CASE NOTE

SUSAN B. ANTHONY LIST V. DRIEHAUS AND THE (BLEAK) FUTURE OF STATUTES THAT BAN FALSE STATEMENTS IN POLITICAL CAMPAIGNS

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INTRODUCTION: THE RISE OF STATE STATUTES THAT BAN FALSE STATEMENTS IN POLITICAL CAMPAIGNS

Political campaigns can get ugly. Today's political candidates must be prepared for mudslinging targeted not just at their professional lives,[1] but also at their private lives,[2] appearance,[3] genealogy,[4] religion,[5] and countless

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1 *See, e.g.*, Susan B. Anthony List v. Driehaus, 805 F. Supp. 2d 412, 414 (S.D. Ohio 2011) (explaining how former Congressman Steve Driehaus's voting record became the subject of a 501(c)(4) organization's advertisement), *aff'd*, 525 F. App'x 415 (6th Cir. 2013), *rev'd*, 132 S. Ct. 2334 (2014). The district court's decision on remand is currently on appeal to the Sixth Circuit. *See* Notice of Appeal at 1, Susan B. Anthony List v. Ohio Elections Comm'n, 45 F. Supp. 3d 765 (S.D. Ohio 2014) (No. 10-0720).

2 *See, e.g.*, Jeet Heer, *Hillary Will Be Haunted by the Ghosts of Clinton Conspiracy Theories*, NEW REPUBLIC (Apr. 13, 2015), http://www.newrepublic.com/article/121523/hilary-clinton-2016-campaign-haunted-old-scandals [http://perma.cc/FP6U-92C7] (summarizing the many allegations that have been levied against the Clintons' personal lives).

3 *See, e.g.*, Chris Cillizza, *Cecily Strong Was Wrong About Hillary Clinton's Appearance Being Off Limits*, WASH. POST (Apr. 27, 2015), http://www.washingtonpost.com/blogs/the-fix/wp/2015/04/27/cecily-strong-was-wrong-about-hillary-clintons-appearance-being-off-limits [http://perma.cc/LQQ9-TP4Q]; Janell Ross, *Donald Trump Says He Wasn't Attacking Carly Fiorina's Looks. Yeah, Right.*, WASH.

other minutiae. The media has intensified its coverage of negative political advertising in recent years,[6] and this trend has prompted calls for more regulation to deter false statements in political advertising.[7]

Some states have responded. Currently, at least eighteen states have statutes on the books that punish false political statements with civil or criminal penalties.[8] But recent litigation has cast doubt on the statutes' validity: Washington's statute was held unconstitutional by an intermediate Washington court in 2005,[9] and *Susan B. Anthony List v. Driehaus* (handed down by the Supreme Court in 2014)[10] paved the way for invalidation of Minnesota's and Ohio's statutes.[11]

POST (Sept. 10, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/09/10/donald-trump-says-he-wasnt-criticizing-carly-fiorinas-looks-yeah-right [http://perma.cc/J86M-MDBE].

4 *See, e.g.*, Garance Franke-Ruta, *Is Elizabeth Warren Native American or What?*, ATLANTIC (May 20, 2012), http://www.theatlantic.com/politics/archive/2012/05/is-elizabeth-warren-native-american-or-what/257415 [http://perma.cc/V2LB-L95B].

5 *See, e.g.*, *Growing Number of Americans Say Barack Obama Is a Muslim*, HUFFINGTON POST (Aug. 19, 2010, 8:32 AM), http://www.huffingtonpost.com/2010/08/19/barack-obama-muslim_n_687360.html [http://perma.cc/S9JS-JJKD].

6 *See* Richard R. Lau & Ivy Brown Rovner, *Negative Campaigning*, 12 ANN. REV. POL. SCI. 285, 286-88 (2009) (describing and offering explanations for this phenomenon).

7 *See, e.g.*, Gerald G. Ashdown, *Distorting Democracy: Campaign Lies in the 21st Century*, 20 WM. & MARY BILL RTS. J. 1085, 1104 (2012) (urging courts to apply the *New York Times* "actual malice" standard strictly to deter false campaign speech, "instead of exclusively focusing on the countervailing interests in free expression"); Colin B. White, *The Straight Talk Express: Yes We Can Have a False Political Advertising Statute*, 13 UCLA J.L. & TECH. 1, 51-55 (2009) (proposing federal legislation); Peter F. May, Note, *State Regulation of Political Broadcast Advertising: Stemming the Tide of Deceptive Negative Attacks*, 72 B.U. L. REV. 179, 206-08 (1992) (proposing state legislation).

