Ohio Elections Commission

Steve Driehaus  
3502 Boudinot Avenue  
Cincinnati, Ohio 45211

Complainant,

v.

Susan B. Anthony List  
1717 L Street NW, Suite 750  
Washington, DC 20036

Respondent.

Case No. 2010E-084

Answer and Affirmative Defenses to Rep. Driehaus’ Complaint

Respondent, the Susan B. Anthony List, by its attorneys, James Bopp, Jr., Anita Y. Woudenberg, and Joe La Rue, of Bopp, Coleson & Bostrom, for its Answer and Affirmative Defenses to the Complaint of Representative Driehaus states and alleges as follows:

Answer

Rep. Driehaus claims that a political advertisement (the “Advertisement”) sponsored by the Susan B. Anthony SBA List (the “SBA List”) during this 2010 election that refers to Rep. Driehaus violates Revised Code Sections 3517.21(B)(9) and (10). Specifically, he alleges that the Advertisement, which states “Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion,” is false. Revised Code Sections 3517.21(B)(9) and (10) proscribe false statements about political candidates. However, the Advertisement is true. In the alternative, it reflects the constitutionally protected opinion of the SBA List. Regardless of whether the Ad is true or false, the government is
prohibited under the First Amendment from ascertaining the truth or falsity of political speech and from punishing false speech.

**Facts**

The SBA List is a 501(c)(4) organization designed to advance pro-life causes. (Buchanan Aff. ¶ 2.) Its five-part mission is “to elect pro-life women to Congress through its SBA List Candidate Fund,” “to educate voters on critical pro-life issues and on upcoming legislation,” “to train and equip pro-life activists nationwide to run successful political and grassroots campaigns,” “to promote positive responses in both traditional and new media to dispel the myths and distortions of the abortion lobby,” and “to advocate the passage of pro-life legislation in Congress, directly with legislators and through mobilizing direct citizen lobbying.” (Buchanan Aff. ¶ 3.)

To advance this mission, the SBA List decided to inform the public about the political conduct of certain Congressmen who voted in favor of the Patient Protection and Affordable Care Act ("PPACA"). (Buchanan Aff. ¶ 4.) The PPACA, passed on March 23, 2010, allows for tax-payer funded abortion. (Buchanan Aff. ¶ 6; Johnson Aff. ¶ 25.)

The PPACA first appeared in Congress in the form of H.R. 3962, which was over 2,000 pages long. (Johnson Aff. ¶ 11.) This bill authorized and/or allowed for federal subsidies for abortion, including a public option to pay for any type of elective abortion. (Johnson Aff. ¶ 11.)

Because of these abortion-related deficiencies, Reps. Stupak and Pitts offered an amendment that removed provisions that directly authorized abortion funding and imposed a blanket prohibition on interpreting the bill to allow abortion subsidies. (Johnson Aff. ¶ 12; Buchanan Aff. ¶ 13; McClusky Aff. ¶ 23.) The amendment was
debated, with Congressmen from both the Republican and Democratic Parties recognizing the need for the amendment and advocating for its adoption, including Mr. Stupak (D-MI), Mr. Pitts (R-PA), Ms. Dahlkemper (D-PA), Mr. Lipinski (D-IL), Mr. Ellsworth (D-IN), Mike Pence (R-IN), Ms. Rodgers (R-WA), and Paul Ryan (R-WI). (Floor Debate on Stupak Amendment, Ex. X.) The amendment was adopted, (Roll Call Vote for Stupak Amendment, Ex. W), and upon House approval of the now-amended H.R. 3962, it was sent to the Senate. (Johnson Aff. ¶ 13.) Rep. Drieuhaus voted both for the amendment and the bill as amended. (Roll Call Vote for Stupak Amendment, Ex. W; Roll Call Vote for PPACA (with Stupak Language), Ex. Y.)

In the Senate, a new bill was written, entitled the “Patient Protection and Affordable Care Act” (the “PPACA”). (PPACA Excerpts, Ex. BB.) This new bill was substantively parallel to the pre-amended H.R. 3962. (Johnson ¶ 15; McClusky Aff. ¶ 22.) Senators Nelson and Hatch offered an amendment that was similar to the Stupak-Pitts amendment in that it sought to prevent any funds appropriated under the bill from being used to subsidize abortions or insurance plans that cover abortion. (Johnson ¶ 18.) The amendment was tabled and never became part of the Senate bill. (Johnson ¶ 19.)

