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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Whether a state statute that criminalizes knowingly false statements about an elected official's voting record, and thereby permits both prior restraint of and chilling effect on arguably true core political speech, violates the Freedom of Speech protected by the First and Fourteenth Amendments?

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy, the mission of which is to restore the principles of the American founding to their rightful and preeminent authority in our national life. The Center advances that mission through participation in cases of constitutional significance, including cases such as this in which the central purpose of the Freedom of Speech Clause, namely, the right of the people to criticize their elected officials, is at stake. The Center has previously appeared as *amicus curiae* in several other cases addressing core First Amendment rights, including *Harris v. Quinn*, No. 11-681 (U.S., pending); *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012); *Seifert v. Alexander*, 131 S.Ct. 2872 (2011) (cert. denied); *Doe v. Reed*, 561 U.S. 186 (2010); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

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[1] Pursuant to this Court's Rule 37(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

The Patient Protection and Affordable Care Act, 124 Stat. 119 (2010) ("Affordable Care Act" or "Act"), is one of the most controversial statutes passed by Congress in recent memory. It has been and remains the subject of intense political debate, affecting elections even before it was adopted, *see*, *e.g.*, Ewan MacAskill, "Republicans take Ted Kennedy's seat in dramatic upset, . . . throwing Obama's health reform plan into doubt," The Guardian (Jan. 20, 2010).[2] Adopted in 2010 on a straight party-line vote and after significant procedural irregularities, the Act is widely regarded as the principle cause of the historic losses suffered by the President's party in the 2010 midterm congressional elections.

One of the more contentious aspects of the law at the time it was adopted in March 2010 was the fact that it appeared to permit taxpayer funding of abortion. When Scott Walker's January 2010 victory in a special election to fill the late Ted Kennedy's Massachusetts Senate seat deprived supporters of the bill of a filibuster-proof majority in the Senate (and hence of the ability to reapprove the bill if the House of Representatives amended the bill that had been approved by the Senate),[3] pro-life Democrat supporters of health care reform in the House of Representatives threatened to vote against the Senate bill because it

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[2] Available at http://www.theguardian.com/world/2010/jan/20/republicans-massachusetts-scott-brown-obama-health.

[3] *See, e.g.*, Janet Hook, "Senator-elect Scott Brown welcomed as Republican hero after upset victory in Massachusetts," McClatchy-Tribune New Service (Jan. 21, 2010), available at http://www.cleveland.com/nation/index.ssf/2010/01/senator-elect_scott_brown_welc.html.

did not include the ban on taxpayer funding of abortion that had been included in a parallel bill previously approved in the House. *See, e.g.,* Huffington Post, "Bart Stupak, Dem Threatening to Kill Health Care Bill Over Abortion, Says Deal Looks Likely" (May 8, 2010);[4] *see also* Chris Silva, "Abortion amendment threatens to derail health reform," American Medical News (Nov. 23, 2009).[5] The stand-off was finally resolved when the President promised to issue an executive order extending the long-standing ban on federal funding of abortion to the new programs created under the Act. *See, e.g.*, Brian Montopoli, "Stupak to Vote Yes on Health Care Bill," CBS News (March 21, 2010);[6] *see also* Executive Order No. 13535, § 3, 75 Fed. Reg. 15599 (Mar. 24, 2010). But that resolution only highlighted the concern raised by pro-life groups that the Affordable Care Act did in fact provide taxpayer funding for abortion. *See, e.g.*, Thomas Peters, "White House Knew Obamacare Abortion Funding 'Ban' a Sham," LifeNews.com (Nov. 15, 2011).[7]

Not surprisingly, citizen groups opposed to the new health care law determined to make a representative's vote in support of the Act a campaign issue in the 2010 midterm elections. Pro-life groups in particular, including Petitioner Susan B. Anthony List, determined

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[4] Available at http://www.huffingtonpost.com/2010/03/08/bart-stupak-dem-threateni_n_490956.html.

[5] Available at http://www.amednews.com/article/20091123/government/311239982/4/.

