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, KIMBERLY ALLISON, DEGEE WILHELM, HELEN BALCOLM, TERRANCE CONROY, LYNN GRIMSHAW, JAYME SMOOT, WILLIAM VASIL, PHILIP RICHTER, 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* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

The Attorney General makes this filing in fulfillment of his duties as Ohio's chief law officer, as an officer of the Court, and as an independently elected state official. His position as *amicus* here is independent of his representation of the Ohio Elections Commission Defendants. He continues zealously to represent those State Defendants in a separate capacity, acting through experienced lawyers in the Constitutional Offices section of the Attorney General's office.[2] As set forth below, the Attorney General does not express the concerns raised in this brief lightly, but has concluded that this Court may benefit in its deliberations from further discussion of the actual workings and effect of the Ohio false statements statute in practice.

The independence of the Attorney General under the Ohio Constitution is designed to allow him to speak for the interests of the State as a whole, and for its citizens. *See* OHIO CONST., Art. III, Sec. 1; OHIO REV. CODE §§ 109.02, 109.12-14; *see also, e.g.*, *Merrill v. Ohio Dep't of Natural Resources*, 955 N.E.2d 935, 944-45 (Ohio 2011) (explaining Attorney General's independent power to determine the State's view, apart from the position of a State agency);

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or his counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted under S. Ct. R. 37.4 and the consent on file with this Court.

[2] The Attorney General has screened counsel on this brief from contact with those attorneys, and has arranged *pro bono* outside counsel for the preparation and filing of this brief.

Northeast Ohio Coalition for the Homeless v. Blackwell, 467 F.3d 999, 1008-09 (6th Cir. 2006) (same; Ohio's Attorney General "is both the State's chief legal officer and a representative of the people and the public interest," as well as "a representative of an individual officer-client").

Ohio's generalized false-statement law (OHIO REV. CODE §§ 3517.21(B)(10) and 3517.22(B)(2)) has previously been upheld against constitutional challenge in the Sixth Circuit. *Pestrak v. Ohio Elections Commission*, 926 F.2d 573 (6th Cir. 1991); *Briggs v. Ohio Elections Commission*, 61 F.3d 487 (6th Cir. 1995). However, those cases were decided prior to this Court's recent decision in *United States v. Alvarez*, 132 S. Ct. 2537 (2012), and the Attorney General has serious concerns about the constitutionality of the generalized false statements provisions of the Ohio Rev. Code – concerns that should warrant judicial review in an appropriate case. The Attorney General believes that for this Court to determine whether this is such a case, it must have a solid understanding of the Ohio statute and how it operates in practice.

An Attorney General has a special duty, as an officer of the Court and representative of the public, to acknowledge when the government's side might be wrong. *See, e.g.,* Seth Waxman, *Defending Congress,* 79 N.C. L. REV. 1073 (2001); Margaret H. Lemos, *The Solicitor General As Mediator Between Court And Agency,* 2009 MICH. ST. L. REV. 185 (2009). To be sure, such an action is reserved for rare cases. As former U.S. Solicitor General Waxman put it, "when an Act of Congress has been challenged, the Solicitor General ordinarily puts a heavy thumb on the scale"

in favor of defending the statute. *Defending Congress,* 79 N.C. L. REV. at 1078. Yet, the duty to defend is not limitless and does not preclude acknowledgment of constitutional concerns.

He may defend a statute as part of his client representation, while candidly acknowledging the statute's constitutional problems. *See Defending Congress,* 79 N.C. L. Rev. at 1081-82. He may, as the U.S. Attorney General and Solicitor General sometimes have done, proceed on two tracks, defending the client's position in one brief and separately filing a brief that acknowledges constitutional problems.

The U.S. Attorney General and Solicitor General took the latter course in *Buckley v. Valeo,* 424 U.S. 1 (1976), the landmark First Amendment case, and the U.S. Solicitor General took the same action in *Metro Broadcasting v. FCC,* 497 U.S. 547 (1990), a case concerning FCC preferences for minority-owned broadcast stations. In *Metro Broadcasting,* the Solicitor General fully advocated for a law's *un*constitutionality. In *Buckley,* Attorney General Edward Levi and Solicitor General Robert Bork noted the law's problems, without advocating a specific conclusion (while General Levi's Justice Department fully defended the law in a separate brief).