Senators Nelson and Boxer offered a “manager’s amendment” to the bill, which created a program subsidizing health insurance for persons meeting certain eligibility requirements. (Johnson Aff. ¶ 20.) The manager’s amendment allows the federal government to subsidize private insurance plans that cover abortion by requiring the government to pay premiums for private health insurance plans that cover any or all abortions. (Johnson Aff. ¶ 22.) The manager’s amendment was adopted and, under the bill number H.R. 3590, the Senate bill was approved and sent to the House of
Representatives. (Roll Call Vote for PPACA (Senate Version), Ex. BB; Johnson Aff. ¶¶ 21, 23.)

This final version of the PPACA contained express allowances for taxpayer-funded abortion. For example, Section 1303(a)(1)(B)(ii) states:

**ABORTIONS FOR WHICH PUBLIC FUNDING IS ALLOWED**—The services described in this clause are abortions for which the expenditure of Federal funds appropriate for the Department of Health and Human Services is permitted, based on the law as in effect as of the date that is 6 months before the beginning of the plan involved.

The PPACA also expressly proscribes taxpayer-funded abortion in specific circumstances. It prohibits school-based health centers from using grant money for abortion. (Catholic Legal Analysis, Ex. I, at 2; PPACA § 4101.) And it prohibits health insurance exchanges from using tax credits and cost-sharing reduction payments to pay for elective abortions. (Catholic Legal Analysis, Ex. I, at 3; PPACA § 1303(b)(2).) However, the plan allows federal subsidies of private insurance plans that cover abortions. (Johnson Aff. ¶ 31; PPACA § 1301 et seq.) It allows federal funding to be directed to community health centers that perform abortions. (Buchanan Aff. ¶ 10; Johnson Aff. ¶ 53-54; McClusky Aff. ¶ 16; PPACA § 10503.) And it creates a Pre-Existing Condition Insurance Plan (PCIP) that authorizes $5 billion in federal funds and allows for elective abortions. (PPACA § 1101; Johnson Aff. ¶ 34; McClusky Aff. ¶ 16; Factcheck.org, Ex. K; CRS Memo, Ex. N.)

Despite the PPACA's allowances for taxpayer-funded abortion, the House of Representatives passed H.R. 3590 on March 21, 2010. (Roll Call Vote for PPACA (Final Version), Ex. BB; Johnson Aff. ¶ 30.) Rep. Driehaus was one of 219 Congressmen who voted for the bill. (Roll Call Vote for PPACA (Final Version), Ex. BB.) One hundred
seventy-eight Republican and 34 Democratic congressmen voted against the bill, (Roll Call Vote for PPACA (Final Version), Ex. BB), and some very vocally. (See Statement of Rep. Lipinski (D-IL), Ex. V) ("... of great concern to me and to a significant majority of my constituents, this bill changes current federal policy and provides funding for abortion. This is not acceptable.")

Upon the passage of the bill, President Obama issued Executive Order 13535 purportedly to ensure that the PPACA would not allow tax-payer funded abortions. (Compl. Ex. B.) The Order at the outset expressly provides three exceptions to taxpayer-funded abortion under the public option: in circumstances of rape, incest, or life of the mother. (Order 13535, Compl. Ex. B, at 2.) Section 2 of the Order prohibits direct payment of federal dollars to pay for abortion services in health insurance exchanges, but nowhere proscribes federal dollars be used to subsidize private insurance premiums, which in turn can be used to pay for abortions. (Buchanan Aff. ¶ 121; McClusky Aff. ¶ 28; Catholic Legal Analysis, Ex. I, at 4; PPACA 1303(a)(2).) With or without the Order, the PPACA allows for taxpayer funded abortions. (Buchanan Aff. ¶ 6; McClusky Aff. ¶ 27.)

Because of Rep. Driehaus' vote in favor of the PPACA, the SBA List created advertising materials (the "Advertisement") which state: "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion." (Buchanan Aff. ¶ 16; Compl., Ex. A.) The Advertisement was scheduled to go up on billboards in the Cincinnati area. (Buchanan Aff. ¶ 16.)