[6] Available at http://www.cbsnews.com/news/stupak-to-vote-yes-on-health-care-bill/

[7] Available at http://www.lifenews.com/2011/11/15/white-house-knew-obamacare-abortion-funding-ban-a-sham/.

to highlight votes in favor of the Act by purportedly pro-life members of Congress, contending that a vote in favor of the Act was a vote to allow taxpayer funding of abortion. *See, e.g.,* Steven Ertelt, "Pro-Life Democrats Criticized, Thanked in Radio Ads on Pro-Abortion Health Care," LifeNews.com (April 6, 2010).[8] One of the people on Petitioner's target list was Respondent Steve Driehaus, a member of Congress from Ohio. Petitioner's planned ad campaign included billboards with the following message: "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion." Pet.App.3a.

As a sitting member of Congress, Representative Driehaus certainly had an ample platform on which to respond to Susan B. Anthony List's campaign message. He could have asserted, for example, that as a result of the President's Executive Order, his vote in favor of the Act was not really a vote to allow taxpayer funding for abortions. Or he could have defended his vote as a compromise with his pro-life position that was necessary to secure health care reform. Instead, Representative Driehaus threatened legal action against the owners of the billboard that the Susan B. Anthony List had rented, under Ohio's so-called "false statement" law, Ohio Revised Code § 3517.21(B)(10), which imposes criminal sanctions for the knowing dissemination of false statements about a candidate designed to promote the election or defeat of the candidate.[9] Pet.App.3a; JA26. Representative Driehaus

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[8] Available at http://archive.lifenews.com/nat6226.html.

[9] A violation of the law is a first-degree misdemeanor punishable by up to six months in prison and fine of five thousand dollars. Ohio Rev. Code §§ 3599.40; 3517.992(V). A second conviction results in loss of voting rights. *Id.* § 3599.39.

also filed a complaint with the Ohio Elections Commission against Susan B. Anthony List itself for its alleged violations of the "false statements" law. Pet.App.3a. In both cases, Representative Driehaus sought to quash political speech that was critical of a vote he had cast in Congress. He succeeded. The billboards never went up; Susan B. Anthony List had to expend precious time and resources in the weeks immediately prior to the election defending against the complaint and staving off the risk of criminal prosecution; and other groups, including co-Petitioner Coalition Opposed to Additional Spending and Taxes, were chilled from engaging in similar speech critical of their representative in Congress.

SUMMARY OF ARGUMENT

It is hard to imagine a First Amendment violation more at the heart of the Freedom of Speech than what occurred here, a prior restraint by an elected official of core political speech during an election on a hotly contested matter of policy. Preventing prior restraints on speech was central to the purpose of those who proposed and ratified the First Amendment, and it remains a core part of this Court's First Amendment jurisprudence. That is particularly true when the prior restraint at issue is of speech critical of elected officials' performance of their duties.

The threat of criminal prosecution under the Ohio "false statements" statute also poses a very real risk of chilling core political speech. Moreover, as the facts of this case make perfectly clear, giving an agency of the government the power to determine the truth or falsity of speech criticizing the actions of government officials on hotly contested matters of policy is too fraught with the potential for abuse to be tolerated in

a nation as devoted to the free (and free-wheeling) exchange of ideas as ours is.

ARGUMENT

I. Representative Driehaus's Threatened Legal Action Under the Ohio "False Statements" Statute Operated as a Prior Restraint on SBA List's Core Political Speech.

This Court has long recognized "that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The principle is as old as the Republic itself, borrowed from the authoritative work of William Blackstone, who described that the liberty of the press "consists in laying no previous restraints upon publications." WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND, § 13 (1769); *see also* James Wilson, Speech in Pennsylvania Ratifying Convention (Dec. 1, 1787), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 122 (1987) ("What is meant by the liberty of the press is, that there should be no antecedent restraint upon it").

By threating legal action against the owner of the billboard on which Susan B. Anthony List had planned to convey its political message, Representative Driehaus effectively imposed a prior restraint on SBA List's planned political speech.