In this case the Attorney General has determined that the *Buckley* model is appropriate. As noted above, the Attorney General continues separately to vigorously represent the Ohio Elections Commission and related respondents in this case. He files this separate *amicus* brief because of the critical importance of free speech to our democratic system, and because of the potentially chilling effect of Ohio law

on civic participation by ordinary citizens. The law at issue here does not merely apply to candidates who choose to run for office, or to political committees who form to advocate an issue. It can reach any "person" who speaks her mind, and recent history suggests that the law polices not just "false" speech, but speech that indisputably is protected under the First Amendment. The Attorney General has concluded that his solemn duty in these circumstances requires him to speak out through the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

Ohio's generalized false-statements provisions, OHIO REV. CODE §§ 3517.153 (complaint); 3517.21(B) & (B)(10) (any "false statement concerning a candidate"); 3517.22(B)(2) (any "false statement" concerning a ballot proposition or issue), raise a number of potential constitutional issues that, particularly in light of *United States v. Alvarez*, 132 S. Ct. 2537 (2012), merit substantive judicial review in the appropriate case.

Under Ohio's generalized false-statement prohibitions, a complaint may be filed by "any person," including but not limited to political opponents, who must merely attest that one of the statements was "false" and made with knowledge or reckless disregard of its falsity. The allegedly false speech then will be reviewed by a state administrative body that has been selected with specific reference to the political affiliations of its members. This process begins with a "probable-cause" hearing before a panel selected by the Chair of

the Commission. Complaints filed within 90 days before an election must be heard within three days. At these expedited hearings, the Commission is not required to allow any evidence, testimony, or argument to be presented, and the hearing may be conducted without the respondent present or even notified. Even if the respondent receives notice before this hearing, is able to appear, and is allowed to present evidence or argument, the respondent may have no opportunity prior to the hearing to gain discovery or to learn the basis for the complaint, which may be conclusory in nature.

If the panel finds "probable cause" – a very low hurdle – the Commission may issues subpoenas compelling the attendance of witnesses and the production of papers, books, accounts, and reports, and may seek enforcement through contempt proceedings in the Franklin County Court of Common Pleas. Eventually, if the full Commission determines by "clear and convincing evidence" that the respondent has violated the false-statements law, the Commission may refer the matter to the appropriate county prosecutor for prosecution.

Probable-cause hearings before the Commission are open public hearings and the media is specifically required to be notified of such hearings. As a practical matter, such hearings can be manipulated by complainants so that the costs they impose on a political opponent form part of the complainant's campaign strategy. There is reason to believe that some complainants do precisely that. The impact of a state agency declaring that it has found "probable cause" that an individual has made a false statement

(often described in the press as "lied") in the immediate run up to an election can be profound. As a practical matter, cases rarely go to the full Commission prior to the election, and pre-election judicial review is extremely uncommon. As a result, candidates who find their campaigns disrupted in the final days, even for what eventually prove to be true statements, have no effective relief – the damage is done. The probable-cause finding, which does not require even a preponderance of the evidence, is perceived by a substantial part of the electorate as the definitive pronouncement of the State of Ohio as to a candidate's or other speaker's truthfulness. It is not surprising, then, that a review of the Commission's files shows that a great many charges that result in a finding of probable cause are dismissed by the complainant after the election. It is not overly cynical to believe that in many cases, this is the complainant's intended strategy from the beginning.

Numerous speakers who have not made a false statement – even under the modest burden of proof for "probable cause" – are likewise forced to devote time, resources, and energy defending themselves before the Elections Commission, typically in the late stages of a campaign. Because the Commission has no system for weeding out frivolous complaints, candidates on the receiving end of a false-statement complaint must endure these burdens no matter how weak the complaint – to fail to defend would risk a public and onerous probable-cause finding. The only alternative to risking being subjected to these procedures is to self-censor or remain silent.

Thus, in practice, Ohio's false statements law allows the State's legal machinery to be used extensively by private actors to gain political advantage in circumstances where malicious falsity cannot ultimately be established.