In arriving at its conclusion that Rep. Driehaus voted for taxpayer-funded abortion, the SBA List reviewed numerous documents from reputable sources, including
materials published by the United States Conference of Catholic Bishops, the Congressional Research Service, the National Right to Life Committee, and Rep. Lipinski of Illinois. (Buchanan Aff. ¶¶ 9-15.) It had no reason to believe any of these documents were false or that any of these sources were lying. (Buchanan Aff. ¶ 16.)

The statutes Rep. Driehaus cites state, in relevant part:

(B) No person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following:

(9) Make a false statement concerning the voting record of a candidate or public official;

(10) 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.

R.C. § 3517.21. For a violation of Revised Code Sections 3517.21(B)(9) and (10) to even be possible, the statements at issue must be facts. Id. They must be knowingly false, id. § 3517.21(B)(9) and (10), or made with reckless disregard of whether it was false or not, id. § 3517.21(B)(10).

Argument

Probable Cause Standard.

According to the Commission, to determine whether probable cause exists to warrant prosecution of the respondent, the Commission assesses 1) whether there is a reasonable basis to believe that the respondent is the proper party, and 2) whether there is a reasonable basis to believe the respondent made a false statement in violation of the cited statutes. The SBA List does not dispute that it is the sponsor of the Advertisement.
So before the Commission is the question of whether Rep. Driehaus has established a reasonable basis to believe the SBA List made and disseminated a false statement in violation of R.C. §§ 3517.21(B)(9) and (10).

As demonstrated below, Rep. Driehaus has not established such a reasonable basis. Based on the facts and the law, it is clear that there is no cause to find that the SBA List violated R.C. §§ 3517.21(B)(9) or (10). The Advertisement is a true statement. Alternatively, it is the SBA List’s constitutionally protected opinion. Moreover, even if the Advertisement were a knowingly false statement, under the First Amendment to the United States Constitution, the government cannot punish false political speech. At most, political candidates and public officials may individually seek damages for false speech uttered with actual malice. For these reasons, the Commission should find no probable cause to initiate proceedings against the SBA List and should dismiss Rep. Driehaus’ Complaint with prejudice.

I. The List Did Not Violate R.C. §§ 3517.21(B)(9) Or (10).

Ohio Revised Code Section 3517.21(B) states, in relevant part:

(B) No person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following:

(9) Make a false statement concerning the voting record of a candidate or public official;

(10) 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.
To violate these provisions, Rep. Driehaus must show both that 1) a false statement was made; and 2) the false statement was made knowingly, id. § 3517.21(B)(9), or was disseminated knowingly as false or with reckless disregard of whether it was false or not. Id. § 3517.21(B)(9); id. § 3517.21(B)(10). Rep. Driehaus alleges that the SBA List violated these provisions because the Advertisement falsely states that Rep. Driehaus voted for taxpayer-funded abortions. (Compl. at 4.) Rep. Driehaus’ claims are fatally flawed.

A. The Commission Should Construe The Law To Avoid Unconstitutional Results.

In applying § 3517.21(B)(9) and (10) to the facts of this case, the Commission should construe these provisions to avoid any unconstitutional results. Statutes that seek to limit, or have the effect of limiting political speech are to be strictly and narrowly construed. See Republican Party of Minnesota, 536 U.S. 765, 781 (2002) (quoting Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214, 222-223, 109 S.Ct. 1013 (1989). While a statute, properly construed, may legitimately proscribe speech that is not constitutionally protected under the First Amendment, the United States Supreme Court has cautioned that such statutes must be narrowly construed in order to avoid a chilling effect on protected speech resulting from doubt as to the statute’s scope or the limits on what it proscribes. See Watts v. United States, 394 U.S. 705, 707, 89, S.Ct. 1399, 1401 (1969) (‘‘... a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind.’’); Virginia v. Black, 538 U.S. 343, 365, 123 S.Ct. 1536, 1551 (2003) (in the absence of a narrow construction of statutory provision prohibiting certain expression, “the provision chills constitutionally protected political speech because of the possibility
that the Commonwealth will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.

Watts involved a federal statute that prohibited making threats against the President or other federal officers. The petitioner Robert Watts was accused of having violated this statute in the context of protesting his possible induction into the armed forces by stating, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." Watts, 394 U.S. at 1401. In construing the statute as it related to "threats" against the President, the United State Supreme Court stated:

We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. For we must interpret the language Congress chose "against the background of a 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.

Id. (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 721 (1964)). While the Supreme Court held that the statute itself was not facially unconstitutional, it found that a proper construction of the statute must be narrowly limited to clear and direct threats of actual harm. To apply the statute to speech that merely allowed for an inference or implication of a threat, without more, would run afoul of the First Amendment.

The United States Supreme Court also addressed the importance of strictly construing a statute which impacts or limits political speech in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976). Buckley involved a challenge to the constitutionality of the Federal Election Campaign Act, which, in part, imposed certain campaign expenditure
limits. One of the provisions of the Act, Section 608(e)(1), stated that “[n]o person may make any expenditure … relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000.” *Id.*, 424 U.S. at 39 (emphasis added). The Court held that the phrase “expenditure … relative to a clearly identified candidate” was “so indefinite” that, by itself, “fail[ed] to clearly mark the boundary between permissible and impermissible speech …” *Id.*, 424 U.S. at 41. Accordingly, the Court held that this phrase must be limited to mean “advocating the election or defeat of a candidate.” *Id.*, 424 U.S. at 42.

Recently, a Wisconsin panel reviewed charges against Wisconsin Supreme Court Gableman for a political ad he ran against his opponent. In reviewing the relevant statutory provisions, the Panel construed the statute narrowly to bring it in line with First Amendment principles, and dismissed the complaint. *In Re Gableman*, No. 2008AP2458-J, at 15 n. 10 (2010) (attached as Ex. DD.) The Commission should do likewise here.

Section 3517.21(B)(9) prohibits “[m]ak[ing] a false statement concerning the voting record of a candidate or public official.” Section 3517.21(B)(10) prohibits “[p]ost[ing], publish[ing], circulat[ing], distribut[ing], or otherwise disseminat[ing] 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.” Unlike § 3517.21(B)(10), § 3517.21(B)(9) does not require the speaker to know a statement is false or to recklessly
disregard whether that statement is false. Under the First Amendment, restrictions on speech must have such “actual malice” requirements.

In *New York Times v. Sullivan*, the United States Supreme Court held that public officials must prove actual malice to assert defamation claims against private citizens:

The constitutional guarantees require, we think, a 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.

376 U.S. 254, 280 (1964). Thus,

where an article is published and circulated among voters for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith and without malice, the article is privileged, although the principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff; and in such a case the burden is on the plaintiff to show actual malice in the publication of the article.

*Id.* at 280-81. In order for damages and penalties to be constitutionally imposed against the SBA List, the SBA List must have run its Advertisement with actual malice.

Significantly, § 3517.21(B) establishes a “knowing” standard “to all of the following,” which includes § 3517.21(B)(9). To ensure that the statute is interpreted to avoid unconstitutional results, the Commission should read § 3517.21(B)(9) to have the “knowing” actual malice standard.

B. The Advertisement Is True.

The Advertisement states: “‘Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion.” (Compl. Ex. A.) Rep. Driehaus’ complaint focuses on the second sentence, claiming it is false. (Compl. at 4.)
Crucially, Rep. Driehaus nowhere proves that the Advertisement is false. Throughout his Complaint, he asserts that the PPACA, coupled with Executive Order 13535 (the “Order”), does not allow taxpayer-funded abortions. Yet nowhere does he cite to any portion of the PPACA or quote any of its language that supports the truth of that statement. This is because he cannot. President Obama would not have signed an executive order purporting to restrict taxpayer-funded abortion to circumstances of rape, incest, and the life of the mother if the PPACA already proscribed such funding.

Indeed, the PPACA contains a provision that expressly allows for taxpayer-funded abortion. Section 1303(a)(1)(B)(ii) states:

ABORTIONS FOR WHICH PUBLIC FUNDING IS ALLOWED---The services described in this clause are abortions for which the expenditure of Federal funds appropriate for the Department of Health and Human Services is permitted, based on the law as in effect as of the date that is 6 months before the beginning of the plan involved.

That the PPACA allows for taxpayer-funded abortion is objectively true.

