

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 THE GOVERNMENT
INTEGRITY FUND IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

The Government Integrity Fund believes that our state and nation need leaders who support policies designed to foster economic growth and opportunity; limit the size and scope of government; and promote individual freedom and responsibility. Too often, those elected to govern do not understand how these three elements of a free society work together to result in economic progress and prosperity. Integral to these three elements is a free and open political debate. An educated and informed electorate begins with freedom of speech and the right to petition for redress of grievances. The unrestrained power of individual freedom is the catalyst for innovation and economic growth.

SUMMARY OF ARGUMENT

The ultimate arbiters of political speech should be the voters. The challenge of providing objective political fact-checking is inherently complicated by the interpretative nature of political speech. These challenges are a continual source of debate and criticism not only by political parties and their candidates, but among journalists themselves. The partisan government Commission responsible for adjudicating the Ohio law not only suppresses political speech through threat of criminal prosecution, but

¹ Pursuant to Supreme Court Rule 37.6, no person other than Counsel identified on the cover and his associate participated in authoring this brief. No entity other than the Government Integrity Fund provided financial support for this brief. The consent of the parties to the filing of this *amicus curiae* brief has been obtained and filed with the Clerk of the Court.

stands as a wall between voters and their would-be representatives.

ARGUMENT

I. FACT-CHECKING POLITICAL SPEECH IS INHERENTLY A POLITICAL INQUIRY

A. A State Commission Cannot be a Neutral Political Fact Checker

The “discovery and spread of political truth” among the voters requires the freedom to “think as you will and speak as you think.” *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring). Voters are the final arbiters in the democratic process. Whether a candidate be honest, or otherwise, the voters make the choice of who will best serve as their representatives. A partisan, state body that attempts to distinguish political truth from lie robs the electorate of their fundamental right to choose.

Ohio’s criminalization of political speech begins with a complaint and hearing process overseen by the Ohio Election Commission (“the Commission”). The seven members of the Commission are appointed by elected officials to determine what is and what is not a false statement about political candidates or their records. Ohio Rev. Code §§ 3517.21(B)(9-10); 3517.992(V). Ohio makes the Commission the gatekeeper of what the voters should or should not know, and it becomes the arbiter of political truth at the most critical points before an election. In effect, the Ohio law circumvents the democratic process.

B. Fact-Checking Political Speech is Quintessentially A Matter of Opinion

The political issues subject to the Commission's fact-checking are as limitless as those before their media counterparts. Political journalism is, by its very nature, a process of fact finding, checking and interpretation. A subset of political journalists has evolved a "specialty" focused wholly on judging the objective truth of political statements. These fact-checkers have emerged as self-appointed final authorities on what is "objectively" true and what is "political spin."

1. A.P. Fact-checking Sarah Palin's Ambitions

Personal motivations are inherently subjective and hardly reducible to the neutral determinations of fact checkers. A good example is the Associated Press putting eleven reporters to work fact-checking Sarah Palin's campaign memoir, *Going Rogue*.² In this instance the AP fact-checkers highlighted Palin's assertion that her motivations were rooted in a "purpose", rather than in ambition. The AP fact-checkers determined that her statements were less than truthful. The AP concluded that "few politicians own up to wanting high office for the power and prestige."³

² Greg Marx, "Straying from the Facts: AP's fact check of Palin reaches too far"(Nov.17,2009,1:33PM), http://www.cjr.org/campaign_desk/straying_from_the_facts.php?page=all,reviewing Sarah Palin, *GOING ROGUE: AN AMERICAN LIFE* (HarperCollins; 1st edition, 2009).

³ *Id.*

The allocation of resources required for the thoroughness of the AP investigation led other fact-checkers to conclude that the AP article was “as much a matter of interpretation and analysis as factual accuracy.”⁴ Respectfully, your *amicus* submits that this example underscores the inherent challenges facing fact-checkers who attempt to make objective determinations of truth or falsity out of statements open to many interpretations.

2. *President Obama and Government Funded Abortions*

In 2009, President Obama responded to criticism that health care reform legislation would provide government funded abortions as “not true” and called such charges “fabrications.”⁵ Douglas Johnson, legislative director for the National Right to Life Committee, disagreed, charging that President Obama’s statements “brazenly misrepresented”⁶ the abortion funding in the health care reform bill. *FactCheck.org* stepped in to decide “which side [was] fabricating.”