The prior restraint at issue here is particularly troubling because the speech was in reference to the voting record of an elected official. The principal purpose of the Freedom of Speech clause of the First Amendment was to ensure that the people could exercise their sovereign will by speaking out against the

actions of their elected representatives. As James Madison noted during House debate over the proposed Bill of Rights, "[t]he right of freedom of speech is secured; ... *the people may therefore publicly address their representatives*, may privately advise them, or declare their sentiment by petition to the whole body; in all these ways they may communicate their will." 1 ANNALS OF CONG. 766 (Aug. 15, 1789) (Joseph Gales ed., 1789) (statement of Rep. Madison) (emphasis added); *see also Stromberg v. California*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system").

Madison's statement reflects a sentiment widely shared by the Founders, perhaps best reflected in one of the colonial-era political references with which many of the Founders were familiar, James Burgh's *Political Disquisitions*. "[I]t certainly is one of the most atrocious abuses," Burgh wrote, "that a free subject should be restrained in his inquiries into the conduct of those who undertake to manage his affairs." James Burgh, "Of the Liberty of Speech and Writing on Political Subjects," in 3 POLITICAL DISQUISITIONS: OR, AN ENQUIRY INTO PUBLIC ERRORS, DEFECTS, AND ABUSES 246 (1775), *reprinted in* 5 THE FOUNDERS CONSTITUTION 120 (1787). Indeed, Burgh even warned that "if it be dangerous and penal to inquire into their conduct, the state may be ruined by their blunders." *Id*.

II. The Very Existence of Ohio's "False Statements" Law Chills Constitutionally Protected Speech.

Even had Representative Driehaus not used the Ohio "False Statements" law to effect a prior restraint on speech critical of his vote in favor of the Affordable Care Act, the Ohio law, standing alone, also poses "a threat of criminal or civil sanctions after publication" and thereby "chills" speech in violation of the First Amendment. *Nebraska Press Ass'n*, 427 U.S., at 559; *cf. Gooding v. Wilson*, 405 U.S. 518, 521 (1972) (allowing overbreadth challenge even by one whose speech might constitutionally be prohibited because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression").

The facts of this case demonstrate just why the "chilled" prong of this Court's Free Speech jurisprudence developed. SBA List had to answer a complaint (and respond to extensive discovery) filed by a member of Congress contending that SBA List's speech about the real impact of the Affordable Care Act with respect to taxpayer funding of abortion was false. After the Ohio Elections Commission found "probable cause" that SBA List had engaged in false speech about an incumbent candidate's voting record, an investigation was launched that was onerous enough to dissuade other speakers, including co-Petitioner COAST, from making the same, hotly contested points that SBA List was making. In other words, "would-be critics of [Representative Driehaus's] official conduct [were] deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved

in court or fear of the expense of having to do so." *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964).

Moreover, even if SBA List's speech were false—and it is at least arguable that it was not—the First Amendment protects it absent compelling circumstances not present here. "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (citing G. Orwell, Nineteen Eighty–Four (1949) (Centennial ed.2003)).

This is particularly true when the subject of the criticism is a public official such as Representative Driehaus. Such public officials voluntarily take positions which open them up to public scrutiny and "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements then private individuals normally enjoy." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974). Counterspeech is in most such cases a perfectly adequate corrective to even false speech.

The alternative, reflected by Ohio's statute, poses simply too great a risk to First Amendment rights. As this Court recognized in the landmark case of *New York Times Co. v. Sullivan*, "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker." 376 U.S., at 271 (citing *Speiser v. Randall*, 357 U.S. 513, 525-526 (1958)).

Allowing an agency of government to determine the truth of speech that is critical of government officials on hotly contested matters of policy is fundamentally at odds with our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times*, 376 U.S., at 270. Recognition of that risk to core First Amendment rights is what led this Court in *New York Times* to exempt citizens from civil or criminal liability (absent actual malice) for speech, even erroneous speech, critical of public officials. *Id.*, at 282-83. And it renders the Ohio statute here constitutionally infirm.

CONCLUSION

Ohio's so-called "false statements" law cannot be reconciled with the First Amendment's protection of core political speech. The decision of the Sixth Circuit below, which effectively insulated that statute from any pre-conviction challenge, should be reversed and the statute should be declared unconstitutional.

Respectfully submitted,

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