The PPACA does create two bans on taxpayer-funded abortion. First, it prohibits school-based health centers from using grant money for abortion. (Catholic Legal Analysis, Ex. I, at 2; PPACA § 4101.) Second, it prohibits health insurance exchanges from using tax credits and cost-sharing reduction payments to pay for elective abortions. (Catholic Legal Analysis, Ex. I, at 3; PPACA § 1303(a)(2).) However, these are the only contexts in which taxpayer-funded abortion is proscribed. The plan allows federal subsidies of private insurance plans that cover abortions. (Johnson Aff. ¶ 31; PPACA § 1303(b)(2).) It allows federal funding to be directed to community health centers that perform abortions. (Buchanan Aff. ¶ 10; Johnson Aff. ¶ 53-54; McClusky Aff. ¶ 16; PPACA § 10503.) And it creates a Pre-Existing Condition Insurance Plan (PCIP) that
authorizes $5 billion in federal funds and allows for elective abortions.¹ (PPACA § 1101; Johnson Aff. ¶ 34; McClusky Aff. ¶ 16; Factcheck.org, Ex. K; CRS Memo, Ex. N.) In these circumstances, the PPACA objectively permits taxpayer-funded abortion.

Moreover, that two amendments were offered during the PPACA’s development seeking to remove taxpayer-funded abortions from the scope of the bill strongly suggests that the PPACA, which passed unamended, includes such funding. Representatives Stupak and Pitt’s amendment to the substantively identical H.R. 3962 was supported by 240 votes in the House. (Roll Call Vote for Stupak Amendment, Ex. W.) That means that at least 240 Congressmen—including Rep. Driehaus—believed the unamended bill allowed for taxpayer-funded abortion. Likewise, 45 members of the Senate wanted to proceed with review of the Nelson-Hatch amendment, suggesting that nearly half of the Senate thought the amendment’s purpose “[t]o prohibit the use of Federal funds for abortions” had merit. (Roll Call Vote for Nelson Amendment, Ex. Z.) Yet the PPACA that became law contained none of these amendments. The PPACA objectively allows and authorizes taxpayer-funded abortion.

To bolster his unsupportable claim that the PPACA does not allow taxpayer-funded abortion, Rep. Driehaus points to the Order. This effort fails on two levels. First, as already mentioned above, that the President thought the Order was necessary to ensure that taxpayer-funded abortions do not occur makes Rep. Driehaus’ assertion that the PPACA already proscribes taxpayer-funded abortion dubious. There would be no need for the Order if the PPACA already proscribed such funding.

¹ The Obama administration chose to limit abortion coverage in PCIPs to cases of rape, incest, or where the life of the mother is endangered. (DHHS Press Release, Ex. O.) Rep. Driehaus did not vote for this limitation, nor does it proscribe taxpayer funding for all abortions.
Second, the Order itself does not proscribe taxpayer-funded abortion. Most obviously, the Order at the outset expressly provides three exceptions to taxpayer-funded abortion: in circumstances of rape, incest, or life of the mother. (Order 13535, Compl. Ex. B, at 2.) But more subtly, while Section 2 of the Order prohibits direct payment of federal dollars to pay for abortion services in health insurance exchanges, it nowhere proscribes federal dollars be used to pay for private insurance premiums, which in turn can be used to pay for abortions. (Catholic Legal Analysis, Ex. I, at 4; PPACA 1303(a)(2).) Thus, Rep. Driehaus’ effort to couple the scope of PPACA with the Order does little to disprove that “Driehaus voted FOR taxpayer-funded abortion.”

And his vote is not disputed. The Congressional record reflects that Rep. Driehaus was one of the 219 majority votes cast in support of the PPACA. (Driehaus Aff. ¶ 2; Roll Call Vote for PPACA (Final Version), Ex. BB, at 2.) Regardless of the fact that President Obama subsequently signed the Order to purportedly limit taxpayer-funded abortions to certain circumstances, Rep. Driehaus did, in fact, vote in support of PPACA. His vote is factually true and not disputed. (Driehaus Aff. ¶ 2.)

For these reasons, the Advertisement is objectively true: Rep. Driehaus voted for a bill that allows for taxpayer-funded abortion. Without a false statement, no reasonable basis exists for finding that the SBA List has violated §§ 3517.21(B)(9) or (10). Rep. Driehaus’ Complaint should be dismissed with prejudice.

C. The SBA List Is Not Advocating The Election Or Defeat Of A Candidate.

Section 3517.21(B)(10) prohibits “[p]ost[ing], publish[ing], circulat[ing], distribut[ing], or otherwise disseminat[ing] 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.” The only constitutional construction of speech that “promotes the election, nomination, or defeat of the candidate” is speech that amounts to what the United States Supreme Court refers to as “express advocacy.” Express advocacy reaches political “communications containing express words of advocacy of election or defeat.” *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976). Express advocacy must include words like “‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” *Id.* The Advertisement does not contain these “magic words.” It simply points out that Rep. Driehaus voted for taxpayer-funded abortions. Because it is not express advocacy, the Advertisement does not fall under § 3517.21(B)(10).