ARGUMENT

IN PRACTICE, THE OHIO FALSE-STATEMENTS STATUTE MAY CHILL AND PENALIZE SPEECH AT CRITICAL TIMES IMMEDIATELY BEFORE ELECTIONS.

The State of Ohio has erected a legislative scheme that, while purporting to regulate false speech arguably unprotected by the Constitution, *see Pestrak,* 926 F.2d at 577, *but see Alvarez*, 132 S. Ct. 2537, in practice repeatedly scoops within its ambit protected truthful speech. Ohio's law therefore may chill constitutionally protected political speech even if adequate safeguards are included in the law, and especially if they are not.

A review of the Ohio statutory system sheds light on the ways in which the generalized false statements provisions of OHIO REV. CODE §§ 3517.22(B)(2) & 3517.21(B)(10) may, in fact, intentionally be used by private actors to chill opposing political speech. The practical effect of these provisions is to permit a private complainant to engage the State's legal and administrative processes in order to gain a campaign advantage without ever having to prove the falsity of a statement, even to the standard of a preponderance of the evidence.

A. The Workings of Ohio's False-Statements Law.

Under Ohio's generalized false-statement prohibitions, anyone who joins in political debate and makes statements deemed to be intended to influence the outcome of an election may end up on the receiving end of a complaint filed with the Ohio Elections Commission. A complaint may be filed by "any person," including but not limited to political opponents, who must merely attest that one of the statements was "false" and made with knowledge or reckless disregard of its "falsity." *See* OHIO REV. CODE §§ 3517.153 (complaint); 3517.21(B) & (B)(10) (any "false statement concerning a candidate"); 3517.22(B)(2) (any "false statement" concerning a ballot proposition or issue). Unlike an enforcement brought by state officials, there is not even a promise or presumption that this power to file a complaint will be used "responsibly." *Cf. United States v. Stevens,* 559 U.S. 460, 480 (2010).

The speaker will then find his statements reviewed by a state administrative body that has been selected with specific reference to the political affiliations of its members. *See* OHIO REV. CODE § 3517.152. If the complaint alleges a false statement and is made within 90 days of the general election, then within three days (or seven days if good cause is shown) the Elections Commission will convene a panel to "hold a hearing on the complaint to determine whether there is probable cause to refer the matter to the full commission for a further hearing." OHIO REV. CODE §§ 3517.154(A), 3517.156(B)(1).

While no more than half the members of the panel may be members of any one political party, the members of the panel are selected by the Chair of the Commission. The Chair of the Commission, however, is selected on a partisan basis and may be from a different political party than the speaker or, indeed, from a political party with a directly opposing candidate in an imminent election. OHIO ADMIN. CODE §§ 3517-1-05(A)(1)(a) & (c). Further, once formed, these panels may be reconstituted at the discretion of the Chair. OHIO ADMIN. CODE § 3517-1-05(A)(1)(f). While it can be presumed that members of the panel seek to carry out their responsibilities free from bias and partisanship, experience and common sense suggest that the perception of some potential speakers will be otherwise. Further, it should be noted that members of the Commission are not required to have any legal training.

At expedited hearings on complaints filed within 90 days prior to a general election the Commission is not required to allow any evidence, testimony, or argument to be presented, and the hearing may be conducted *ex parte*, without the respondent present. OHIO ADMIN. CODE §§ 3517-1-10(B) and (D)(1). Even if the respondent receives notice before this hearing and is able to appear, and allowed to present evidence or argument, the respondent may have no opportunity prior to the hearing to gain discovery or to learn the basis for the complaint, which may be conclusory in nature.

The probable-cause panel may dismiss the complaint for want of probable cause, may find probable cause and refer the complaint to the full

Commission for a merits hearing, or, if the "evidence is insufficient for the panel to make a determination," may "request that an investigatory attorney investigate the complaint" and then proceed to a full Commission hearing. OHIO REV. CODE § 3517.156(C).[3] The Commission may issues subpoenas compelling the attendance of witnesses and the production of papers, books, accounts, and reports, and may seek enforcement through contempt proceedings in the Franklin County Court of Common Pleas. OHIO REV. CODE § 3517.153(B).

