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INTRODUCTION

“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397 (1980) [upholding right to publicly burn American flag.]

This case involves hard-hitting judicial campaign advertisements criticizing the record of a sitting judge that members of the hearing panel (hereinafter the “Panel”) and presumably members of the Board of Professional Conduct (hereinafter the “Board”) found offensive.

The Board found violations that were never charged. Board Findings ¶21. The Board claimed the right to disregard the context in which the statements in the advertisements appear. Board Findings ¶45. The Board recommended a sanction in excess of any sanction previously imposed in a campaign statement case, and says that it did so primarily because Respondent defended against their charges. Board Findings ¶62 & p. 13. The Board failed to follow the constitutionally required standards for evaluating statements in campaign advertisements, and made sweeping statements that are simply unsupported by the record. See, e.g., Board Findings ¶¶14, 15 & 18.

In short, the Board lost its way.

Respondent submits that the Findings of the Board should be set aside, its recommendations disregarded, and all charges against the Respondent should be dismissed.

ARGUMENT

I. CANDIDATES MAY NOT BE PUNISHED FOR CAMPAIGN SPEECH THAT IS SUSCEPTIBLE OF A TRUE INTERPRETATION, WHETHER OR NOT THE SPEECH “WOULD BE DECEIVING OR MISLEADING TO A REASONABLE PERSON.” *In re Judicial Campaign Complaint Against O’Toole*, 141 Ohio St.3d 355, 2014-Ohio-4046, ¶21.

The Complaint in the instant action accuses Respondent Ron Tamburrino of violating Judicial Conduct Rules 4.2(A)(1) and 4.3(A) based upon two television advertisements that his campaign published in connection with his 2014 campaign against Judge Timothy Cannon for election to the 11th District Court of Appeals.

Count One of the Complaint alleges that an advertisement criticizing Judge Cannon’s opinion in *State v. Andrews*, 177 Ohio App.3d, 593, 2008-Ohio-3993 (1) violated Jud. Cond. Rule 4.2(A)(1) (but not Jud. Cond. Rule 4.3) by “insinuating that Judge Cannon’s legal analysis in the *State v. Andrews* case was akin to a judge committing a crime by serving alcohol to underage children in a courtroom.” Complaint ¶11, bullet point 1.¹ Count One of the Complaint also claims that the statement in the *State v. Andrews* advertisement that “Judge Cannon doesn’t think teenage drinking is serious” was a knowingly false statement in violation of Jud. Cond. Rule 4.3(A). The Complaint does not allege that the statement “Judge Cannon doesn’t think teenage drinking is serious” violated Jud. Cond. Rule 4.2(A)(1). No other statements in the *State v. Andrews* advertisement were alleged to be in violation of the Code of Judicial Conduct.

Count Two of the Complaint alleges that the statement in a separate advertisement that “Cannon won’t disclose his Taxpayer Funded Travel Expenses” was a knowingly false statement

¹ The transcript of the *State v. Andrews* advertisement is hearing Exhibit A. The *State v. Andrews* case is hearing Exhibit B.

in violation of both Rule 4.2(A)(1) and Rule 4.3(A). No other statements in the “won’t disclose” advertisement were alleged to be in violation of the Code of Judicial Conduct.²

Rule 4.3(A) states that a judicial candidate “shall not knowingly or with reckless disregard . . . [p]ost, publish, broadcast, transmit, circulate, or distribute information concerning the judicial candidate or an opponent, either knowing the information to be false or with a reckless disregard of whether or not it was false.” As discussed more fully below, the two 4.3(A) allegations involve statements that are simply not false and, for this reason alone, should not be the basis of any finding against Respondent.

Jud. Cond. Rule 4.2(A)(1) (hereinafter “Rule 4.2(A)(1)”) states that “[a] judicial candidate shall be responsible for . . . [a]cting at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary.” As more fully discussed below, campaign advertisements cannot violate 4.2(A)(1) in the absence of a false statement made knowingly or with reckless disregard of its truth or falsity. Thus, the Rule 4.2(A)(1) claim also should not be the basis of any finding against Respondent.

A. Statements In Judicial Campaign Advertisements That Are Susceptible Of A True Interpretation Cannot Be Sanctioned.

The Board’s Findings declare that the statements charged in the Complaint – as well as statements that were never alleged to violate the Code - were false. However, the Board did so by giving the statements an interpretation that would make them false statements without ever determining whether or not there were other reasonable interpretations that would make the statements either true or matters of opinion.

² The transcript of the “won’t disclose taxpayer funded travel expenses” advertisement is hearing Exhibit C.

In other words, the Board evaluated the judicial campaign speech at issue in a way that is clearly prohibited in evaluating non-judicial campaign speech. *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1996) – which remains binding upon this Court – rejected this differentiation regarding core campaign speech.

Since *New York Times v. Sullivan*, 376 U.S. 254 (1964) was decided, courts have repeatedly found “that an election candidate does not forego his or her First Amendment rights simply because he or she decides to seek a judicial office, rather than a non-judicial one. . . . The guarantees of the First Amendment are not shaped and re-shaped simply because a litigant wishes to distinguish one type of election from another. Neither the First Amendment nor [*Buckley v. Valeo*, 424 U.S. 1 (1976)] can be read so narrowly.” *Suster v. Marshall*, 149 F.3d 523, 529-530 (6th Cir. 1996) (striking down Ohio’s judicial canons limiting judicial campaign spending).

While Ohio could eliminate judicial elections entirely, “[t]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.” *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002) (striking down announce clause), quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991). Although *Republican Party of Minnesota v. White* did not rule “that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office” (501 U.S. at 783), it did rule that regulations affecting speech would be subject to strict scrutiny, and *Suster v. Marshall*, supra at 529, expressly rejected the view “that there is a distinct

difference between judicial officers and political officers” regarding restrictions on campaign speech.

B. *Williams-Yulee* Gives No Authority To Sanction Judicial Campaign Advertisements That Are Not False.

Relator has suggested that *Williams-Yulee v. Florida Bar*, 575 U.S. ___, 135 S.Ct. 1656 (2015) has changed the legal landscape such that speech regulations prohibited by *Suster v. Marshall*, 149 F.3d 523, 529-530 (6th Cir. 1996) and *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002), are now permitted. To the contrary, *Williams-Yulee* does not change the rule that the state may not restrict the content of judicial advertisements unless the advertisements are false.

Williams-Yulee v. Florida Bar, 575 U.S. ___, 135 S.Ct. 1656 (2015), was decided sometime after the 2014 election campaign advertisements at issue in this case were broadcast. *Williams-Yulee* held that “[a] State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.” *Williams-Yulee* found that the act of making “personal appeals for money by a judicial candidate inherently create[s] an appearance of impropriety”. However, *Williams-Yulee* also found that prohibiting personal solicitations of campaign funds would not silence public debate or censor the candidate’s speech in any way since the “judicial candidates [would remain] free to discuss any issue with any person at any time.” Thus, although *Williams-Yulee* found that judicial candidates could be treated differently than other candidates for purposes of banning personal solicitations, it also held that judicial candidates should be treated the same as other candidates for purposes of exercising their right to “discuss any issue with any person at any time.”

C. **Speech That Is Misleading Or Subject To Different Interpretations May Not Be Sanctioned.**

In *In re Judicial Campaign Complaint Against O'Toole*, 141 Ohio St.3d 355, 2014-Ohio-4046, syllabus 2, (hereinafter "*O'Toole*") the Ohio Supreme Court declared unconstitutional "[t]he portion of Jud. Cond. R. 4.3(A) that prohibits a judicial candidate from knowingly or recklessly conveying information about the candidate or the candidate's opponent that, if true, would be deceiving or misleading to a reasonable person. . . ." *O'Toole* narrowed Jud. Cond. R. 4.3(A) to provide as follows:

"[N]o candidate for judicial office shall knowingly or with reckless disregard do any of the following: 'Post, publish, broadcast, transmit, circulate, or distribute information concerning the judicial candidate or an opponent, either knowing the information to be false or with a reckless disregard of whether or not it was false.'" [*O'Toole*, 2014-Ohio-2014, ¶44.]