8 *See* ALASKA STAT. ANN. § 15.56.014(a)(3) (West 2014); COLO. REV. STAT. ANN. § 1-13-109 (West 2015); FLA. STAT. ANN. § 104.271 (West 2015); LA. STAT. ANN. § 18:1463 (West 2014); MASS. GEN. LAWS ANN. ch. 56, § 42 (West 2015); MICH. COMP. LAWS ANN. § 168.931 (West 2015); MINN. STAT. ANN. § 211B.06 (West 2015), *invalidated by* 281 Care Comm. v. Arneson, 766 F.3d 774 (8th Cir. 2014); MISS. CODE ANN. § 23-15-875 (West 2015); MONT. CODE ANN. § 13-37-131 (West 2015); N.C. GEN. STAT. ANN. § 163-274 (West 2015); N.D. CENT. CODE ANN. § 16.1-10-04 (West 2013); OHIO REV. CODE ANN. § 3517.21 (West 2015), *invalidated by* Susan B. Anthony List v. Ohio Elections Comm'n, 45 F. Supp. 3d 765 (S.D. Ohio 2014); OR. REV. STAT. ANN. § 260.532 (West 2015); TENN. CODE ANN. § 2-19-142 (West 2015); UTAH CODE ANN. § 20A-11-1103 (West 2014); WASH. REV. CODE ANN. § 42.17A.335 (West 2015), *predecessor invalidated by* Rickert v. State, 119 P.3d 379 (Wash. Ct. App. 2005); W. VA. CODE ANN. § 3-8-11 (West 2015); WIS. STAT. ANN. § 12.05 (West 2015).

9 *See Rickert*, 119 P.3d at 382-87 (ruling on the constitutionality of the statute's predecessor, WASH. REV. CODE ANN. § 42.17.530 (West 1999), which contained language substantially similar to the current WASH. REV. CODE ANN. § 42.17A.335 (West 2015)).

10 132 S. Ct. 2334 (2014).

11 *See 281 Care Comm.*, 766 F.3d at 785-96 (applying strict scrutiny to invalidate Minnesota's statute); Susan B. Anthony List v. Ohio Elections Comm'n, 45 F. Supp. 3d 765, 774-81 (S.D. Ohio 2014) (finding that Ohio's statute failed under strict scrutiny, and permanently enjoining its enforcement).

With the 2016 presidential election on the horizon, will other states' statutes fall in the wake of *Susan B. Anthony List*? Given the Supreme Court's other recent speech jurisprudence, the answer is probably yes.

I. *SUSAN B. ANTHONY LIST V. DRIEHAUS*

A. *Act One: Justiciability*

With *Susan B. Anthony List*, the Supreme Court set the stage for litigation challenging state statutes that punish false statements in political campaigns. In its decision, the Court did not decide the merits of whether a state statute (Ohio's, in this case) was unconstitutional for violating the First Amendment's speech protections. Instead, the Court adjudicated solely the preliminary issue of justiciability: whether standing and ripeness doctrines should prevent courts from adjudicating a preenforcement challenge to Ohio's statute.[12] In the words of the political organizations challenging the law, refusing to allow their preenforcement challenge would create "a paradigmatic Catch-22, whereby a speech-restrictive law cannot be challenged in federal court before, during, or after . . . enforcement proceedings—only once a speaker has been successfully convicted."[13]

The case began during the 2010 midterm election season. Susan B. Anthony List (SBA), a pro-life organization, prepared advertising to attack then-Representative Steve Driehaus; the advertisement would have read: "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion."[14] It was designed to criticize Driehaus's vote for the Patient Protection and Affordable Care Act of 2010.[15]

In response, Driehaus invoked Ohio's statute against false statements in political campaigns,[16] and he filed a complaint with the Ohio Elections

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12 *Susan B. Anthony List*, 132 S. Ct. at 2338.

13 Brief for Petitioners at 11, *Susan B. Anthony List*, 132 S. Ct. 2334 (No. 13-0193).

14 *Susan B. Anthony List*, 132 S. Ct. at 2339.

15 *Id.*

16 Ohio's statute declares that

> [n]o person, during the course of any campaign for nomination or election to public office or office of a political party, . . . shall knowingly and with intent to affect the outcome of such campaign do any of the following:
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> . . . Make a false statement concerning the voting record of a candidate or public official; [or]
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> . . . Post, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate.