If the full Commission determines by "clear and convincing evidence" that the respondent has violated the false statements law, the Commission may refer the matter to the appropriate county prosecutor for prosecution, OHIO REV. CODE § 3517.155(A)(1)(c), which can result in imprisonment for up to six months, or a fine of up to $5000.00. OHIO REV. CODE § 3517.992(V).[4]

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[3] Unlike most Ohio government agencies, the Ohio Elections Commission is specifically authorized to retain attorneys and investigatory attorneys without approval or supervision of the Attorney General. OHIO REV. CODE § 3517.152 (H)(2)(a).

[4] The referral passes directly to the appropriate prosecutor. While the Ohio Code provides that the Attorney General "shall advise the prosecuting attorneys of the several counties respecting their duties," OHIO REV. CODE § 109.14, it is not clear that he has the authority to order them to prosecute or not to prosecute any particular violation, or that he has control over the prosecutor's legal position prior to an appeal to the Supreme Court of Ohio. *See* OHIO REV. CODE § 309.08 (providing that "[t]he prosecuting attorney shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party, except for those required to be prosecuted by a special prosecutor pursuant to section 177.03 of the Revised Code or by

As outlined below, while only a full Commission finding may result in legal penalties, the initial hearing by a Commission panel may be the most important part of the statute in practice. This hearing is designed to determine whether probable cause exists for further investigation. By definition, it comes before any determination of falsity, or even likelihood of falsity, is made, and it can trigger substantial investigation and discovery obligations.

Finally, it must be emphasized that the statute applies not only to campaigns or large entities, but to any "person." Thus by its express terms the law applies to an individual blogger, to a person posting a comment on Facebook or other social media, or to a homemade sign or pamphlet made by a single individual, as well as to billboards, broadcast, and print advertisements.

B. Ohio's Statutory Scheme May Have a Chilling Effect on Protected Speech.

The petitioners in this case allege that their speech is and has been chilled by the possibility of investigation and prosecution, and will again be chilled in the future. In order to evaluate this claim, the Court should consider the operation of the Ohio statutes within the unique realm of elections.

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the attorney general pursuant to section 109.83 of the Revised Code," and further providing that "[i]n conjunction with the attorney general, the prosecuting attorney shall prosecute in the supreme court cases arising in the prosecuting attorney's county * * *").

As noted above, a Commission finding of "probable cause" may trigger substantial legal obligations for a respondent to a complaint. In this case, for example, three officials of petitioner Susan B. Anthony List were noticed for depositions, and both the Susan B. Anthony List and allied organizations were subjected to extensive document requests. JA 55-58, 67-71.

Beyond the explicit legal burdens that may result from a finding of "probable cause," however, the probable-cause hearings conducted by a panel of the Ohio Elections Commission may create other chilling effects on speakers. The hearings are, by law, public hearings. OHIO ADMIN. CODE §§ 3517-1-05(C), 121.22(C). The Commission is required to give advance notice of the hearing to the press. OHIO ADMIN. CODE § 121.22(F).[5] As one federal court has noted, "[t]he hearings become part of the media 'hype' surrounding a campaign, and they can be manipulated by candidates." *Pestrak v. Ohio Elections Commission,* 670 F. Supp. 1368, 1376 (S.D. Ohio 1987) *rev'd in part on other grounds,* 926 F.2d 573 (6th Cir. 1991); *see also State of Washington v. Vote No! Committee*, 957 P.2d 691, 698-99 (Wash. 1998) (finding that Washington's false-statements law was "manipulated by candidates to impugn the electoral process rather than promote truthfulness"). For one on the receiving end of a false-statements complaint, the impact of a state agency declaring that it has found "probable cause" that an individual has

[5] Compare this procedure to 2 U.S.C. § 437g(a)(12), providing for confidential investigations of complaints in federal campaign finance cases.

made a false statement (often described in the press as "lied") in the immediate run-up to an election can be profound.