Jud. Cond. R. 4.3, as modified by *O'Toole* is modeled on R.C. 3517.21(B)(10). In other words, *O'Toole* adopted the defamation standard for public figures set forth in *New York Times v. Sullivan*, 376 U.S. 254 (1964), which has long been the standard applied to attempts to punish political speech of candidates generally. See, also, *Pesttrak v. Ohio Elections Commission*, 926 F.2d 573 (6th Cir. 1991).

Under that standard, political speech cannot be punished unless, among other things: (1) The statement at issue is false; (2) The false statement was made either knowing it to be false or with reckless disregard for its truth or falsity; and, (3) There is "clear and convincing evidence" both of the falsity of the statement and of the knowledge or reckless disregard of the speaker. See, e.g., *O'Toole, supra*; *New York Times v. Sullivan, supra*; and, *Pesttrak, supra*.

1. **The “innocent construction rule” protects statements that are subject to different interpretations.**

O’Toole held that there can be no Jud. Cond. Rule 4.3 violation unless the statement is false. True but deceiving or misleading speech cannot be penalized. Moreover, as the Ohio Supreme Court held in *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 372 (1983), “[I]f allegedly defamatory words are susceptible [of] two meanings, one defamatory and one innocent, the defamatory meaning should be rejected, and the innocent meaning adopted.”

2. **The “substantial truth doctrine” bars attempts to punish speech based upon minor inaccuracies.**

The law does not require that a statement must be perfectly accurate in every conceivable way to be considered “true.” “It is sufficient [in defending against a defamation action] to show that the imputation is substantially true, or as it is often put, to justify the ‘gist,’ the ‘sting,’ or the substantial truth of the defamation.” *Krems v. Univ. Hosp. of Cleveland*, 133 Ohio App.3d 6, 10-11 (11th Dist. 1999), quoting Prosser, *Law of Torts* (4 Ed.1971) 798-799. See, also, *Bruss v. Vindicator Printing Co.*, 109 Ohio App.3d 396 (7th Dist. 1996); and, *Natl. Medic Serv. Corp. v. E. W. Scripps Co.*, 61 Ohio App.3d 752 (1st Dist. 1989). Under the substantial truth doctrine, minor factual inaccuracies will be ignored so long as the inaccuracies do not materially alter the substance or impact of what is being communicated. In other words, only the “gist” or “sting” of a statement must be correct.

3. **Words must be interpreted according to the context in which they appear.**

Ohio Jury Instructions CV 431.01(5) defines how to determine whether or not a statement is false, as follows:

“A statement is false when it is not substantially true. It is substantially true when the (gist) (substance) (scheme) of the statement is true, or is justified by the facts, taking the statement as

a whole. The defendant's words must be given their natural and ordinary meaning, taking into consideration the circumstances in which the statement was made. You must ignore any minor ways in which the statement is false. . . ." [Emphasis added.]

One must "examine more than simply the alleged defamatory statements in isolation, because the language surrounding the averred defamatory remarks may place the reasonable reader on notice that what is being read is the opinion of the writer." *Bentkowski v. Scene Magazine*, 637 F.3d 689 (6th Cir. 2011).

4. **The statement must be made with knowledge of or in reckless disregard of the falsity.**

The reckless disregard standard for public figure defamation differs from the recklessness standard of other torts. It requires proof that the speaker made a false statement with a "high degree of awareness of [its] probable falsity." *Garrison v. State of Louisiana*, 379 U.S. 64, 74 (1964). "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727 (1968).

Ohio Jury Instructions CV 431.01(10), similarly, defines "reckless disregard" as follows:

"'Reckless disregard' means that the defendant acted while actually aware of the probable falsity of the statement, or the defendant entertained serious doubts as to the truth of the statement. The defendant's failure to investigate may be considered evidence that the defendant acted with reckless disregard to the statement's truth or falsity, but only if you find from the facts and circumstances that the defendant had serious doubts about the truth of the statement."

5. **The violation must be proven by clear and convincing evidence.**

Both Gov. Jud. Rule 2 § 6(B)(3) and the U.S. Supreme Court have held that no punishment may be levied in areas trenching on the first amendment involving public figures

without “clear and convincing evidence” of all of the necessary elements of a violation. *New York Times v. Sullivan*, 376 U.S. 254, 285-86 (1963); *Anderson v. Liberty Lobby*, 477 U.S. 242, 252-53 (1986).

D. The Board Failed To Properly Follow This Court’s Decision In *O’Toole*.

In *O’Toole* the Ohio Supreme Court exercised its judgment about what limits the First Amendment places upon the Court’s ability to punish campaign speech. Since Jud. Cond. Rule 4.3(A) may not constitutionally prohibit “speech that is true but would be deceiving or misleading to a reasonable person” [*O’Toole* ¶21], then no other provision of the rules can constitutionally be interpreted to prohibit speech that is true but would be deceiving or misleading to a reasonable person.

To be sure, the Board asserts that the statements charged (and others) are “false”, but its analysis is limited to claiming that the statements can be interpreted as false, not that they are incapable of being interpreted as true. The prohibition against sanctioning misleading speech is not merely a “magic words” rule permitting misleading campaign speech to be sanctioned as long as the label “false” can be attached to it. The Board lacks authority to “interpret” Jud. Cond. Rule 4.2(A) to punish speech that the Board is prohibited from punishing under Jud. Cond. Rule 4.3(A), and the Board lacks authority to “interpret” Jud. Cond. Rule 4.3(A) to punish speech that the Board is prohibited from punishing under *O’Toole*. The Board may not bring in through the back door what it is prohibited from bringing in through the front door.

E. *O’Toole* Distinguishes Commercial Speech From Political Speech.

As *O’Toole* indicates, the authority to sanction political speech under Jud. Cond. Rules 4.2 or 4.3 is very different from the authority to sanction commercial speech under Rule of Professional Conduct 7.1. Prof. Cond. Rule 7.1 prohibits lawyers from making a “misleading or

nonverifiable” statement or a statement that “omits a fact necessary to make the statement considered as a whole not materially misleading.” Jud. Cond. Rules 4.2 and 4.3 do not – and according to *O’Toole* cannot – prohibit such statements.

Since disciplinary cases more often deal with lawyer advertising issues than they do with campaign speech issues, it is important not to view campaign advertising through the same lens as one views communications concerning a lawyer’s services. The Board’s findings appear to have confused this distinction.

Campaign speech is “true” for purposes of Jud. Cond. Rule 4.3(A) if it susceptible to a true interpretation – even if others might prefer a different interpretation, would have liked more information to be included in the campaign advertisement, or believe that the political advertisement could be misleading. The First Amendment places a higher value on the voting public’s ability to hear political messages than it does on state entities’ desire to restrict the messages the public hears – even if done ostensibly for the public’s own good or to prevent the public from having an unfavorable view of the judiciary.

II. THERE IS NO CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT EITHER KNOWINGLY MADE A FALSE STATEMENT OR DID SO WITH A HIGH DEGREE OF AWARENESS OF ITS PROBABLE FALSITY.

A. An Expression of Opinion In A Political Advertisement Cannot Form The Basis Of A Jud. Cond. Rule 4.2(A)(1) Violation.

The *State v. Andrews* advertisement that is the subject of Count One of the Complaint featured a judge on the bench serving alcohol to three minor children who were standing before the judge’s bench as the narrator stated “Everyone knows a judge would never serve alcohol to kids in a courtroom. But Appellate Judge Tim Cannon did something almost as bad.” The advertisement goes on to discuss Judge Cannon’s decision in *State v. Andrews*.

The Complaint makes no claim that this portion of the advertisement made a false statement in violation of Jud. Cond. Rule 4.3(A). Rather, the Complaint alleges that “[b]y insinuating that Judge Cannon’s legal analysis in the *State v. Andrews* case was akin to a judge committing a crime by serving alcohol to underage children in a courtroom, respondent violated Jud. Cond. Rule 4.2(A)(1).” Complaint ¶11, first bullet point.

Yet, nothing in this advertisement or in this introductory portrayal says Judge Cannon committed a crime. Nor is there any claim in the Complaint that the portrayal constitutes a false statement.

Generally, whenever a campaign advertisement is in violation of Jud. Cond. R. 4.3(A), there is also a violation of Jud. Cond. Rule 4.2(A)(1), for the simple reason that knowingly telling a lie (in violation of Rule 4.3(A)) is a generally failure to act with integrity, as required by Rule 4.2(A)(1). Thus, in Count Two of the Complaint, the 4.2(A)(1) and 4.3(A) violations stand or fall together.