Commission (OEC).[17] The OEC convened a probable cause panel, which, by a 2–1 vote, found probable cause that SBA had indeed run afoul of the Ohio statute.[18] The probable cause finding triggered discovery and a full hearing before the OEC.[19] But before the full hearing, Driehaus lost his bid for reelection and withdrew his OEC complaint.[20]

Meanwhile, a lawsuit in federal court was heating up. SBA had filed a federal suit to enjoin the OEC's proceeding, and another actor had also joined the suit: the Coalition Opposed to Additional Spending and Taxes (COAST), which operated two political action committees.[21] Although COAST had no pending OEC quarrel with Driehaus, it argued that its First Amendment free speech rights were also chilled by SBA's OEC proceedings.[22] Thus, COAST contended, the Ohio statutory regime should be held unconstitutional—even before enforcement against COAST itself.[23] By the time the federal district court consolidated the lawsuits, both SBA and COAST could bring only preenforcement challenges against the Ohio statute, because Driehaus's OEC complaint against SBA had been withdrawn.[24]

The preenforcement issue was a sticking point. Both the district court[25] and the Sixth Circuit[26] refused to hear the merits of the First Amendment claim. Instead, they dismissed SBA and COAST's claims on justiciability grounds, for lack of standing and lack of ripeness.[27]

On certiorari to the Supreme Court, the case attracted a maelstrom of commentary. At the merits stage, a total of twenty-one amicus briefs were filed.[28] Almost all the amici supported reversing the Sixth Circuit to allow SBA and COAST to pursue their preenforcement challenges to the Ohio

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OHIO REV. CODE ANN. § 3517.21(B)(9)–(10) (West 2015), *invalidated by* Susan B. Anthony List v. Ohio Elections Comm'n, 45 F. Supp. 3d 765 (S.D. Ohio 2014).

17 *Susan B. Anthony List*, 132 S. Ct. at 2339.

18 *Id.*

19 *Id.*

20 *Id.* at 2340.

21 Susan B. Anthony List v. Driehaus, 805 F. Supp. 2d 412, 414-16 (S.D. Ohio 2011), *aff'd*, 525 F. App'x 415 (6th Cir. 2013), *rev'd*, 132 S. Ct. 2334 (2014).

22 *Id.* at 416.

23 *Id.*

24 *See supra* note 20 and accompanying text; *see also Susan B. Anthony List*, 805 F. Supp. 2d at 416 (noting that the suits were consolidated on November 19, 2010).

25 *Susan B. Anthony List*, 805 F. Supp. 2d at 419-23.

26 Susan B. Anthony List v. Driehaus, 525 F. App'x 415, 418-23 (6th Cir. 2013), *rev'd*, 132 S. Ct. 2334 (2014).

27 *See* sources cited *supra* notes 25–26. SBA's claims were also dismissed for mootness. Susan B. Anthony List v. Driehaus, No. 10-0720, 2011 WL 3296174, at *6 (S.D. Ohio Aug. 1, 2011).

28 *See Susan B. Anthony List v. Driehaus*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/susan-b-anthony-list-v-driehaus [http://perma.cc/N2JT-8Y2V] (last updated July 18, 2014) (listing and providing links to all twenty-one amicus briefs).

law.[29] Notably, Ohio's Attorney General, even while representing the state respondents and defending the Sixth Circuit's opinion, filed an amicus brief in his independent capacity that noted significant flaws with Ohio's statutory regime.[30] Even satirist P.J. O'Rourke co-filed an amicus brief with the Cato Institute that—apart from its ability to persuade the Court to reverse the Sixth Circuit—was remarkable for its humor and ingenuity.[31]

When the Supreme Court handed down its unanimous opinion on June 16, 2014, it appeared that SBA, COAST, and their amici had succeeded. Although the Court limited its holding to the justiciability issues, it held that standing and ripeness considerations would not stand in the way of SBA and COAST's preenforcement challenges to Ohio's statutory regime.[32] The Court reversed the Sixth Circuit's opinion below,[33] leaving SBA and COAST free to fight Ohio's law on the merits.

B. *Act Two: The Merits*

On remand, therefore, the district court had to decide the constitutional First Amendment question: "*whether Ohio's political false-statements laws are the least restrictive means of ensuring fair elections*."[34] Just a week and a half before the district court's decision on remand, the Eighth Circuit had handed down its decision in *281 Care Committee v. Arneson,* which signaled the direction that the *Susan B. Anthony List* district court would ultimately take.[35] In *281 Care Committee*, the Eighth Circuit held an analogous Minnesota

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29 *See id.* (showing that the amicus briefs were filed shortly after the petitioners' brief on the merits, meaning that they were filed in support of the petitioners SBA and COAST, and not in support of the Ohio respondents). *But see* Brief of Amicus Curiae Ohio Attorney General Michael DeWine in Support of Neither Party at 4-7, Susan B. Anthony List v. Driehaus, 132 S. Ct. 2334 (2014) (No. 13-0193) (making practical arguments on the merits, rather than on the justiciability issues).

30 Brief of Amicus Curiae Ohio Attorney General Michael DeWine in Support of Neither Party, *supra* note 29, at 4-7; *see also* Marty Lederman, DeWine v. DeWine *(with the United States Somewhere in Between)*, SCOTUSBLOG (Apr. 8, 2014, 10:30 AM), http://www.scotusblog.com/2014/04/dewine-v-dewine-with-the-united-states-somewhere-in-between [http://perma.cc/57E4-UR78] (analyzing the Ohio Attorney General's dueling briefs).