A pre-election probable-cause determination has great effect beyond costs in time and money to the respondent. To the challenged speaker, such a determination itself may be viewed as a sanction by the State, because it is viewed as such by large segments of the electorate. Indeed, that result may be the precise outcome sought by the complainant in enlisting the State's enforcement procedure to his side in a campaign debate. A candidate who files a complaint that results in a "probable cause" finding may trumpet that in press releases and ads. *See, e.g.*, Robert Higgs, *For Ohio Candidates, Truth Can Often be Pretty Tricky*, Cleveland Plain Dealer, 2010 WLNR 21967428 (Nov. 1, 2010). In short, the stark realities of the system are such that speakers who find their statements challenged in the governmental review process may have little choice but to participate fully in the Commission's assessment of the speech at issue. And a finding of probable cause, if issued, will often harm, and is often intended by the complainant to harm, the speaker's campaign, regardless of any eventual final determination by the Commission.

And when a probable-cause finding is made close to an election, it is rare that the speaker will have the opportunity for vindication at a full Commission hearing, let alone before a court of law, before the election in question. This is important because an essential feature of an election is timeliness. The election arrives on a date certain, and once that date

has passed, it is extremely rare for any court to set aside the results of an election. A federal judicial decision to enjoin the results of an election is a "drastic, if not staggering" act. *Bell v. Southwell*, 376 F.2d 659, 662 (5th Cir. 1962). State courts, too, are appropriately reluctant to overturn election results. "[T]he courts of Ohio are hesitant to set aside an election result and will do so only in extraordinary cases, wrought with flagrant and determinative election irregularities." Steven F. Huefner, *Recourse for Election Worker Misconduct*, *in* THE E-BOOK ON ELECTION LAW (Edward Foley, *et al.*, eds. 2004), available at http://moritzlaw.osu.edu/electionlaw/ebook/part5/procedures_recount02.html#_ednref6; *see also In re Election of November 6, 1990 for the Office of Attorney General*, 569 N.E.2d 447, 449-50 (Ohio 1991) ("[C]ourts should be very reluctant to interfere with the election of public officials by the people, except to enforce rights or mandatory or ministerial duties as the statutes require. The survival of our system of government requires that proper respect be given to the will of the people as expressed at the ballot box. * * * Accordingly, we have adopted stringent standards for granting relief in election contests."). This stringent standard begets a reality: official actions that cannot be corrected before an election can rarely, as a practical matter, be remedied after an election.

It is not unduly cynical to suggest, as did the federal district court in *Pestrak*, 670 F. Supp. at 1376, that in at least some Elections Commission matters, complainants may time their submissions to

achieve maximum disruption of their political opponents while calculating that an ultimate decision on the merits will be deferred until after the relevant election. In Ohio, "savvy politicians know to make such complaints just before an election, so that the target of the complaint suffers bad publicity in the final days of the campaign, when it is too late for the complaint to be upheld or dismissed." *Speech Police*, COLUMBUS DISPATCH, 2012 WLNR 5833464 (Mar. 19, 2012). "Bringing * * * campaign practices actions against a candidate who has purportedly disseminated false statements is not always about correcting the record or remedying injury to reputation. It is often also about inflicting political damage. In this respect, the [action] itself can be a weapon of substantial political force." William P. Marshall, *False Campaign Speech and the First Amendment,* 153 U. PA. L. REV. 285, 300 (2004).

Even where the Commission does not find probable cause, the damage is often done. The speaker is forced to use time and resources responding to the complaint, typically at the exact moment that the campaign is peaking and his time and resources are best used elsewhere. In other words, the State has constructed a process that allows its enforcement mechanisms to be used to extract a cost from those seeking to speak out on elections, right at the most crucial time for that particular type of speech. And if the allegations turn out to be unfounded, there is no possibility of timely remedy.

The timing of complaints at the Commission supports the notion that some partisans may seek to

trigger actions immediately before the election, and that in such cases the finding of probable cause is itself the result that the complainant seeks. A review of Ohio Elections Commission records for 2010 and 2011 found that twenty-one complaints were filed alleging false statements under OHIO REV. CODE § 3517.22(B). Sixteen appear to have reached a probable cause panel within one week of the election. DeWine Brief *Amicus Curiae* at 13, *Coast Candidates PAC v. Ohio Elections Commission,* 2012 WL 4322517 (S.D. Ohio, Sep. 20, 2012) (NO. 1:11CV775), Doc. No. 18.