D. The SBA List Did Not Prepare The Ad Knowing It Was False Or With Reckless Disregard Of Its Truth or Falsity.

Rep. Driehaus also fails to meet his burden under Revised Code Sections 3517.21(B)(9) and (10) to demonstrate that the Advertisement was knowingly false, or was made with reckless disregard of whether it was false or not. *See id.; see also New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that the First Amendment requires a public official to prove actual malice, that is, knowledge of falshood or reckless disregard of falsehood). Rep. Driehaus nowhere alleges evidence to demonstrate that the SBA List knew the Advertisement was false, as required under Revised Code Section 3517.21(B)(9), or recklessly disregarded whether the Advertisement was false, as required under Revised Code Sections 3517.21(B)(9) and (10). This alone subjects his Complaint to dismissal.

Moreover, the evidence says otherwise. In reviewing the PPACA’s scope, the SBA List reviewed numerous documents. (Buchanan Aff. ¶ 9.) These documents include
articles from the United States Conference of Catholic Bishops, a memo from the Congressional Research Service, an article from the National Right to Life Committee, and statements by Congressmen. (Buchanan Aff. ¶ 9-15.) The SBA List’s opinion is consistent with these groups and individuals’ conclusions that the bill allowed taxpayer-funded abortion. (See Ex. I, N, T-V.) The SBA List’s substantial review of relevant materials before arriving at their opinion belies any claim that the SBA List recklessly disregarded the truth of their assertions or knew them to be false.

Because Rep. Driehaus has failed to establish a reasonable basis for concluding that the SBA List knowingly made a false statement of fact, or a fact stated with reckless disregard for whether it is false or not, his Complaint as to R.C. §§ 3517.21(B)(9) and (10) should be dismissed with prejudice.

II. **Alternatively, The Advertisement Is A Constitutionally Protected Opinion.**

In the alternative, the Advertisement reflects the SBA List’s opinion on the effect of Rep. Driehaus’ vote supporting PPACA. The SBA List believes that a vote for PPACA is a vote for taxpayer-funded abortion. (Buchanan Aff. ¶ 3.)

“A statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). And any “[c]riticism of [public officer’s] official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.” *New York Times*, 376 U.S. at 273. Indeed,

imposing liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. . . . The protection of the public requires not merely discussion, but information. Political
conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen.

_New York Times_, 376 U.S. at 272 (citations omitted).

The Advertisement is precisely this type of political speech: it criticizes Rep. Driehaus for his official conduct regarding the PPACA. The SBA List cannot constitutionally be held criminally or civilly liable for providing information along with their opinion in the Advertisement.

**III. Penalizing The List’s Speech Renders R.C. §§ 3517.21(B)(9) And (10) Unconstitutional.**

Ohio Revised Code Section 3517.21 states, in relevant part:

(B) No person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following:

(9) Make a false statement concerning the voting record of a candidate or public official;

(10) 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.

Because these provisions allow the government to ascertain the falsity of political speech and to punish such speech, R.C. §§ 3517.21(B)(9) and (10) are unconstitutional under the First and Fourteenth Amendments of the United States Constitution.

“‘The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind ... every person must be his own watchman for truth, because the forefathers did not trust any government to separate the truth from the false for us.’” _Meyer v. Grant_, 486 U.S. 414, 419-20 (1988). As such, the state cannot

In *Rickert v. State*, 168 P.3d 826 (Wash. 2007), the Washington Supreme Court stated that "[t]he notion that the government, rather than the people, may be the final arbiter of truth in political debate is fundamentally at odds with the First Amendment." *Id.* at 827. The *Rickert* court reviewed a cause of action filed by the Public Disclosure Commission against a political candidate who, allegedly, sponsored "Political advertising or an electioneering communication that contain[ed] a false statement of material fact about a candidate for public office." *Id.* The court found that provision failed strict scrutiny and as such, was unconstitutional under the First Amendment of the U.S. Constitution. *Id.* at 856.

Likewise, in *In Re Gableman*, 784 N.W.2d 631 (Wis. 2010), three Wisconsin Supreme Court justices on an equally divided court observed:

Time and again the United States Supreme Court has held that regulations authorizing the government to restrain or suppress speech and to prosecute violations of government-imposed regulations restraining speech are disfavored due to the protections accorded by the First Amendment. *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430 (1945); *Buckley v. Valeo*, 424 U.S. 1, 17, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007).

*Id.* at 636. In *Gableman*, the court considered a political advertisement run by Wisconsin Supreme Court Justice Gableman against his opponent Louis Butler during their political race. *Id.* at 634. The State initiated proceedings against Justice Gableman for violating Wisconsin Supreme Court Rule 60.06(3)(c), which states that "[a] candidate for a judicial office shall not knowingly or with reckless disregard for the statement's truth or falsity
misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent.” To avoid striking the clause because it ran afoul of the First Amendment, the three justices construed the statute narrowly and held that Justice Gableman’s objectively true statements could not be punished based on their implications. *Id.* at 643. The justices recognized that protecting core political speech is purpose of the First Amendment, and that the government could not justify its regulation under strict scrutiny unless construed narrowly. *Id.* at 636, 643.

The same is true here. Content-based regulation of protected political speech is subject to strict scrutiny. *Burson v. Freeman*, 504 U.S. 191, 198 (1992). As in *Rickert* and *Gableman*, the State must demonstrate that the provision at issue “is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” *Id.* Under such scrutiny, Revised Code Sections 3517.21(B)(9) and (10) fail.

First, Revised Code Sections 3517.21(B)(9) and (10) do not serve a compelling interest. They do not serve an interest in compensating candidates for reputation injury because they do not include a provision for damages nor require proof of harm to that candidate’s reputation. *Rickert*, 168 P.3d at 851.

Perhaps, like the provision at issue in *Rickert*, the interest Revised Code Sections 3517.21(B)(9) and (10) seeks to serve is designed to preserve the integrity of the election process. However, that interest is not reflected in these provisions. While the state has an interest in preventing direct harm to elections by, for example, protection the election poll area, *Burson*, 504 U.S. at 199, or by avoiding voter confusion through avoiding ballot overcrowding, *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986), Revised Code Sections 3517.21(B)(9) and (10) do not prevent such direct harms. Instead
they are in direct conflict with First Amendment principles fostering robust political
debate and condemning government censorship.

Second, in the event that either of these interests were compelling, Revised Code
Sections 3517.21(B)(9) and (10) are not narrowly tailored to serve them. Revised Code
Sections 3517.21(B)(9) and (10) do not require proof of harm to a candidate’s reputation,
a necessary component if the interest is indeed to compensate that candidate for such
harm. *Rickert*, 168 P.3d at 851. As to these interests, Revised Code Sections
3517.21(B)(9) and (10) are overinclusive and therefore inadequately tailored to serve a
compelling interest.

The state of Ohio elects its public officials. The solution to any speech concerns
that arise in that context are already contained in that system: more speech. *See Brown v.
Hartlage*, 456 U.S. 45, 61 (1982). To interject a government censor like the Commission
and the judicial system into the political fray as the arbiter of truth is contrary to this
fundamental principle.

**AFFIRMATIVE DEFENSES**

The Complaint fails to state a claim on which relief can be granted. The
Advertisement is premised upon true facts—that Rep. Driehaus voted in favor of
PPACA—and reflects the SBA List’s well-founded opinion that the PPACA allows for
taxpayer funded abortion.

The SBA List also asserts that regardless of the truth or falsity of its statements,
Revised Code Sections 3517.21(B)(9) and (10) are unconstitutional on their face and as
applied to the Advertisement under the First and Fourteenth Amendment of the United
States Constitution.
PRAYER FOR RELIEF

For the foregoing reasons, Rep. Driehaus cannot establish any cause to show that the SBA List has violated Revised Code Sections 3517.21(B)(9) and (10). Moreover, the SBA List cannot constitutionally be found in violation of Revised Code Sections 3517.21(B)(9) and (10). Accordingly, this Commission should dismiss Rep. Driehaus’ Complaint with prejudice.

Because Rep. Driehaus cannot establish any cause to establish the claimed violation, the SBA List also seeks attorneys’ fees incurred defending this frivolous lawsuit. R.C. § 3517-1-13.

Dated: October 12, 2010

Respectfully submitted,

[Signature]
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