31 *See* Brief of Amici Curiae Cato Institute and P.J. O'Rourke in Support of Petitioners at 18, Susan B. Anthony List v. Driehaus, 132 S. Ct. 2334 (2014) (No. 13-0193) ("Criminalizing political speech is no laughing matter, so this Court should reverse the court below."); *see also* Ilya Shapiro, Trevor Burrus & Gabriel Latner, *Truthiness and the First Amendment*, 16 U. PA. J. CONST. L. HEIGHTENED SCRUTINY 51, 51-52 (2014) (discussing the Cato Institute's amicus brief and commenting that "never before has one of our briefs generated this much attention").

32 *Susan B. Anthony List*, 132 S. Ct. at 2343-47.

33 *Id.* at 2347.

34 Susan B. Anthony List v. Ohio Elections Comm'n, 45 F. Supp. 3d 765, 769 (S.D. Ohio 2014).

35 766 F.3d 774 (8th Cir. 2014). The Eighth Circuit released the opinion in *281 Care Committee* on September 2, 2014. *Id.* at 774. The Southern District of Ohio's opinion in *Susan B. Anthony List* was released on September 11, 2014. 45 F. Supp. 3d at 765.

statute unconstitutional.[36] The court used strict scrutiny to adjudicate the constitutionality of the Minnesota statute, and it found that the statute failed the "narrowly tailored" prong of strict scrutiny analysis.[37] The statute was "simultaneously overbroad and underinclusive," and it was not "the least restrictive means" of advancing fair and honest elections.[38]

The Ohio district court's decision followed a similar analysis. It subjected the Ohio statute to strict scrutiny: the statute would survive First Amendment review only if it was "narrowly tailored to achieve a compelling governmental interest."[39] The court held that Ohio's proffered governmental interest ("protecting the integrity of its elections") was really just an interest in "*paternalistically* protecting the citizenry at large from 'untruths' identified by Government appointees."[40] Given that even the state's proffered interest was not a "compelling" interest under Supreme Court precedent,[41] the more questionable paternalistic interest was certainly was not compelling.[42]

Moving on to the "narrowly tailored" prong, the district court, following the Eighth Circuit in *281 Care Committee*, found that the Ohio statute chilled a substantial amount of truthful speech in its quest to prevent false speech.[43] The court repeated throughout its opinion a mantra drawn from the Supreme Court's 2012 opinion in *United States v. Alvarez*: instead of a state statutory regime, "*[t]he remedy for speech that is false is speech that is true*."[44] In other words, corrective "counterspeech"[45]—not the threat of state prosecution—should be the remedy for false campaign speech. Concluding that Ohio's statute failed to pass strict scrutiny, the court held the statute unconstitutional and permanently enjoined its enforcement.[46]

Ohio appealed to the Sixth Circuit.[47] The parties have filed their briefs,[48] and oral argument is scheduled for December 10, 2015.[49] Ohio's

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36 766 F.3d at 785-96.

37 *Id.* at 787-96.

38 *Id.* at 788.

39 *Susan B. Anthony List*, 45 F. Supp. 3d at 775 (quoting Abrams v. Johnson, 521 U.S. 74, 82 (1997)).

40 *Id.* at 775-76.

41 *See id.* at 776 (noting that "the Supreme Court did *not* describe the state interest in preventing false speech as 'compelling' or even 'substantial'").

42 *See id.* at 777 ("Defendants have failed to evidence that Ohio's statute actually protects the compelling interest of protecting the integrity of elections.").

43 *Id.* at 777-79.

44 *Id.* at 769-70, 773, 778 (quoting United States v. Alvarez, 132 S. Ct. 2537, 2550 (2012) (plurality opinion)).

45 *Id.* at 778.

46 *Id.* at 779-81.

47 *See* Notice of Appeal at 1, *Susan B. Anthony List*, 45 F. Supp. 3d 765 (No. 10-0720).

48 *See* Brief of Appellants-Defendants Ohio Elections Commission and Its Members, Susan B. Anthony List v. Ohio Elections Comm'n, No. 14-4008 (6th Cir. Feb. 11, 2015); Reply Brief of

opening brief argued that the district court was bound by prior Sixth Circuit precedent, which held that the statute merely punished defamation and fraud (unprotected speech categories under the First Amendment).[50] In *Pestrak v. Ohio Elections Commission*, the Sixth Circuit had upheld the OEC's "truth declaring" function and its ability to recommend prosecution.[51] Ohio's brief argued, therefore, that *Pestrak*'s holding was not modified by intervening opinions—not even the Supreme Court's decision in *Alvarez*.[52]