FactCheck.org concluded that the President’s characterization of the criticism as “fabrications” went

⁴ *Id.*

⁵ FactCheck.org, “Abortion: Which Side is Fabricating: Despite what Obama said, the House Bill would allow abortions to be covered by a federal plan and by federally subsidized private plans.”, <http://www.factcheck.org/2009/08/abortion-which-side-is-fabricating/> (last visited February 28, 2014).

⁶ *Id.*

too far.⁷ Its analysis indicated that the health care legislation provided two options under which a woman could receive an abortion. A federal plan and federal subsidies for private plans. However, it further concluded that the bill did not require Congress to appropriate federal money for abortion coverage. Seizing on the word “fabrication”, *FactCheck* effectively concluded that the President was not lying, but not wholly truthful.⁸ Your *amicus* submits that such interpretations are at the very core of fact-checking.

3. Mitt Romney’s “Binders of Women”

During the second Presidential debate in 2012, Mitt Romney claimed to have actively recruited women for his staff during his tenure as Governor of Massachusetts. Governor Romney stated that he sought input from women’s groups that resulted in “binders full of women” who were qualified for positions in his administration.⁹ Fact-checkers at CBS News questioned whether the binders were the result of a Romney initiative or a concerted advocacy effort on the part of women’s groups.¹⁰

CBS’ fact-checkers determined that Romney’s suggestion that the number of woman in his

⁷ *Id.*

⁸ *Id.*

⁹ Lucy Madison, “Fact-Checking Romney’s ‘binders full of women’ claim (Oct. 18, 2012, 10:27AM), <http://www.cbsnews.com/news/fact-checking-romneys-binders-full-of-women-claim/>.

¹⁰ *Id.*

administration was due to his staff's recruitment efforts was misleading. As evidence, CBS fact-checkers cited to statements by women's advocacy groups that argued that they approached both parties prior to the 2002 election. Romney campaign staffers disagreed, stating that they had engaged in an independent recruitment process which yielded the majority of woman who served in the administration.

CBS interpreted Romney's statements to mean that "he organically noticed a dearth of women applicants" as the basis for his recruitment push. Its conclusion that the statement was "misleading" rests on CBS' interpretation of Romney's initial statement, rather than a reasoned evaluation of the two camps' statements.

C. The Interpretive Problems Facing Fact-Checkers are Widely Acknowledged

Whether it be the "Truth-o-Meter" of *PolitiFact* or the "Pinocchios" of the *Washington Post's* "The Fact Checker," providing metrics that allow the public to scrutinize public figures has become an inescapable feature of the political landscape. These animated caricatures provide a convenient rubric to help the public distinguish political truth from lie. However, these fact-checking organizations, and their cartoon devices, have come under criticism.

Recently, *Politico*, a politics-centric news outlet, surveyed various fact-checkers. *Politico* analyzed metrics and outcomes to conclude that methods and interpretations hinder effective fact-checking. Additionally, while formally nonpartisan, fact checkers continue to have an up and down relationship with

partisan factions “depend[ing on] whose pants are adjudged to be on fire any given day.”¹¹

Politico’s survey revealed inconsistencies resulting from both methodology and the inherent challenges of fact-checking subjective statements. *PolitiFact*, for example, takes a categorical approach to fact-checking which results in “statements that are literally true getting ratings other than ‘true.’”¹² *Politico* observed that “Alabama Republican Dale Peterson’s technically truthful statement that he ‘was in the Marine Corps during the Vietnam War’ was rated ‘mostly false’ because he hadn’t served in Vietnam.”¹³

The credibility of political fact-checking is truly undermined when it “purports to resolve subjective disputes of political opinion under the guise of objective expertise.”¹⁴ Glenn Greenwald observed in a *Salon* article that cited to *PolitiFact*’s reliance on “supposedly neutral, ideology-free ‘expert[s]’” as the basis for their

¹¹ Ben Smith, “The facts about the fact checkers”, POLITICO (Nov.1, 2011, 10:51AM) available at <http://www.politico.com/news/stories/1011/67175.html>.

¹² *Id.*

¹³ *Id.*

¹⁴ Glen Greenwald, “*PolitiFact* and the Scam of Neutral Expertise: Many Deeply Biased ‘National Security Experts’ are Absurdly Treated as Objective and Ideology-Free”, SALON (Dec 5, 2011, 9:27AM), at http://www.salon.com/2011/12/05/Politico_and_the_scam_of_neutral_expertise/.

criticism of Ron’s Paul’s stance on the a 2011 defense authorization bill.¹⁵

Greenwald’s objections are not unique. Mark Hemingway of the *Weekly Standard* criticized the “veneer of objectivity”¹⁶ under which fact checkers operate. Hemingway cautioned that “the fact checker is less often a referee than a fan with a rooting interest in the outcome.”¹⁷

Amicus respectfully submits that while partisan motivations may color fact-checkers’ analytical lenses, there is a more fundamental problem facing fact-checkers across the political spectrum. Not all political statements are subject to a black-and-white determination. When fact-checkers channel their conclusions into categorical determinations, the context of underlying statements gets lost.

II. Nothing in Ohio Law Prohibits Anyone from Filing a Complaint Against a Fact-Checking Organization

Your *amicus* submits that the questionable accuracy of fact-checking organizations places their political analysis at the mercy of the Commission. Ohio political candidates can, and have, used the Commission to deter and suppress speech critical to the voters’ understanding of the issues. The Commission is not only a forum for prosecuting candidates, political

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

parties and advocacy groups. Fact-checkers and the media are also subject to the Commission's process. In the 2012 Ohio Senate race between State Treasurer Josh Mandel and Senator Sherrod Brown a political back-and-forth between the candidates earned Mandel a "pants-on-fire" from *PolitiFact*.¹⁸ *PolitiFact* analyzed Mandel's criticism of Brown's stance on "fracking" as siding with "Washington bureaucrats and fringe extremists."

In order to run the accusation down, *PolitiFact* analyzed the term "fringe extremist." To characterize a position as "fringe" or "extreme" necessarily implies an understanding as to what is considered mainstream. It should not come as a surprise that, when interviewed by *PolitiFact*, the three Ohio officials Mandel referenced "did not consider [themselves] to be fringe-like."

Ohio law criminalizes "false statements" made regarding a candidate's record. Under Ohio law, Mandel could bring *PolitiFact* before the Commission to determine what constitutes a "fringe extremist", and to defend its assessment that his characterization was a lie.¹⁹

A complaint under the Ohio law may be filed by "any person" who believes that the political speech of

¹⁸ PolitiFact.com, "Josh Mandel says Sherrod Brown has sided with Washington bureaucrats and fringe extremists on fracking.", (Dec 7, 2011, 6:00AM), <http://www.politifact.com/ohio/statements/2011/dec/07/josh-mandel/josh-mandel-says-sherrod-brown-has-sided-washingto/>

¹⁹ *Id.*

another is false. Ohio Rev. Code §§ 3517.21(B)(9, 10); 3517.992(V). All that is required of a hypothetically aggrieved party is to have a subjective perception that a political statement lacks absolute, black and white truth. These are political statements which in many cases may be technically true but literally untrue, such as in the case of Congressman Peterson's service in the Marines. Or more likely predicated upon value judgments or political interpretations had Josh Mandel challenged his Pinocchio rating.

The commentators cited in this brief acknowledge that fact-checking organizations struggle to separate factual determinations from political interpretation. But this is their role as journalists. The media serves a broader public debate rooted in the fundamental freedoms of speech and petition for redress of grievances that the Ohio law suppresses. Questions of accuracy or truth arise constantly in the political process, but "if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 375 (1927)(Brandeis, J. concurring). The mechanisms of popular government thrive not only on the free and open debate among the candidates and their platforms, but also on the trust that the candidates inspire in the electorate.

CONCLUSION

This case is an opportunity for the Court to reaffirm the foundational understanding that more speech, not less, is the remedy for political interpretation. Such an understanding can only be protected when a speaker can petition a federal court for pre-enforcement relief

from speech-repressive law. Accordingly, your *amicus* supports reversal of the Sixth Circuit's ruling.

Respectfully submitted,

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