However, in Count One, the Complaint attempts to sanction a portion of the advertisement without any claim that it contains a false statement. To Respondent’s knowledge, there has *never* been a finding in any case of a statement in a campaign advertisement being in violation of Rule 4.2(A)(1) in the absence of a finding that the statement also violated Rule 4.3(A). Indeed, the Comments following Rule 4.2 note that “Rule 4.2(A)(1) reflects the ‘independence, integrity, and impartiality’ standard used elsewhere in the Code. . . .” (Emphasis added.) Plainly, Rule 4.2(A)(1), standing alone, does not provide the narrowly tailored bright line standard that is constitutionally required for restrictions on political speech.

The advertisement explicitly states, “[e]veryone knows that a judge would never serve alcohol to kids in a courtroom,” and never suggests that Judge Cannon did so. See the transcript of the *State v. Andrews* ad, hearing Exhibit A.

The advertisement then goes on to state, “Appellate Judge Tim Cannon did something almost as bad.” Once again the word “almost” indicates that Judge Cannon did *not* do something “as bad” as serving alcohol to kids in a courtroom. The view that Judge Cannon’s ruling in *State v. Andrews* was “almost as bad” was, and is, Ron Tamburrino’s opinion. Judging from the vigor of the dissent, Ron Tamburrino is not likely to be alone in that view.

The dissent in *State v. Andrews* accuses the majority of violating its duty to “review the trial court’s findings of fact only for clear error and [to] give due weight to inferences the trial judge drew from the facts” (§49), and of disregarding the officers’ testimony that they were concerned for the safety and welfare of the juveniles involved (§§61-63). The dissent concludes that the majority’s censure of “police officers for properly doing their duty creates a real danger to the rule of law.” (§68.)

The dissenting judge in *State v. Andrews* had every right to express her opinion criticizing, even harshly, the judgment of the majority. However, Ron Tamburrino had just as much right to criticize the judgment of his political opponent in his campaign advertisement.

Whether or not one agrees with the view that Judge Cannon’s decision in *State v. Andrews* was “almost as bad” as serving alcohol to kids in a courtroom, expressions of opinion are constitutionally protected speech. *Vail v. The Plain Dealer Publishing Co.*, 72 Ohio St.3d 279 (1995).

Jud. Cond. Rule 4.2(A)(1) is not an amorphous prohibition that can be used to punish any political speech deemed unseemly. It prohibits three, and only three, types of conduct: (1)

conduct inconsistent with the “independence” of the judiciary; (2) conduct inconsistent with the “integrity” of the judiciary; and, (3) conduct inconsistent with the “impartiality” of the judiciary.

None of these three prohibitions are implicated by expressing the opinion that Judge Cannon’s decision in *State v. Andrews* was “almost as bad” as serving kids alcohol in a courtroom. Nothing in the advertisement challenged Judge Cannon’s impartiality, integrity or independence. Rather, the advertisement challenged his judgment – particularly his judgment that teenage drinking wasn’t a serious crime.

The Complaint never charges that the statement that Judge Cannon’s opinion was “almost as bad” as serving kids alcohol was a false statement. Nonetheless, the Board recommends that the Court find that this statement was false and that Respondent should be punished for a violation that he was never charged with. Board Findings ¶21.

Whatever advertisements we find seemly or unseemly, comparative advertising (often disparaged as “negative” advertising) is not prohibited by the Code of Judicial Conduct, and could not be prohibited without violating 42 U.S.C. §1983 and the First Amendment.

Since there is no claim (or even a basis for a claim) in the Complaint that the introductory portrayal of a judge serving alcohol was a false statement in violation of Jud. Cond. Rule 4.3(A), the Board had no right to “find” that the portrayal violated Jud. Cond. Rule 4.3(A), and had no basis for finding that it violated Jud. Cond. Rule 4.2(A)(1).

B. The Characterization Of Judge Cannon’s Opinion In *State v. Andrews* Was Not A False Statement.

Count One of the Complaint also alleges that the statement in the *State v. Andrews* advertisement that “Judge Cannon doesn’t think teenage drinking is serious” is a false statement in violation of Rule 4.3(A). Complaint ¶11, second bullet point.

In the context of the *State v. Andrews* decision, the statement “Judge Cannon doesn’t think teenage drinking is serious” is clearly a true statement. Thus, Relator attempts to interpret the statement out of its context as a statement about Judge Cannon’s personal feelings about teenage drinking unrelated to his opinion in *State v. Andrews*. It is simply unreasonable to interpret this statement outside of the context of the *State v. Andrews* decision³:

- Right before the oral statement “Cannon doesn’t think teenage drinking is serious” was the oral statement “In the case of *State versus Andrews*, Cannon ruled that cops couldn’t enter a house to arrest a parent who was hosting a teenage drinking party, because he felt teenage drinking wasn’t a serious crime.”
- Before the oral statement “Cannon doesn’t think teenage drinking is serious” was made, the television advertisement showed the words, “Judge Cannon ruled cops couldn’t arrest a parent who hosted a teenage drinking party.”
- Right before the oral statement at issue, the television advertisement showed the words, “Cannon: ‘There were no exigent circumstances to justify the intrusion’ *State v. Andrews* 177 Ohio App.3d 593 (2008).”
- While the oral statement “Cannon doesn’t think teenage drinking is serious” was being made, the advertisement showed the visual words, “Judge Tim Cannon doesn’t think teenage drinking is a serious offense.”

The notion that the oral statement “Cannon doesn’t think teenage drinking is serious” referred to anything other than his decision in *State v. Andrews* is absurd. Absurd or not, such an interpretation is clearly not the “only reasonable interpretation” of the statement at issue.

In the context of the advertisement, the statement “Cannon doesn’t think teenage drinking is serious” clearly refers to Judge Cannon’s opinion in *State v. Andrews* that teenage drinking

³ See the transcript attached as Exhibit B to the Answer.

was not a serious misdemeanor offense and was not serious enough to warrant the intrusion.⁴ In context, the statement is clearly true.

The Board's findings assert that "Nowhere in the majority opinion" and "Nowhere in Cannon's concurring opinion does there include any language that police could not enter a home or arrest a parent who hosts a teenage drinking party." Board Findings ¶¶ 14, 15. In fact, both the majority opinion and the concurring opinion held that "in the case of *State v. Andrews*" the police "couldn't enter a house to arrest a parent." See, e.g. *State v. Andrews*, Hearing Exhibit B at ¶¶ 18, 39, 43 & 47. The dissenting opinion also includes language addressing that very issue. See, e.g., *State v. Andrews*, ¶¶ 48, 58 & 59. No doubt, if the facts of *State v. Andrews* had been different, say if a warrant had been issued, Judge Cannon might have ruled differently. However, the advertisement never said that Judge Cannon ruled that police can *never* enter a house to arrest *any* parent who is hosting an underage drinking party. The advertisement said that "In the case of *State v. Andrews*, Cannon ruled that cops couldn't enter a house to arrest a parent." Judge Cannon did rule that way in *State v. Andrews*, and did so because he found that the teenage drinking was not sufficiently serious to justify the warrantless intrusion.

The Board's findings further assert that "Nowhere in either the majority opinion or in Cannon's concurring opinion is there any reference that teenage/underage drinking is not a serious crime." Board Findings ¶ 18. In fact, there is.

In Judge Cannon's constitutional analysis, at ¶ 44 of *State v. Andrews*, 177 Ohio App.3d 593, 2008-Ohio-3993, the fact that Judge Cannon did not consider teenage drinking to be "a

⁴ The charge was contributing to the delinquency of a minor, based upon hosting a teenage drinking party. Teenage drinking was what the case was about and was the gravamen of the charge.

serious misdemeanor offense” was precisely why Judge Cannon concluded that the intrusion was unwarranted:

“The majority opinion also indicates that there is no need to address the fact that the instant offense is a misdemeanor versus a felony, because there were no ‘exigent circumstances’ to justify the intrusion. I, however, believe the fact that the instant offense is a misdemeanor charge is of particular importance, because it is a factor to consider in making the assessment of whether exigent circumstances exist. I would want nothing in this decision to deter an officer from exercising his duty if he clearly observes a serious misdemeanor offense or an offense of violence, or if he has other good cause to make an intrusion.” [Emphasis added.]

Mr. Tamburrino was entitled to read and rely upon what Judge Cannon says in an opinion as expressing his views. That is precisely what Mr. Tamburrino did.⁵

Judge Cannon stated in his opinion that if the teenage drinking offense had been, in his view, “a serious misdemeanor offense . . . or other good cause,” that an officer would not be deterred from making an intrusion. Judge Cannon’s concurring opinion ruled that police officers couldn’t enter a house to arrest a parent who was hosting a teenage drinking party, precisely because he concluded that while some misdemeanor offenses are “serious,” the teenage drinking offenses were not “serious” enough misdemeanor offenses to justify the warrantless intrusion. Mr. Tamburrino disagreed with Judge Cannon’s judgment, as did the dissenting judge. Mr. Tamburrino had every right to say so in his campaign’s TV advertisement.

⁵ The Board’s findings assert, at ¶11, that “Respondent confirmed that the only source material he relied upon to base the content of this ad was Cannon’s concurring opinion in the case of *State v. Andrews*, 177 Ohio App. 593, 2008-Ohio-3993. Hearing Tr. 266.” This mischaracterizes his testimony. At Hearing Tr. 266, Mr. Tamburrino was asked “[Q:] The ad with regard to the underage drinking, the comments in there, the statements in there, are based solely upon the content of the *State v. Andrews* case, correct? In other words, there aren’t other cases you’re citing to or referencing other than the *State v. Andrews* case in that ad? [A:] That’s correct.” Mr. Tamburrino never said that the only opinion he relied on was the concurring opinion. Indeed, in his testimony, Mr. Tamburrino also made reference to the majority and dissenting opinions.

The context of the statement made in Mr. Tamburrino's campaign advertisement is clear, and fairly summarizes Judge Cannon's own words in his decision.

The advertisement quotes Judge Cannon's finding that there were no exigent circumstances. A number of Ohio courts have found that any crime involving incarceration is sufficiently serious to constitute an exigent circumstance justifying a warrantless arrest. See, e.g., *State v. Rouse* (Franklin App. 1988), 53 Ohio App.3d 48, 51 ("In disputing the existence of exigent circumstances in the instant cause, appellant argues first that the offense which gave rise to the arrest was a misdemeanor and was therefore not sufficiently grave to justify a warrantless arrest in appellant's home. . . . [A]ppellant's argument on this point fails because . . . Ohio's treatment of the offense as a jailable, criminal offense manifests an intention to treat OMVI as a serious offense."); and *State v. Hamilton* (Medina App. 1999), 1999 WL 598840 (Underage possession of alcohol, a first degree misdemeanor, found to satisfy the "seriousness of the offense" standard for the arrest).

Although other Ohio courts held that a first degree misdemeanor was sufficiently serious to constitute the exigent circumstance justifying a warrantless intrusion and arrest, Judge Cannon disagreed. Respondent criticized Judge Cannon's decision in his advertisement, because Respondent thought it was a bad decision.

The Board apparently believes that the thirty second advertisement should have included more information about the background of the case being discussed. The *State v. Andrews* decision is cited in the advertisement. In *State v. Andrews*, Judge Cannon found that the teenage drinking party offenses were not sufficiently serious to justify the police entering the house under the facts of that case. What was said in the advertisement was true.

While Respondent submits that it would be irrational to interpret the spoken “serious” words as referring to anything other than Judge Cannon’s opinion in *State v. Andrews*, particularly because they are spoken at the same time the written “serious” words appear on the screen in the ad, Respondent need not prove that his interpretation is the only possible one. Rather, Relator had the burden of proving by clear and convincing evidence that it is impossible to interpret those words in a true sense (and that Respondent knew or believed that those words were false). The innocent construction rule protects speech that is reasonably capable of a true interpretation. The Board simply does not have the authority to punish campaign speech that it believes is unfair or misleading.

C. The Statement That Judge Cannon “Won’t Disclose His Taxpayer Funded Travel Expenses” Was Not A False Statement.

Count Two of the Complaint deals with a statement made in the advertisement attached as Exhibit C to the Complaint, that “Cannon won’t disclose his Taxpayer Funded Travel Expenses.” The statement is true – or at the very least is subject to a true interpretation.

At the hearing, members of the panel noted that the “won’t disclose his taxpayer funded travel expenses” statement can be interpreted in different ways. Judge Cannon argued that “won’t disclose” meant *to him* that someone made a public records request for documents that Judge Cannon refused to produce. Mr. Davis argued that “‘disclose’ could mean a lot of different things.” Hearing Tr. 248:2-4. See also Tr. 246:24-25. However, the issue is not whether “won’t disclose” *could* be interpreted to make it a false statement under Judge Cannon’s understanding of what it meant or under any of the “lot of different things” Mr. Davis acknowledged it could have meant. The issue is whether or not there is clear and convincing evidence that “won’t disclose” *must* be interpreted to make it a false statement – and whether or not there is clear and convincing evidence that Respondent knew or believed the statement was

false. Otherwise, labeling the statement “false” would unlawfully punish arguably “misleading” campaign speech.

Respondent testified that by “won’t disclose”, he meant that Judge Cannon won’t post the information on the website. Hearing Tr. 245:8-22. This was an issue throughout the campaign. Judge Cannon understood that Respondent’s position was that his court should post a copy of its budget on its website and, at least a couple of days before the ad ran, that Respondent’s definition of a budget included expenses of the court that Respondent believed should be publicly disclosed the same way. Hearing Tr. 151:24-153:12. Respondent, testified about his experience preparing and reviewing detailed budgets of operations of a publicly traded company audited according to generally accepted accounting principles (GAAP) and detailed budgets of operations of public entities audited according to public accounting principles. Hearing Tr. 207:10-208:13. Respondent testified that the publicly disclosed budget he envisioned for the court’s website would have included details regarding sources of revenue and the payment of all discretionary and nondiscretionary expenses. Hearing Tr. 208:14-210:23, 213:15-214:1. Judge Cannon maintained copies of his taxpayer funded travel expenses in his office and in his role as presiding and administrative judge “probably could have” posted them (or at least data included therein) on the court’s website as the administrative judge. Hearing Tr. 153:13-157:9. But Judge Cannon testified, “Ron Tamburrino isn’t going to dictate what we do or don’t do with our website.” Hearing Tr. 165:1-11; Hearing Exhibits H, I, J, K & L.

Whether or not the word “won’t” *can* mean refusing a direct request, it need not *only* mean refusing a direct request. Respondent testified, “I think you can predict it based on his policy and his past conduct.” Hearing Tr. 259:8-10. If Judge Cannon had posted data regarding his taxpayer funded travel expenses, Respondent would have had to immediately take down his

advertisement. Hearing Tr. 259:11-18. But until then, Respondent's opinion as to what Judge Cannon would or would not do in the future is just that, an opinion. As such, it cannot be a false statement of *fact*.

The failure to post on Judge Cannon's court's website who pays all the bills of the appellate judges was an issue in the campaign. Judge Cannon was present at the October 21, 2014 Ashtabula County League of Women Voters candidates forum when Ron Tamburrino spoke. [Hearing Tr. 111:11-13.] The video⁶ of that forum, at 9:43, shows that Ron Tamburrino stated, while sitting right next to Judge Cannon:

“I believe the Court of Appeals at the Eleventh District does a poor job of letting the public – who pays their salaries and pays their bills – know what's going on in the court of appeals. . . . [A]ll of that information [should be] on the website immediately and forthwith.”

Judge Cannon has never disclosed details of his taxpayer funded travel expenses to the voting public. There is no claim and no evidence that Judge Cannon has ever attempted to do so. Relator's Admissions ¶20.

In contrast to panel member Mr. Davis' acknowledgment that “won't disclose” can mean a “lot of different things”, the Board's Findings assert that the statement “Cannon won't disclose his taxpayer funded travel expenses” must mean that Ron Tamburrino asked him to do so – using the words “taxpayer funded travel expenses” – and that Judge Cannon said “no.” Yet, Relator admitted that nothing in the advertisement that is the subject of Count Two of the Complaint states that Respondent did or did not ask Judge Cannon or his campaign to disclose his “taxpayer funded travel expenses.” Hearing Exhibit D, Relator's Admissions ¶21.

⁶ A DVD of the October 21, 2014, Ashtabula County League of Women Voters candidates forum video was submitted as Hearing Ex. Q, and this excerpt is included as part of Hearing Ex. N.

This interpretation of the “won’t disclose” statement also disregards Judge Cannon’s above-cited testimony reflecting that he fully understood Respondent’s position that his court’s budget including expense information should be posted on his court’s website and that Judge Cannon posted limited court financial information on his court’s website (not including his reimbursed travel expenses) in response to Respondent’s urging that all such information be posted. Hearing Tr. 55:21-57:10. That Judge Cannon posted limited court financial information, but not detailed financial details including Judge Cannon’s taxpayer funded travel expenses that Respondent suggested should be posted, was tantamount to Judge Cannon’s refusal to post the information he understood Respondent suggested should be posted. Thus, the Tamburrino Campaign’s November 1, 2014 press release (Hearing Exhibit 6) and his letter to Mr. Malchesky dated October 27, 2015 (Hearing Exhibit 11) properly described Judge Cannon’s conduct as a refusal. As of the dates of those writings, Judge Cannon clearly understood what information Mr. Tamburrino wanted posted on the court’s website and Judge Cannon had refused to post that information when he posted other financial information.

The Board’s Findings at ¶28 assert that the statement that “Cannon won’t disclose” must refer to a past event (of a request having been made and rejected) and cannot refer to a future event. The Board’s rationale for interpreting “won’t” to mean “didn’t” is that “the statement in the ad follows two statements of past events.” Board Findings ¶28. Whether or not it is possible to interpret “won’t” as past tense, it is not unreasonable to interpret it using the ordinary rules of grammar.

“Won’t” is a contraction of “will not”, a statement or prediction about future conduct. As Relator admits, a statement about what someone will or will not choose to do in the future is necessarily an opinion or a prediction. Hearing Exhibit D, Relator’s Admissions ¶23. Judge

Cannon's failure to disclose this information on the Court's website in the past was a sound basis for predicting his future conduct, wholly apart from the fact that opinions are fully protected by Ohio's Constitution.

The Board also argues that the information was disclosed to the Supreme Court, and thus it was "disclosed" to someone, even though it was never disclosed to the voters to whom the advertisement was addressed. The target audience was the voters seeing the advertisement. The information was not disclosed to the public by posting it on the court's website or otherwise.

Moreover, Relator presented no testimony or documentary evidence the Supreme Court ever "requested" Judge Cannon's taxpayer funded travel expenses using those words, as Relator contends Respondent was under a duty to do. The Supreme Court's "received" date stamp denotes only that Judge Cannon submitted information on Hearing Exhibits H, I, J, K & L to the Supreme Court in the form of *his* request for reimbursement and that those documents were received by the Supreme Court. The stamped documents do not demonstrate that the Supreme Court ever asked him to submit the information. Judge Cannon was free to submit the documents to the Supreme Court in order to be reimbursed, just as he was free not to submit them if he chose to waive reimbursement.

The advertisement ran well before the 2014 election and Judge Cannon still chose not to disclose that information on his court's website. Ron Tamburrino's prediction of Judge Cannon's future conduct is not only fully protected under the First Amendment as a statement of opinion - it is also fully confirmed by the continuing conduct of Judge Cannon.

The Board's interpretation of the statement "won't disclose" (as refusing a direct request) is not the only interpretation possible. Since the statement that was used is susceptible to a

reasonable true interpretation, it should not be the basis of any adverse finding against Respondent.

D. There Was No Clear and Convincing Evidence That Respondent Knew That The Statements At Issue Were False Or Made Them With Reckless Disregard Of Their Truth Or Falsity.

Knowledge or “reckless disregard” in the context of an allegedly false publication is well defined. It does *not* mean mere negligence or recklessness. *St. Amant v. Thompson*, 390 U.S. 727 (1968). Rather it requires proof, by clear and convincing evidence, that Respondent made a false statement either knowing it to be false, or with a “high degree of awareness of its probable falsity.” *Garrison v. State of Louisiana*, 379 U.S. 64, 74 (1964). See, also Ohio Jury Instructions CV 431.01(10).

There is simply no evidence – let alone clear and convincing evidence – that Respondent either knew that the statements in his advertisements were false or that he published them with a high degree of awareness of their probable falsity.⁷ Indeed, to this day he submits that they were true statements. The Board makes no finding regarding which of the two standards Respondent is alleged to have met – knowledge or reckless disregard. The Board merely asserts that one standard or the other was met. Board Findings ¶50. Whether or not the statements could be interpreted in different ways, there is no clear and convincing evidence that Respondent knew or believed them to be untrue.

⁷ Relator may claim that the OSBA’s public criticism of the *State v. Andrews* advertisement should have given Respondent notice that the advertisement was false. However, the OSBA committee “wasn’t making a judgment about whether the statements in the ad were true or false.” Thus, it would be intellectually dishonest to claim that Respondent must have known that the statements in the ad were false or must have had a high degree of awareness of their probable falsity based upon the OSBA’s letter. See Hearing Tr. 196:21-197:7. The OSBA’s letter, Hearing Exhibit 4, was admitted over Respondent’s objections. Hearing Tr. 274-275.

III. THE RECOMMENDED SANCTION IS UNPRECEDENTED AND UNWARRANTED.

Since Respondent believes the Disciplinary Counsel has failed to prove a violation, Respondent also believes there should be no sanction imposed.

The Board, however, recommends a penalty exceeding any penalty ever imposed upon a judicial candidate for disciplinary violations based upon the content of judicial campaign advertisements. In other cases finding election campaign violations, this Court has imposed either a public reprimand or a six-month stayed suspension. See, e.g., *In re Judicial Campaign Complaint Against O'Toole*, 141 Ohio St.3d 355, 2-14-Ohio-4046 (public reprimand for false statements involving name tags falsely claiming to be a judge); *Disciplinary Counsel v. Evans* (2000), 89 Ohio St.3d 497, 2000-Ohio-227 (six-month stayed suspension for false statements in campaign ad and false reporting of contributions and expenditures on campaign finance statements); *In re Judicial Campaign Complaint Against Hildebrandt* (1997), 82 Ohio Misc.2d 1, 675 N.E.2d 889 (six-month stayed suspension for inaccurate disparaging campaign statements); *In re Complaint Against Harper* (1996), 77 Ohio St.3d 211, 673 N.E.2d 1253 (public reprimand for a misleading disparaging television campaign advertisement). See, also, *In re Judicial Campaign Complaint Against Burick* (1999), 95 Ohio Misc.2d 1, 9705 N.E.2d 422; and, *In re Judicial Campaign Complaint Against Roberts* (1996), 81 Ohio Misc.2d 59, 675 N.E.2d 84 (public reprimand for misleading campaign advertisements concerning endorsements).

The Relator recommended a public reprimand. The panel recommended a six-month stayed suspension, with conditions. However, the Board has recommended a one year suspension with the final six months stayed, with conditions. The Board claims that “a more stringent sanction is necessary” because Respondent refused to agree that the statements in his

advertisements were false. In other words, the Board demands that Respondent be punished in an unprecedented way for putting up a defense against the charges against him.

While “a refusal to acknowledge the wrongful nature of conduct” is an aggravating factor under Gov. Bar Rule V §13(B)(7), Respondent was not defending lying. Respondent was denying that he committed the conduct that he was accused of, among other defenses. Moreover, the Respondents in *O’Toole*, in *Harper*, and in other of the campaign violation cases cited above denied their guilt and denied the falsity of their statements without becoming subject to enhanced punishments.

The Board also found as an aggravating factor that “Respondent timed the two different ads on television to air at the end of the judicial campaign (mid and late October) to strategically prevent Judge Cannon from having the opportunity to air television ads that countered the effect of the late ads.” While the judicial advertisements aired in October, every judicial candidate that airs television ads for the November election airs them in October! The notion that this is an aggravating factor rather than the normal operation of an election campaign is simply nonsense. Moreover, there is nothing in the record supporting a finding that the advertisements were “strategically” timed to prevent a response. Indeed, Judge Cannon had plenty of time to obtain a public statement from the Ohio State Bar Association condemning the *State v. Andrews* advertisement as “unfair”, and used the OSBA’s letter effectively in the final days of the campaign. [Hearing Tr. 125:6-23; Hearing Ex. 4; and, attachment C to Hearing Exhibit 15.] Moreover, nothing in Gov. Bar Rule V §13(B) permitted the Board to consider October airing of campaign television advertisements to be an aggravating factor.

The Board also found as an aggravating factor that “Respondent engaged in multiple offenses.” But, as noted below, the Board multiplied the violations by “finding” violations for

which Respondent was never charged and ignored that Relator dismissed a charged violation. See Relator's Closing Argument, p. 12, footnote 2.

The Board correctly found as mitigating factors that Respondent has no prior disciplinary record and was cooperative during the proceedings. However, the Board failed to consider Respondent's good character, reputation, and ten years of public service.

Respondent has had an unblemished record during his thirty-three years of practicing law. Hearing Tr. 206:10-12, 210:24-211:3. He has never had an ethics finding against him and is rated by his peers in Martindale-Hubbell as AV Preeminent. Hearing Tr. 210:24-211:6. He has served the public as a township trustee for ten years, and in 2014 Respondent was a first time judicial candidate. Hearing Tr. 207:22-208:5, 208:24-209:2.

Even if there was a basis for finding a violation against Respondent – which Respondent denies – there is no basis for the unprecedented penalty recommended by the Board.

IV. THE PROCEDURE FOLLOWED DENIED RESPONDENT HIS DUE PROCESS RIGHTS

A. Respondent Was Prejudiced By The Unreasonable Delay In Completing The Investigation.

The grievance should have been dismissed because the investigation extended beyond one year and Mr. Tamburrino was prejudiced by this unreasonable delay. See Gov. Bar Rule V § 9(D).

The grievance was dated October 28, 2014. Gov. Bar Rule V § 9(D) provides that investigations “shall be concluded within sixty days from the date of the receipt of the grievance.” The rule also provides that extensions of time to complete the investigation may be granted provided “[i]nvestigations for which an extension is granted shall be completed within one hundred fifty days from the date of receipt of the grievance.” Rule V § 9(D)(2). In certain other cases, such as unusually complex investigations, time delays in obtaining evidence or

testimony of witnesses, or other good cause shown, extensions beyond one hundred fifty days may be granted, provided “[n]o investigation shall be extended beyond one year from the date of the filing of the grievance.” Gov. Bar Rule V § 9(D)(2).

Gov. Bar Rule V § 9(D)(3) states that the time limits are not jurisdictional, and that “[n]o grievance filed shall be dismissed unless it appears that there has been an unreasonable delay and that the rights of the respondent to have a fair hearing have been violated.” However, Gov. Bar Rule V § 9(D)(3) also states that “[i]nvestigations that extend beyond one year from the date of filing are prima facie evidence of unreasonable delay.”

The original grievance was filed with the Board of Professional Conduct on October 28, 2014, with a request for an expedited hearing. On October 29, 2014, the grievant was informed that there would not be an expedited hearing. Hearing Tr. 255:20-25. Counsel for Relator has indicated that the Disciplinary Counsel’s office did not receive a copy of the grievance until October 30, 2014. Hearing Tr. 238:13-14. On October 30, 2015, the Disciplinary Counsel sent a letter to Counsel for Respondent that the investigation was completed. Relator argued that the one year period should have run from the date the Disciplinary Counsel received the grievance (October 30, 2014), and not from the time the grievance was filed (October 28, 2014). However, the rules require the investigation to be completed within a year of the filing of the grievance, not a year from the date it is sent from the Board of Professional Conduct to the Disciplinary Counsel.

More than a year elapsed between the date the grievance was filed (October 28, 2014) and the date Relator concluded his investigation (October 30, 2015). The delay was prima facie unreasonable and Mr. Tamburrino’s rights to a fair hearing have been violated.

There may be disputes about what was or was not said at various forums regarding Mr. Tamburrino's suggestions about disclosure of Judge Cannon's court's financial records. Memories fade. The ability to subpoena and depose third-party witnesses becomes an exercise in futility. Documents and records of Judge Cannon or his campaign may have been destroyed, as many political campaigns routinely purge their records shortly after the campaign is over. The political tinge of partisan memories makes verification by third parties even more important. Yet a year or more later, those memories were necessarily diminished or gone.

The Disciplinary Counsel made no request that Judge Cannon or his treasurer, Mr. Malchesky, or anyone else retain documents or other evidence. Judge Cannon made no request that any witnesses retain documents or other evidence, including the identity of potential witnesses who were disclosed to Respondent by Relator and Judge Cannon for the first time in the form of a privilege log served a few days before the panel hearing. Hearing Tr. 174-175. As a result, documents were destroyed, including when Judge Cannon got rid of his cell phone that included potentially relevant text messages and other data, and videotapes of campaign events ceased to be available. Hearing Tr. 239:7-240:7. Perhaps all of those documents were irrelevant. Perhaps not. Perhaps other documents were lost or destroyed. Perhaps not. Perhaps lost or destroyed documents would have led to exculpatory evidence. Perhaps not. But Respondent was prejudiced by his inability to access them. The Board's suggestion that Respondent could have "obtain[ed] materials in his defense" earlier [Board Findings ¶37] fails to consider that Respondent had no ability to subpoena documents or to conduct formal discovery until the Complaint was certified. The Board's suggestion also fails to consider that Respondent was under no duty to waive his rule conferred right to confidentiality regarding the existence of

the grievance prior to certification of a complaint by advising third parties to identify and preserve potentially relevant evidence.

In rejecting Respondent's claim to have been prejudiced by the delay, the Board of Professional Conduct reversed the burden and found that Respondent had failed to prove prejudice. Board's Findings ¶¶33-35. However, Gov. Bar Rule V § 9(D)(3) shifts to Relator the burden of overcoming with clear and convincing evidence the prima facie presumption of unreasonableness when the investigation lasts over one year. There was simply no dispute about the fact that the grievance was filed with the Board of Professional Conduct prior to October 30, 2014, and there is simply no dispute that Relator presented no evidence to overcome the prima facie presumption of unreasonableness by clear and convincing evidence.

B. Respondent Was Prejudiced By The Failure Of Relator To Keep His Response To the Original Grievance Confidential.

Mr. Tamburrino also was prejudiced by Relator's failure to abide by the confidentiality provisions that apply to investigations. Gov. Bar Rule V §9(E) states, "If the respondent specifically requests, in writing, to the Office of Disciplinary Counsel or certified grievance committee that the reply not be furnished to the grievant, the Office of Disciplinary Counsel or certified grievance committee shall not furnish the reply to the grievant." Thus, in Ron Tamburrino's prior response to the December 2, 2014, Letter of Inquiry, he stated, at the bottom of the second page:

"Because of the political nature of Mr. Malchesky's charges against me, I am concerned that anything I say may be used by Mr. Malchesky or others to harm me politically in the future. For that reason, I ask that a copy of this response not be provided to him."

This request was not honored. Instead, Ron Tamburrino's prior response was provided to the grievant. This improper publication of Ron Tamburrino's response prejudiced Respondent

Ron Tamburrino. Mr. Malchesky's (and presumably Judge Cannon's and other's) review of the strength of Ron Tamburrino's initial response prompted them to hire expert counsel to find some basis for pursuing an ethics charge against Ron Tamburrino, for precisely the political motivations that prompted Mr. Tamburrino's original request that his response not be provided to his political adversary's campaign treasurer.

All of the charges in the original grievance were found to lack merit except for the claim that "Cannon won't disclose his taxpayer reimbursed travel expenses." Mr. Malchesky and Judge Cannon chose not to make a claim with the Board regarding the *State v. Andrews* advertisement prior to the 2014 election. Their judgment prior to the election was that this television advertisement did not raise any ethical issue that they saw fit to bring before the Board. Six months later, after they read Ron Tamburrino's response to Mr. Malchesky's original grievance, they changed their minds. See Hearing Exhibit 15. After they read Ron Tamburrino's response to the original grievance they even hired expert counsel to help them scour the record for anything else they could come up with against Ron Tamburrino.

But for the Relator's violation of Gov. Bar Rule V §9(E) there would have been no issue regarding the *State v. Andrews* advertisement. Perhaps Judge Cannon's memory and testimony would have been exactly the same if he had not been provided Respondent's response. Perhaps not. But Respondent was prejudiced by having his "confidential" response document provided to his accuser contrary to Gov. Bar Rule V, §8(E), which explicitly prohibited disclosure when so requested, as Respondent did. See Trial Exhibit 15, p. 2.

Thus, even if the counts in the Complaint had merit – which they do not – the prejudice to Mr. Tamburrino by Relator's violation of the confidentiality rules would warrant dismissal of the Complaint.

Just as the applicable rules required Mr. Tamburrino to cooperate with Relator during his investigation, the applicable rules also required Relator to timely conclude his investigation, take reasonable steps to identify and direct others to identify and preserve potentially relevant (even if exculpatory) evidence, and maintain confidentiality of Mr. Tamburrino's information when requested to do so. Relator's failure to satisfy these obligations warrants dismissal of the Complaint.

C. Respondent Was Prejudiced By Being Punished For Allegedly Making False Statements That Were Never Part Of The Complaint.

At ¶21 of the Board's Findings, the Board found that Respondent made six false statements in the *State v. Andrews* advertisement. But five of those six statements were never part of the Complaint and were never alleged to be disciplinary violations. Respondent was never placed on notice that he would have to defend the truth of those five statements. Respondent was clearly prejudiced by the Board's finding him guilty of violations on which he was never charged. Further, the Board declared that "nearly all of the 'Teenage Drinking' ad's statements are completely and verifiably false" and improperly treated these "multiple violations" as an aggravating factor. Board Findings ¶¶48, 53.

The five statements enumerated by the Board at ¶21 of its Findings were:

1. "but appellate judge Tim Cannon did something almost as bad"

As noted above, the Complaint expressly did not claim that this statement of opinion was a false statement of fact.

2. "In the case State versus Andrews, Cannon ruled that cops couldn't enter a house to arrest a parent. . ."
3. "Judge Cannon ruled cops couldn't arrest a parent who hosted a teenage drinking party."

4. “. . . who was hosting a teenage drinking party, because he felt teenage drinking wasn't a serious crime.”
5. “Judge Time Cannon doesn't think teenage drinking is a serious offense.”

The Complaint does not claim that any of the above statements misstated the finding in *State v. Andrews* under the facts and circumstances of that case. The Complaint does not dispute the fact that Judge Cannon found that teenage drinking was not sufficiently serious to constitute an exigent circumstance justifying a warrantless entry and arrest. The only statement in the *State v. Andrews* advertisement alleged to be false was the statement “Cannon doesn't think teenage drinking is serious”. Relator argued that this statement referred to Judge Cannon's personal feelings about teenage drinking and, thus, should be viewed differently than the other statements in the advertisement that merely characterized his decision in the case. See, e.g., Relator's Closing Argument at p. 3.

The probable cause panel did not find probable cause that *any* statements in the *State v. Andrews* advertisement were false, *except* for the statement “Cannon doesn't think teenage drinking is serious.” The Board's decision to find against Respondent on statements whose truth was never previously disputed usurps the probable cause panel's authority, effectively overturns the probable cause determination *ex post facto*, disregards the limits of the Board's authority, and violates the Due Process rights of Respondent.

D. Respondent Was Prejudiced By The Panel's Failure To Rule On Privilege Claims Asserted By Judge Cannon, And By Failing To Transmit With The Record Judge Cannon's Privilege Log And The Allegedly Privileged Documents For Review By This Court.

The panel conducted an *in camera* review of documents Judge Cannon alleged in response to a subpoena were privileged communications between him and Mr. Malchesky, an attorney who served as Judge Cannon's campaign treasurer. Without determining whether any

of the documents fell within the alleged privilege, the panel determined none of the documents were relevant, then returned all the documents to Judge Cannon. Hearing Tr. 171:7-181:12.

Respondent requested that the documents be made part of the record for review by this court. Respondent's Post Hearing Brief, p. 10. Respondent has received nothing from Relator or the Board reflecting the documents have been made part of the record.

Respondent has been prejudiced in at least two ways. First, Respondent was denied an opportunity to weigh in on the panel's determination the documents were irrelevant, because Respondent never got a chance to review them. Second, because the documents and the privilege log are not part of the record, Respondent has been denied an opportunity to seek meaningful review of the issues.

V. OHIO'S DISCIPLINARY PROCESS, AS APPLIED TO CAMPAIGN SPEECH, IS UNCONSTITUTIONAL.

A. The Recent *Susan B. Anthony List* Decision Indicates That The Court's Current Process For Punishing Campaign Speech Is Unconstitutional.

O'Toole was rendered prior to the Sixth Circuit Court of Appeals decision in *Susan B. Anthony List v. Driehaus* (6th Cir., Feb. 24, 2016), No. 14-4008, a copy of which is attached. The *Susan B. Anthony* case declared unconstitutional R.C. 3517.21(B)(10), a provision of the Ohio Revised Code that was almost word for word identical with Jud. Cond. Rule 4.3(A). Since “[p]olitical speech is at the core of First Amendment protections”, the content based restrictions found in R.C. 3517.21(B)(10) (and in Jud. Cond. Rule 4.3(A)) must survive strict scrutiny. *Susan B. Anthony*, p. 7. See, also *O'Toole* ¶20.

“It is the rare case in which a speech restriction withstands strict scrutiny.” *Susan B. Anthony*, p. 8. In order to do so, the speech restriction must both serve a compelling state interest

and must be narrowly tailored to achieve that interest. *Susan B. Anthony*, p. 8, *O'Toole* ¶¶20, 21.

In *O'Toole*, the Ohio Supreme Court found that Jud. Cond. Rule 4.3(A) served a compelling state interest and was narrowly tailored to meet that interest (at least if the comments to Jud. Cond. Rule 4.3(A) about misleading speech are disregarded). However, in 2016, *Susan B. Anthony* analyzed the narrowly tailoring requirement very differently than the Ohio Supreme Court did in *O'Toole* in 2014. The Sixth Circuit's analysis at pp. 8-11 of *Susan B. Anthony* of why R.C. 3517.21(B)(10) is not narrowly tailored to protect the integrity of Ohio's elections, could be taken almost verbatim as an analysis of why Rule 4.3(A) fails the narrowly tailoring requirement. The very defects found by the Sixth Circuit in R.C. 3517.21(B)(10) regarding timing, application to non-material statements, over-inclusiveness, and under-inclusiveness are equally present in Jud. Cond. Rule 4.3(A).

For example, *Susan B. Anthony* found the timing of Ohio's political false statement laws to be constitutionally defective because "while the laws provide an expedited timeline for complaints filed within a certain number of days before an election, complaints filed outside this timeframe are free to linger for six months." This same defect is present in the procedure for enforcing Jud. Cond. Rule 4.3(A), except that cases are free to linger for a year (or more).

Susan B. Anthony also found Ohio's political false statements laws to be facially unconstitutional because, notwithstanding the argument "that the political false statements laws require that the false statement be material, no such requirement exists on the law's face." Similarly, under Jud. Cond. Rule 4.3(A), and false statement, material or not, can form a violation.

Susan B. Anthony further found that Ohio's political false statements laws to be both over-inclusive and under-inclusive since pre-election rulings could cause damage to a campaign that ultimately may not be in violation of the law, while post-election rulings would not timely provide relief for campaigns that are the victim of potentially damaging false statements (or relief for campaigns wrongfully alleged publicly to have made false statements).

In light of the *Susan B. Anthony* decision, Respondent respectfully submits that the manner in which the Court reviews and sanctions campaign speech violates *Susan B. Anthony List v. Driehaus* (6th Cir., Feb. 24, 2016), No. 14-4008.

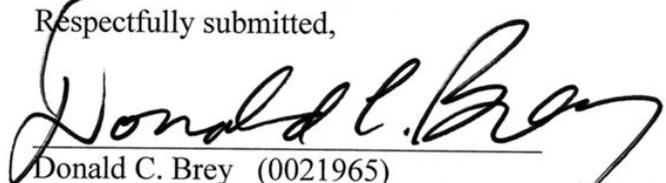
B. Elected Judges May Not Constitutionally Establish Rules And Punish Challengers To Sitting Judges For Campaign Speech.

Respondent is further prejudiced by having the legitimacy of his campaign speech criticizing a sitting judge reviewed by sitting judges and those who deal with sitting judges on a regular basis. It is difficult to ignore the inevitability that there is heightened risk that such bodies will view criticism of judges more harshly than other panelists or other bodies (such as jurors in defamation actions) would view such criticism when applying appropriate standards. This concern, in part, underlies the U.S. Supreme Court's decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commissioners*, 574 U.S. ___, 135 S.Ct. 1101 (2015), in which a state agency comprised of dentists was found to have no immunity from anti-trust laws when they established rules that adversely affected potential competitors to dentists. The concerns expressed in the *Susan B. Anthony* case suggest that the inclusion of elective judges on the panel and board seeking to punish challengers for political speech cannot pass constitutional scrutiny.

CONCLUSION

WHEREFORE, Respondent submits that the Findings of the Board should be set aside, its recommendations disregarded, and all charges against the Respondent should be dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This certifies that a true and accurate copy of the foregoing was served upon Joseph M. Caligiuri, Chief Assistant Disciplinary Counsel, by ordinary U.S. Mail, postage prepaid, at 250 Civic Center Drive, Suite 325, Columbus, Ohio 43215-7411, and by email at Joseph.Caligiuri@sc.ohio.gov this 5th day of July, 2016.


Donald C. Brey

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 16a0048p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

SUSAN B. ANTHONY LIST; COALITION OPPOSED TO
ADDITIONAL SPENDING & TAXES,
Plaintiffs-Appellees,

v.

STEVEN DRIEHAUS,

Defendants,

OHIO ELECTIONS COMMISSION; JOHN R.
MROCZKOWSKI; BRYAN FELMET; CHARLES E.
CALVERT; JAYME P. SMOOT; HARVEY H. SHAPIRO;
DEGEE WILHELM; LARRY L. WOLPERT; PHILIP
RICHTER,

Defendants-Appellants.

No. 14-4008

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 1:10-cv-00720; 1:10-cv-00754—Timothy S. Black, District Judge.

Argued: December 10, 2015

Decided and Filed: February 24, 2016

Before: COLE, Chief Judge; SUTTON, Circuit Judge; BELL, District Judge.*

COUNSEL

ARGUED: Tiffany L. Carwile, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellants. Yaakov M. Roth, JONES DAY, Washington, D.C., for Appellee Susan B. Anthony List. **ON BRIEF:** Tiffany L. Carwile, Bridget C. Coontz, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellants. Yaakov M. Roth, Michael A.

*The Honorable Robert Holmes Bell, United States District Judge for the Western District of Michigan, sitting by designation.

Carvin, JONES DAY, Washington, D.C., David R. Langdon, LANGDON LAW LLC, West Chester, Ohio, for Appellee Susan B. Anthony List. Curt C. Hartman, THE LAW FIRM OF CURT C. HARTMAN, Cincinnati, Ohio, Christopher P. Finney, FINNEY LAW FIRM LLC, Cincinnati, Ohio, for Appellee Coalition Opposed to Additional Spending. Deborah J. Dewart, Swansboro, North Carolina, Maurice A. Thompson, 1851 CENTER FOR CONSTITUTIONAL LAW, Columbus, Ohio, David J. Carey, THOMPSON HINE LLP, Columbus, Ohio, John K. Bush, BINGHAM GREENEBAUM DOLL LLP, Louisville, Kentucky, John C. Eastman, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, Orange, California, Allen Dickerson, CENTER FOR COMPETITIVE POLITICS, Alexandria, Virginia, for Amici Curiae.

OPINION

COLE, Chief Judge. Susan B. Anthony List (“SBA List”) and the Coalition Opposed to Additional Spending and Taxes (“COAST”) sued the Ohio Elections Commission (“Commission”) and various state officials, alleging that Ohio’s political false-statements laws, Ohio Rev. Code § 3517.21(B)(9)–(10), violate the First and Fourteenth Amendments. The district court agreed and entered summary judgment and a permanent injunction in favor of SBA List and COAST. *Susan B. Anthony List v. Ohio Elections Comm’n*, 45 F. Supp. 3d 765, 781 (S.D. Ohio 2014). Because the laws are content-based restrictions that burden core protected political speech and are not narrowly tailored to achieve the state’s interest in promoting fair elections, we affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Ohio’s Political False-Statements Laws

Ohio’s political false-statements laws prohibit persons from disseminating false information about a political candidate in campaign materials during the campaign season “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.” Ohio Rev. Code § 3517.21(B)(10). The statutes specifically prohibit false statements about a candidate’s voting record, but are not limited to that. *See* Ohio Rev. Code § 3517.21(B)(9)–(10). “Campaign materials” are broadly defined as, but not limited to, “sample ballots, an

advertisement on radio or television or in a newspaper or periodical, a public speech, [or] press release.” Ohio Rev. Code § 3517.21(B).

Any person, including the Secretary of State or a Board of Elections official, may file a complaint with the Commission alleging a violation of the political false-statements laws. Ohio Rev. Code §§ 3517.21(C), 3517.153. For a complaint filed shortly before an election, there is a three-step process to be convicted of the crime of making a political false statement. First, a panel of the Commission conducts a preliminary probable cause hearing based on the complaint and issues a public finding. Ohio Rev. Code §§ 3517.154, 3517.156. If the panel finds probable cause, the complaint proceeds to an adjudicatory hearing before the full Commission. Ohio Rev. Code § 3517.156(C)(2) (referencing the hearing procedures outlined by § 3517.155). If, after the adjudicatory hearing, the Commission finds by clear and convincing evidence that a party violated the political false-statements laws, it may refer the case to a prosecutor. Ohio Rev. Code §§ 3517.21(C), 3517.155(A)(1)(c), 3517.155(D). If convicted in subsequent state court proceedings, first-time violators may be sentenced up to six months in prison or fined up to \$5,000. Ohio Rev. Code § 3517.992(V). For complaints filed after an election, more than sixty days before a primary election, or more than ninety days before a general election, there is no probable cause hearing and the complaint proceeds directly to an adjudicatory hearing. Ohio Rev. Code § 3517.155.

B. Litigation

In 2010, then-Congressman Steven Driehaus filed a complaint with the Commission alleging that SBA List violated Ohio’s political false-statements laws by issuing a press release accusing him of voting for “taxpayer-funded abortion” by voting for the Affordable Care Act. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2339 (2014). A panel of the Commission issued a probable cause finding that SBA List violated the law. *Id.* SBA List responded by filing suit against Driehaus and various state officials in the Southern District of Ohio. That case was consolidated with a similar case that COAST filed, adding the Commission as a defendant, based on its desire to make similar accusations against Driehaus in a mass email. Both parties sought declaratory and injunctive relief, alleging the political false-statements laws violate the First and Fourteenth Amendments to the United States Constitution. *Id.* at 2339–40.

The Supreme Court held this case was ripe for review as a facial challenge, despite the dismissal of the administrative proceedings. *Id.* at 2347.¹ On remand, the district court granted SBA List's and COAST's motions for summary judgment, holding that Ohio's political false-statements laws were content-based restrictions that fail strict scrutiny review. *Ohio Elections Comm'n*, 45 F. Supp. 3d at 775–79. Accordingly, the district court “str[uck] down the laws as unconstitutional and permanently enjoin[ed] the Ohio Elections Commission and its members from enforcing Ohio's political false-statements laws.” *Id.* at 770. The Commission appeals.

II. STANDARD OF REVIEW

We review de novo a district court's decision to grant summary judgment. *E.g.*, *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 242 (6th Cir. 2015). Summary judgment is only appropriate if the record, when viewed in the light most favorable to the nonmoving party, reveals no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; Fed. R. Civ. P. 56(a).

III. ANALYSIS

A. Whether We Are Bound By Sixth Circuit Precedent

As an initial matter, the Commission argues we are bound by our decision in *Pesttrak v. Ohio Elections Commission*, 926 F.2d 573 (6th Cir. 1991), which held that Ohio's political false-statements laws were constitutional on their face and, for the most part, in their enforcement. “A published prior panel decision ‘remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.’” *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009) (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)); *see also* 6th Cir. R. 32.1(b). Despite the Commission's arguments, we conclude we are no longer bound by *Pesttrak* due to intervening Supreme Court decisions.

First, while the 1986 version of the statute construed by *Pesttrak* had identical prohibitions, it had different enforcement procedures that alleviate some of the problems with the current statute. *Compare* Ohio Rev. Code § 3599.091 (1986), *with* