorado, which is close enough given that state's liberal drug policy, climate, and fondness for winter sports.

<sup>14</sup> Apocryphal.

old as America. If you don't believe us, just ask Thomas Jefferson, "the son of a half-breed squaw, sired by a Virginia mulatto father."<sup>15</sup> Or ponder, as Grover Cleveland was forced to, "Ma, ma, where's my pa?"<sup>16</sup>

In modern times, "truthiness"—a "truth" asserted "from the gut" or because it "feels right," without regard to evidence or logic<sup>17</sup>—is a key part of political discourse. It's 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.

Everybody knows that the economy is better off under [Republican/Democratic]<sup>18</sup> 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.<sup>19</sup>

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's evangelically [liberal/conservative].<sup>20</sup>

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

15 *Son of a Halfbreed Indian Squaw (Quotation)*, THOMAS JEFFERSON'S MONTICELLO, <http://www.monticello.org/site/son-half-breed-indian-squaw-quotation> (last visited Mar. 21, 2014).

16 Answer: "Gone to the White House, ha ha ha!" Elisabeth Donnelly, *Ye Olde Sex Scandals: Grover Cleveland's Love Child*, THE AWL (Feb. 9, 2010), <http://www.theawl.com/2010/02/ye-olde-sex-scandals-grover-clevelands-love-child>.

17 *The Word—Truthiness, in The Colbert Report: Stone Phillips* (Comedy Central television broadcast Oct. 17, 2005), available at <http://thecolbertreport.cc.com/videos/63ite2/the-word—truthiness>; see also *Definition of Truthiness*, DICTIONARY.COM, <http://dictionary.reference.com/browse/truthiness> (last visited Feb. 28, 2014).

18 Circle as appropriate.

19 47 percent to be exact, though it may be higher by now.

20 Again, pick your truth.

The Ohio law challenged in *Susan B. Anthony List v. Driehaus*, and others like it that criminalize “false” speech, don’t 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<sup>21</sup> is inconsistent with the First Amendment.

The Supreme Court has repeatedly held that political speech, including and especially speech about politicians, merits the highest level of protection.<sup>22</sup> Indeed, quite recently the Court held that the First Amendment protects outright lies with as much force as the truth.<sup>23</sup>

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.<sup>24</sup>

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

### III. TRUTHINESS, INSINUATIONS, AND ALLEGATIONS ARE VITAL TO POLITICS

In the hotly contested election of 1828, supporters of John Quincy Adams called Andrew Jackson a “slave-trading, gambling, brawling murderer.”<sup>25</sup> Jackson’s supporters responded by accusing Adams of having premarital sex with his wife and playing the role of a pimp by securing a prostitute for Czar Alexander I.<sup>26</sup>

During Thomas Jefferson’s presidency, James T. Callender, a pamphleteer and “scandalmonger,” alleged that Jefferson had fathered numer-

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21 We’re unsure how much torture statistics can withstand before they too run afoul of the law.

22 See, e.g., *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (“[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.”) (quoting *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)) (internal quotation marks omitted).

23 See *United States v. Alvarez*, 132 S.Ct. 2537, 2539 (2012) (“[F]alsity alone may not suffice to bring the speech outside the First Amendment.”).

24 Two Pinocchios out of four is OK, but three is illegal?

25 Mac McClelland, *Ten Most Awesome Presidential Mudslinging Moves Ever*, MOTHER JONES (Oct. 31, 2008, 11:45 AM), <http://www.motherjones.com/mojo/2008/10/ten-most-awesome-presidential-mudslinging-moves-ever>.

26 *Id.*

ous children with his slave Sally Hemings.<sup>27</sup> 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.<sup>28</sup>

More recently, we've had discussions of draft-dodging, Swift Boats, and lying about birthplaces<sup>29</sup>—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), turning commonplace political jibber-jabber<sup>30</sup> into a protracted legal dispute.

When political arguments—however infantile—become legal disputes, the public is denied an important part of political speech: 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.”<sup>31</sup> 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.

The *SBA List* case began when Rep. Steven Driehaus responded to an advocacy group's political attack<sup>32</sup> by filing a complaint with the OEC.<sup>33</sup> 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.<sup>34</sup> 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 Un-

27 *James Callender*, THOMAS JEFFERSON'S MONTICELLO, <http://www.monticello.org/site/research-and-collections/james-callender> (last visited Mar. 21, 2014).

28 *Thomas Jefferson and Sally Hemings: A Brief Account*, THOMAS JEFFERSON'S MONTICELLO, <http://www.monticello.org/site/plantation-and-slavery/thomas-jefferson-and-sally-hemings-brief-account> (last visited Mar. 21, 2014).

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

30 Or is it argle-bargle?

31 *Whitney v. California*, 274 U.S. 357, 377 (1927).

32 Driehaus voted for Obamacare, which the Susan B. Anthony List said was the equivalent of voting for taxpayer-funded abortion. Petition for Writ of Certiorari at 2, *Susan B. Anthony List v. Driehaus*, 525 F. App'x 415 (6th Cir. 2013), *cert. granted*, 134 S.Ct. 895 (2014) (No. 13-193). We're 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.

33 Petition for Writ of Certiorari, *supra* note 32, at 2.

34 *Id.* at 4.

ion debate.<sup>35</sup> 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're *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," they are 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.

#### IV. THE FIRST AMENDMENT PROTECTS TRUTHINESS, INSINUATIONS, AND ALLEGATIONS

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."<sup>36</sup> 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*, the Supreme Court held that there is no "general exception to the First Amendment for false statements."<sup>37</sup> 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 Washington's equivalent ban on false campaign speech, that state's 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."<sup>38</sup>

The U.S. Supreme Court has also 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

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35 One of us (Shapiro) has been to an Oxford Union debate; the level of discourse isn't always that high.

36 *Compare Obama's Plan Expands Existing System*, POLITIFACT (Oct. 9, 2008), <http://www.politifact.com/truth-o-meter/statements/2008/oct/09/barack-obama/obamas-plan-expands-existing-system>, with *Lie of the Year: 'If you like your health care plan, you can keep it.'* POLITIFACT (Dec. 12, 2013, 4:44 PM), <http://www.politifact.com/truth-o-meter/article/2013/dec/12/lie-year-if-you-like-your-health-care-plan-keep-it>.

37 132 S.Ct. 2537, 2544 (2012).

38 *Rickert v. Pub. Disclosure Comm'n*, 168 P.3d 826, 829 (Wash. 2007).

the Sedition Act of 1798.”<sup>39</sup> 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 the *Alvarez* Court held to be constitutionally protected. 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.<sup>40</sup>

The *SBA List* 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 otherwise. Those voters who believed that Obama 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 mechanics of the underlying legislation.

Ohio’s 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.<sup>41</sup> 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,

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<sup>39</sup> *N.Y. Times v. Sullivan*, 376 U.S. 254, 273 (1964).

<sup>40</sup> *Abortion*, GALLUP, <http://www.gallup.com/poll/1576/abortion.aspx> (last visited Mar. 21, 2014) (describing results from the latest poll, taken May 2013: 26 percent favoring legal abortion always, 52 percent sometimes, 20 percent never).

<sup>41</sup> OHIO REV. CODE ANN. § 3517.21(B) (West 1995).



for that matter. That's no exaggeration: the law criminalizes a misstatement made in "campaign materials," including in "public speeches."<sup>42</sup>

It's irrelevant that the law is limited to cases where the statements were made "knowingly" or with reckless disregard for the truth. It wouldn't 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's 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.

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?

The *Alvarez* 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."<sup>43</sup> 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,<sup>44</sup> 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 ensure compliance with 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.<sup>45</sup> Even if the Supreme Court were to reverse itself and hold that false statements are outside the scope of First Amend-

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42 *Id.*

43 *United States v. Alvarez*, 132 S.Ct. 2537, 2547 (2012).

44 § 3517.21(B)(10).

45 § 3517.21(B)(5).

ment protection, there's no question that truthful statements about candidates' criminal records are "at the core of our electoral process and of the First Amendment freedoms."<sup>46</sup>

There's 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.<sup>47</sup> Nor are Ohio politicians so particularly thin-skinned that they require protection that politicians in other states do not.<sup>48</sup> "Politics are politics, and it's a big boys' and big girls' game. That's just the way it is."<sup>49</sup>

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.<sup>50</sup>

Courts have 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 the Constitution only permits the attachment of compensatory liability.<sup>51</sup>

While the mere fact that the courts have not recognized an exception to the First Amendment in the past doesn't mean that such an exception doesn't exist, the First Amendment requires that those advocating such an exception show "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription."<sup>52</sup> The *Alvarez* Court held that the government hadn't proven a longstanding tradition of restricting false statements made by or about a political candidate.<sup>53</sup> If the historical record provides evidence of any longstanding tradition in

46 *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

47 *See, e.g., Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (holding that the First Amendment protects a magazine accusing a religious leader of a sexual relationship with his mother); *Beckham v. Bauer Publ'g Co.*, No. 10-cv-07980-R-SS, 2011 U.S. Dist. LEXIS 32269 (C.D. Cal. Mar. 17, 2011) (a newspaper asserting a 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).

48 *See, e.g., Judge Dismisses Libel Suit Against Tenn. Senator*, ASSOCIATED PRESS, Apr. 26, 2013, available at <http://www.firstamendmentcenter.org/judge-dismisses-libel-case-against-tenn-senator> (describing an unreported case regarding allegations that a politician's opponent had been arrested on drug charges).

49 *Id.* (describing the judge's comments in dismissing the suit).

50 *See, e.g., Burnett v. Nat'l Enquirer*, 144 Cal. App. 3d 991 (Cal. Ct. App. 1983) (asserting that a publisher can be held civilly liable for defamatory and false speech); *Eastwood v. Nat'l Enquirer*, 123 F.3d 1249 (9th Cir. 1997) (finding that the fabrication of a public figure's interview answers is civilly actionable).

51 *See Gertz v. Robert Welch*, 418 U.S. 323 (1974) (concluding that 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).

52 *Brown v. Ent. Merch. Ass'n*, 131 S.Ct. 2729, 2734 (2011).

53 *United States v. Alvarez*, 132 S.Ct. 2537, 2547 (2012).

this regard, it's the venerable practice of politicians' lying about themselves and each other with complete impunity.

#### V. 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—among whom Cato and P.J. O'Rourke can certainly be counted—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 make a living by exposing charlatans, mocking liars, lambasting arrogance, and unmasking truthiness.

It was only two years ago that the Supreme 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.<sup>54</sup>

As Chief Judge Alex Kozinski wrote 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.”<sup>55</sup>

No one should be concerned that false political statements won't be subjected to careful examination. As the 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 spe-

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<sup>54</sup> *Id.* at 2550 (emphases added).

<sup>55</sup> *United States v. Alvarez*, 638 F.3d 666, 675 (9th Cir. 2011).

cial force.”<sup>56</sup> 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 wasn’t 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 the reader isn’t yet convinced of this point, we 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 can’t 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 won’t 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’s no lie that can be told about a politician that won’t 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.

Criminalizing political speech is no laughing matter, so the Court should strike down Ohio’s law.

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56 456 U.S. 45, 61 (1982) (quoting *Whitney v. California*, 275 U.S. 357, 377 (1927) (Brandeis, J., concurring)).