Further evidence of the manipulation of the system to penalize speech in the crucial run-up to an election, rather than to penalize false statements, is that, typically, no penalty is sought beyond the finding of a violation. From 2001 through 2011, the Elections Commission found a violation of § 3517.22(B) in 14 cases, and violations of § 3517.21(B) in 97 cases. *Id.* While the Commission reserves the authority to refer cases for prosecution, it does so only sporadically. In many cases, the Commission specifically reports that the "penalty" is the finding of a violation. *See e.g. Landis v. Scarmack*, Ohio Elections Commission, Case Summary Sheet 2012E-023 (2012), available at http://elc.ohio.gov/casesummarysheets/CaseSummary.stm ("2012 General Complaints," p. 24).

The time-sensitive nature of the election and the authoritative imprimatur given to the Commission as a purportedly expert, impartial state agency make a probable-cause hearing a serious matter, even beyond the ramifications of future hearings and

investigations. Once the State has harmed a speaker's cause by making a finding (whether of probable cause or of violation) for which no judicial review can, as a practical matter, be had before the election, many speakers feel effectively penalized for speaking.

C. The Statutory Scheme Has Few Safeguards To Protect First Amendment Rights.

The *Pestrak* appeals court upheld the constitutionality of regulating "false" speech in the forerunner to what is now OHIO REV. CODE § 3517.21(B), but also invalidated other provisions. Among other things, *Pestrak* noted that "clear and convincing evidence" was required before punishment could be levied against a speaker "in areas trenching on the first amendment." 926 F.2d at 578 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 285-86 (1964)). By definition, the probable-cause determinations of the Commission are not based on "clear and convincing" evidence. *See* OHIO REV. CODE § 3517.156. Thus, to the extent that a probable-cause finding has the practical effect of penalizing speech, it violates this requirement of *Pestrak* using a burden of proof even lower than a preponderance of the evidence.

Further, the *Pestrak* court noted that "[e]ven when there is the strongest reason for restraint, as in the possibility of public disorder, there must be an immediate opportunity for judicial review." 926 F.2d at 578. Yet if what a complainant seeks is not a prosecution, or even a final agency action, but merely

the ability to file a complaint, to engage the chilling power of the state, and perhaps to obtain a probable-cause finding shortly before voters go to the polls, it is clear that no adequate judicial review can be had before the election. This truly is a situation where justice delayed is justice denied for the innocent speaker.

D. The Statutory Scheme Pulls Within Its Ambit Much Protected Speech.

Few respondents contest an adverse Commission finding in court because the election will be over, won or lost, by the time any judicial hearing takes place, and so the remedy is largely meaningless. Even if the speaker is ultimately victorious, that speaker gets little or nothing for his or her efforts but additional legal bills. Nevertheless, the few challenges that do take place demonstrate that the State administrative apparatus affects a good deal of speech that is well within the ambit of constitutionally protected speech, and that the remedy is rarely, if ever, a timely one.

For example, in *Service Employees International Union District 1199 v. Ohio Elections Commission*, 822 N.E.2d 424 (Ohio Ct. App. 2004), a union was vindicated and the OEC's findings reversed, but not until a full year and a half after the election. Probable cause in the matter was found within two weeks before the election. A full merits hearing was held one day before the election, at which the Commission found a false statement violation by a vote of 4-3. *Id.* at 427-28. The next year the Court of Common Pleas affirmed the Commission's finding.

Id. at 428. The case then went to the Court of Appeals, which found that "[t]he statement at issue [was] ambiguous and susceptible of different interpretations," and that even assuming falsity for the sake of analysis, the "record lacks clear and convincing evidence that SEIU knew that the statement was false or acted in reckless disregard * * *. Moreover, * * * SEIU's interpretation of the statement is rational and has a basis in fact." *Id.* at 430, 432. Thus, roughly a year and a half after the election, the matter was remanded with orders to reverse the Commission's determination against the Union.

The few other reported cases too frequently tell similar stories. *See, e.g., Flannery v. Ohio Elections Commission*, 804 N.E.2d 1032 (Ohio Ct. App. 2004) (reversing OEC finding of violation nearly two years after election; complaint had been brought against Democratic candidate for Secretary of State by incumbent's campaign manager; Commission found probable cause and ultimately violations; trial court reversed; Court of Appeals ultimately held that, "even assuming arguendo that Flannery's statements were false, the Commission failed to sustain its burden that the statements were made with actual malice."); *Committee to Elect Straus Prosecutor v. Ohio Elections Commission*, No. 07AP-12, 2007 Ohio App. LEXIS 4797 (Ohio Ct. App. 2007) (affirming trial court reversal of two findings of violations where statements were not shown to have been made with actual malice; appeals court ruling came two years and eleven months after the election in which the statements were made); *Steve Buehrer for Congress*

v. Ohio Elections Commission, No. 07CVF12-17565 (Ohio C.P., Nov. 17, 2009) (Two years after the election, Commission false statement finding reversed: "There was no evidence before the Commission that the statement was false, or * * * published * * * knowing the same to be false or with reckless disregard of whether it was false or not.").

The public documents from the Ohio Elections Commission further show the burden that the false statements law places on *protected* speech. A prior review of Commission files between 2001 and 2010, revealed that the Commission found violations of OHIO REV.CODE § 3517.21(B) in 90 cases. But the Commission dismissed another forty-eight cases after a hearing, and 112 were dismissed because the complainant withdrew the complaint or failed to prosecute (typically after the election – a further indication that the goal may often be less an ultimate finding of a violation than a probable-cause finding before the election). Two hundred sixty were dismissed with findings of "no probable cause." *Coast Candidates PAC v. Ohio Elections Commission*, DeWine Brief *Amicus Curiae* 17, n. 5.

In short, numerous speakers who have not made a false statement even under the modest burden of proof for "probable cause" are forced to devote time, resources, and energy defending themselves before the Elections Commission, typically in the late stages of a campaign. And under OHIO REV. CODE § 3517.154, the Commission cannot even weed out frivolous complaints before the probable-cause hearing unless the complaint is technically deficient. False-statement complaints almost by definition are

filed by persons with hostile political motives. For such complainants, the fact that the complaint is dismissed, whether at probable cause or after a full hearing, may be almost beside the point. The damage inflicted is the time and cost to the opposition of having to defend itself in the campaign's final days. Vindication in court 18 months or two years later is scarcely vindication at all.

To summarize, an Ohio citizen who chooses to exercise his or her civic responsibilities by speaking out on issues of the day may face the issuance of government subpoenas, targeting by a government-appointed "investigative attorney" (even absent a finding of probable cause), and a politically damaging Commission determination labeling her speech "false" just before the election, all with the threat of criminal prosecution in the background. These factors may impel the speaker to take on the burden of responding to the complaint. This is so even if the respondent believes his or her speech is true, and it comes at the time – in the days immediately before the election – when such response is most distracting and burdensome. Alternatively, the risk of such consequences may force the speaker to remain quiet or self-censor statements that could be used to trigger even a frivolous complaint.

The impact of this system on speakers cannot be trivial. And while the petitioners in this case represent relatively large non-profit organizations, for an individual pamphleteer or blogger, especially, the threat of prosecution can be terrifying. *Cf. Corsi v. Ohio Elections Comm'n,* 981 N.E.2d 919 (Ohio App.

2012), *appeal not allowed* 134 Ohio St. 3d 1485, *cert. den.* 134 S. Ct. 163 (2013).

CONCLUSION

There is ample reason to believe that Ohio's false-statements law allows the State's legal machinery to be used extensively by private actors to gain political advantage in circumstances where malicious falsity cannot ultimately be established. In light of the ongoing stream of false-statement claims made under the most generalized and unspecific of Ohio's false-statements laws – some obviously more justified than others – the Attorney General submits this filing as a friend of the Court and the legal process, in the belief that this review of the statute in actual operation may be helpful to the Court in considering the questions presented in this case.

Respectfully submitted,

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