In the alternative, Ohio argued that, under *Alvarez*, only intermediate scrutiny should apply, because a majority of Supreme Court Justices did not agree that strict scrutiny is the rule for First Amendment speech restrictions.[53] And, Ohio continued, its false statement law passed muster under intermediate scrutiny, because the law "reflects a proper fit between ends and means" and "insulate[s] innocent speech by requiring *both* actual malice *and* clear and convincing evidence."[54]

SBA and COAST responded that *Pestrak* was outdated by the Supreme Court's opinion in *Alvarez*, so strict scrutiny must be the standard of review. In SBA's words, *Pestrak*'s premise—that false speech is categorically unprotected—"has been squarely rejected."[55] SBA contended that "the Supreme Court has made clear that the First Amendment prohibits content-discriminatory speech restrictions even *within* categories of otherwise-unprotected speech."[56] SBA and COAST further declared that strict scrutiny is the rule because the Ohio law targets false *political* speech, which all the Justices in *Alvarez* indicated should receive stricter review.[57] And, assuming that strict scrutiny applies, COAST observed that Ohio had failed to offer any showing that its law is narrowly tailored to serve a compelling governmental interest.[58]

Appellants-Defendants Ohio Elections Commission and Its Members, *Susan B. Anthony List*, No. 14-4008 (6th Cir. Apr. 16, 2015); Brief of Appellee Coalition Opposed to Additional Spending & Taxes, *Susan B. Anthony List*, No. 14-4008 (6th Cir. Mar. 30, 2015); Brief for Appellee Susan B. Anthony List, *Susan B. Anthony List*, No. 14-4008 (6th Cir. Mar. 30, 2015).

49 Notice of Oral Argument at 9:00 a.m. Thursday, December 10, 2015, *Susan B. Anthony List*, No. 14-4008 (6th Cir. Oct. 8, 2015).

50 Brief of Appellants-Defendants Ohio Elections Commission and Its Members, *supra* note 48, at 17-36.

51 926 F.2d 573, 578-80 (6th Cir. 1991). *Pestrak* had, however, invalidated the OEC's prior ability to levy fines and cease-and-desist orders against violators. *Id.* at 577-78.

52 Brief of Appellants-Defendants Ohio Elections Commission and Its Members, *supra* note 48, at 30-32.

53 *Id.* at 36-39.

54 *Id.* at 40-42.

55 Brief for Appellee Susan B. Anthony List, *supra* note 48, at 10-11.

56 *Id.*

57 *See id.* at 40-42.

58 Brief of Appellee Coalition Opposed to Additional Spending & Taxes, *supra* note 48, at 20-22.

Even if intermediate scrutiny were the rule, SBA's brief noted that the Ohio law would fail (1) for lack of evidence that the law preserves electoral integrity, (2) because counterspeech is a wholly effective remedy, (3) because it chills truthful speech, and (4) because it "discriminates in favor of powerful public officials with the greater capacity to correct falsehoods."[59]

In reply, Ohio charged SBA and COAST with failure to meet their initial burden of proof: because SBA and COAST are bringing a facial challenge to the Ohio statute, they must show that "a substantial number of instances exist in which the law cannot be applied constitutionally."[60] Ohio contended that SBA and COAST had wholly failed to carry their burden, for they "made no attempt" to prove unconstitutional applications of the Ohio law in a substantial number of circumstances.[61]

Amicus briefs, all supporting SBA and COAST, have been filed.[62] Oral argument is looming on the horizon. When the Sixth Circuit hands down its decision in the coming months, it will decide whether the Ohio law will live to see another day.

II. THE ENDGAME FOR OHIO'S STATUTE

How will the Sixth Circuit rule? It could heed SBA and COAST's arguments and strike down the Ohio law as unconstitutional, as the Eighth Circuit did for Minnesota's law in *281 Care Committee*. Or it could chart its own course and find a way to uphold the Ohio law, despite *Alvarez*.

The Sixth Circuit's analysis will depend on how it fits *Alvarez* into the preexisting political-speech doctrines established by Supreme Court decisions such as *New York Times Co. v. Sullivan*,[63] *Garrison v. Louisiana*,[64]

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59 Brief for Appellee Susan B. Anthony List, *supra* note 48, at 42–54.

60 Reply Brief of Appellants-Defendants Ohio Elections Commission and Its Members, *supra* note 48, at 5 (quoting Speet v. Schuette, 726 F.3d 867, 871-72 (6th Cir. 2013)).

61 *Id.* at 5-6.

62 *See* Amicus Curiae Brief of 1851 Center for Constitutional Law in Support of Plaintiff-Appelless [sic] and Affirmance, Susan B. Anthony List v. Ohio Elections Comm'n, No. 14-4008 (6th Cir. Apr. 6, 2015); Brief of the American Civil Liberties Union of Ohio Foundation, Inc. as Amicus Curiae in Support of Appellees Susan B. Anthony List and Coalition Opposed to Additional Spending and Taxes, *Susan B. Anthony List*, No. 14-4008 (6th Cir. Apr. 7, 2015); Brief of Amicus Curiae Center for Competitive Politics in Support of Plaintiffs-Appellees and in Support of Affirmance, *Susan B. Anthony List*, No. 14-4008 (6th Cir. Apr. 6, 2015); Brief of Amicus Curiae Center for Constitutional Jurisprudence in Support of Plaintiffs-Appellees, *Susan B. Anthony List*, No. 14-4008 (6th Cir. Apr. 6, 2015); Brief of Amicus Curiae Justice and Freedom Fund in Support of Plaintiffs-Appellees and Affirmance, *Susan B. Anthony List*, No. 14-4008 (6th Cir. Apr. 3, 2015).

63 376 U.S. 254 (1964).

and *McIntyre v. Ohio Elections Commission*.[65] *New York Times* stands for the "federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[66] In *Garrison*, the Court exported the *New York Times* "actual malice" standard for *civil* defamation suits and applied the same standard to states' *criminal* libel rules: for statements made against public officials, a speaker can face *criminal* sanctions only if the state proves he or she had (1) knowledge of a statement's falsity or (2) reckless disregard of whether the statement was false or true.[67] Both *New York Times* and *Garrison* emphasized the importance of "breathing space" in public debate, given that erroneous statements may inevitably accompany liberal freedom of expression.[68]

The Court's 1995 decision in *McIntyre v. Ohio Elections Commission* bears on the SBA case because it, like the SBA case, ruled on the validity of an Ohio election law. In *McIntyre*, the Court overturned an Ohio law that barred the distribution of anonymous campaign literature, but it justified its decision by citing with approval the Ohio law that barred false statements in political campaigns—the predecessor to the law at issue in *Susan B. Anthony List*.[69]

With just *New York Times*, *Garrison*, and *McIntyre* as key precedents, a court would likely uphold the Ohio false statement law. The Ohio law codifies the "actual malice" mens rea requirement from *New York Times* and *Garrison* precisely: "No person . . . shall *knowingly* . . . [p]ost, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either *knowing* the same to be false or with *reckless disregard* of whether it was false or not . . . ."[70] Given the Supreme Court's apparent approval of this regime, as expressed in *McIntyre*, there would seem to be nothing unconstitutional about it.

Enter *United States v. Alvarez*. In this 2012 decision, the Court did not consider a restriction on *political* speech, but a restriction on *content-based* speech (the Stolen Valor Act's punishments for false claims about receipt of

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64 379 U.S. 64 (1964).

65 514 U.S. 334 (1995).

66 *N.Y. Times*, 376 U.S. at 279-80.

67 *Garrison*, 379 U.S. at 74-75.

68 *See id.* at 74 (quoting *N.Y. Times*, 376 U.S. at 271-72).

69 *See McIntyre*, 514 U.S. at 349-53 (citing OHIO REV. CODE ANN. § 3599.09.1(B) (1988), which contains substantially the same text as OHIO REV. CODE ANN. § 3517.21 (West 2015), the statute at issue in the SBA case).

70 OHIO REV. CODE ANN. § 3517.21(B)(10) (emphasis added).

military decorations or medals)[71]—a broader category that includes political speech.[72] The four-Justice plurality declared that "exacting scrutiny" (where the government's chosen speech restriction will pass muster only if it is "actually necessary" to advance a "compelling" governmental interest) is the standard of review for content-based speech restrictions.[73]

The more moderate concurring opinion, endorsed by two Justices, proposed a more pragmatic approach. The concurring Justices would apply something akin to "intermediate scrutiny," which would require "limitations" to "make certain that the statute does not allow its threat of liability . . . to roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely or the need for the prohibition is small."[74] Together, the plurality and the concurring Justices formed a six-member majority that voted to hold the Stolen Valor Act unconstitutional, because it was not finely tailored to its purpose.[75]

Thus, beyond the *New York Times* and *Garrison* "actual malice" standard, *Alvarez* superimposes another set of First Amendment hurdles on state political-speech restrictions. If a law, like Ohio's, punishes false statements in political speech, then it must condition punishment on a finding of actual malice *and* must pass at least intermediate scrutiny.[76] For Ohio's false statement law to pass intermediate scrutiny, the Sixth Circuit must find sufficient "limitations" that would prevent the law from chilling protected speech (i.e., truthful speech, or false speech without actual malice).[77]

In its Sixth Circuit brief, the state of Ohio cited its law's heightened mens rea requirements and many procedural safeguards as sufficient limitations that would provide the "breathing space" for protected speech.[78] In particular, Ohio highlighted how the law punishes only statements with actual intent

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71 *See* United States v. Alvarez, 132 S. Ct. 2537, 2543 (2012) (plurality opinion).

72 *See* Susan B. Anthony List v. Ohio Elections Comm'n, 45 F. Supp. 3d 765, 775 (S.D. Ohio 2014) ("Ohio's statute is content-based because it applies only to certain speech about candidates. . . . The fact that the law targets political speech only further supports such a finding.").

73 *Alvarez*, 132 S. Ct. at 2543, 2548-49.

74 *Id.* at 2551-52, 2555 (Breyer, J., concurring in the judgment).

75 *See id.* at 2556; *see also id.* at 2551 (plurality opinion).

76 *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, J.; Powell, J.; and Stevens, J.))). In *Alvarez*, the Court's holding would be the position taken by the two concurring Justices.

77 *See supra* note 75 and accompanying text.

78 Brief of Appellants-Defendants Ohio Elections Commission and Its Members, *supra* note 48, at 42-44.

to affect the outcome of the campaign.[79] But even the concurring opinion in *Alvarez* noted that "there remains a risk of chilling that is not completely eliminated by *mens rea* requirements; a speaker might still be worried about being *prosecuted* for a careless false statement, even if he does not have the intent required to render him liable."[80] And procedural safeguards would not diminish the fear of prosecution. In fact, they may heighten a speaker's fear by making the possible prosecution more formal, so that a speaker has even greater need of counsel if he or she is summoned before the OEC.[81] Taking *Alvarez* into account, it will be difficult for the Sixth Circuit to uphold the Ohio false statement statute.

If the Sixth Circuit affirms the district court and finds the Ohio statute unconstitutional, two circuits (the Sixth and the Eighth) will have held that state statutes banning false statements in political campaigns violate the First Amendment. If litigants continue to fear state prosecution for political speech, challenges to other states' statutes will likely arise in coming years.[82] Other circuits would likely follow the Sixth and Eighth Circuits' approach (unless the statute being litigated differs significantly from the Ohio and Minnesota statutes). Other states' statutes may be in jeopardy.

In the unlikely event that the Sixth Circuit upholds the Ohio statute and reverses the district court, a nascent circuit split will emerge. As challenges to other statutes percolate through the lower courts, the circuit split could become entrenched and merit Supreme Court review.[83] Given the views of the majority of the Justices in *Alvarez*,[84] the Supreme Court would likely follow the Eighth Circuit's opinion in *281 Care Committee* and hold that the Constitution requires a level of scrutiny for political speech restrictions that invalidates statutes like Ohio's. Even if the Sixth Circuit rules in Ohio's favor, the future for Ohio's false statement law is bleak.

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79 *Id.* at 43.

80 *Alvarez*, 132 S. Ct. at 2555 (Breyer, J., concurring in the judgment).

81 *See* Brief for Appellee Susan B. Anthony List, *supra* note 48, at 46 (highlighting how the Ohio statute deters even truthful speech by imposing "burdensome Commission proceedings" that require speakers to hire legal counsel and respond to discovery requests "in the crucial days leading up to an election" (quoting Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2346 (2014))).

82 The Supreme Court's decision in *Susan B. Anthony List v. Driehaus* made preenforcement challenges to these statutes much more accessible by eliminating prior justiciability barriers to suit. *See supra* Section I.A. As a result, political advocacy groups like SBA can more easily challenge state statutes across the country.

83 *See* SUP. CT. R. 10 (indicating that a circuit split is a reason for the Court to grant certiorari).

84 *See supra* notes 73–75, 80 and accompanying text.

III. SITTING DUCKS: OTHER STATE STATUTES

What about the fifteen other state statutes that ban false statements in political campaigns and have not yet been invalidated by the courts?[85] Will any of them survive the wave of legal challenges that may follow the decisions in *281 Care Committee* and *Susan B. Anthony List*?

The short answer is probably not. Too many of them resemble (or could be argued to resemble) the Ohio statutory scheme in *Susan B. Anthony List* and the Minnesota statutory scheme in *281 Care Committee*. All of them, like the Ohio and Minnesota statutes, codify the *New York Times* "actual malice" standard.[86] Most of them, like the Ohio and Minnesota statutes, impose criminal sanctions on violators.[87] Some, like the Minnesota and Ohio statutes, can trigger administrative proceedings before state agencies at the whim of a complainant.[88] No matter what enforcement regime exists, would-be political speakers could allege that their speech is chilled by the fear of prosecution—no matter whether the threat is a civil suit or a criminal prosecution, and no matter whether the proceedings are before an agency or a court. Any statute that seeks to punish false political speech runs the risk of deterring protected political speech by imposing "burdensome" proceedings that require speakers to hire legal counsel and respond to discovery requests

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85 See *supra* note 8 for a list of the other statutes.

86 *See* sources cited *supra* note 8; *see, e.g.*, FLA. STAT. ANN. § 104.271(2) (West 2015) ("Any candidate who . . . with *actual malice* makes . . . any statement about an opposing candidate which is false is guilty of a violation of this code." (emphasis added)); OR. REV. STAT. ANN. § 260.532(1) (West 2015) ("No person shall cause to be written, printed, published, posted, communicated or circulated, any . . . publication . . . *with knowledge or with reckless disregard* that the . . . publication . . . contains a false statement of material fact relating to any candidate, political committee or measure." (emphasis added)).

87 *See* MINN. STAT. ANN. § 211B.06 (West 2015), *invalidated by* 281 Care Comm. v. Arneson, 766 F.3d 774 (8th Cir. 2014); OHIO REV. CODE ANN. § 3517.21, *invalidated by* Susan B. Anthony List v. Ohio Elections Comm'n, 45 F. Supp. 3d 765 (S.D. Ohio 2014); *see also* ALASKA STAT. ANN. § 15.56.014(a)(3) (West 2014); COLO. REV. STAT. ANN. § 1-13-109 (West 2015); MASS. GEN. LAWS ANN. ch. 56, § 42 (West 2015); MICH. COMP. LAWS ANN. § 168.931 (West 2015); MISS. CODE ANN. § 23-15-875 (West 2015); N.C. GEN. STAT. ANN. § 163-274 (West 2015); N.D. CENT. CODE ANN. § 16.1-10-04 (West 2013); TENN. CODE ANN. § 2-19-142 (West 2015); W. VA. CODE ANN. § 3-8-11 (West 2015). *But see* FLA. STAT. ANN. § 104.271(2) (imposing a $5,000 civil penalty on violators); MONT. CODE ANN. § 13-37-131(4) (West 2015) (declaring violators to be liable in a civil action brought under the statute "for an amount up to $1,000").

88 *Compare, e.g.*, FLA. STAT. ANN. § 104.271(2) ("An aggrieved candidate may file a complaint with the Florida Elections Commission . . . ."), *with* OHIO REV. CODE ANN. § 3517.21(C) ("After the complaint is filed, the commission shall proceed . . . ."), *and* 281 Care Comm. v. Arneson, 766 F.3d 774, 778 (8th Cir. 2014) (noting that under Minnesota's statute, with exceptions, "anyone can lodge a claim under § 211B.06 with the Minnesota Office of Administrative Hearings").

"in the crucial days leading up to an election."[89] Given the Supreme Court's speech-protective jurisprudence in *Alvarez*, it is unlikely that any false statement statute will survive constitutional scrutiny.[90]

CONCLUSION: THE DEMISE OF STATE STATUTES THAT BAN FALSE STATEMENTS IN POLITICAL CAMPAIGNS

Susan B. Anthony List v. Driehaus set the stage for across-the-board invalidation of many—if not all—state statutes that ban false statements in political campaigns. *Susan B. Anthony List* gave political speakers easier access to preenforcement lawsuits to challenge these statutes, and it is unlikely that any state statute can pass *Alvarez*'s high bar for constitutional scrutiny of content-based speech.

What is left for a political candidate who faces a mudslinging liar of an opponent? State statutory remedies are off the table, and even a *New York Times* defamation suit during election season might be dismissed on First Amendment grounds. (It could, like a state remedial scheme, chill both protected and unprotected speech.)[91] The injured political candidate is left with only the solution offered by the *Alvarez* plurality: "The remedy for speech that is false is speech that is true."[92] The candidate must fight false speech with true counterspeech—and hope that the American people can discern truth from lies.

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89 Brief for Appellee Susan B. Anthony List, *supra* note 48, at 46 (quoting Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2346 (2014)).

90 Mississippi's false statement statute is unique in one respect: it does not allow complaints brought "within the last five (5) days immediately preceding the date of any election." MISS. CODE ANN. § 23-15-875 (West 2015). This caveat may reduce a political speaker's fear of prosecution in the crucial days leading up to an election. But it does not immunize the statute from a First Amendment challenge: Mississippi would have to defend the statute as having sufficient limitations to ensure that "the statute does not allow its threat of liability . . . to roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely and the need for the prohibition is small." United States v. Alvarez, 132 S. Ct. 2537, 2555 (2012) (Breyer, J., concurring in the judgment); *see also supra* notes 74, 76–77 and accompanying text. Mississippi's time-based protection does nothing to diminish the threat of liability if a charge is filed more than five days before an election. And within the five-day grace period, the statute allows political speakers to say anything they like, no matter how false; the statute fails to protect the governmental interest in election integrity during that time. In brief, Mississippi's time-based limitation on its statute would not pass even intermediate scrutiny under *Alvarez*. It does not guard against the chilling of protected political speech nor does it rationally further the governmental interest in election integrity.

91 *See generally supra* notes 80, 90 and accompanying text.

92 *Alvarez*, 132 S. Ct. at 2550 (plurality opinion).

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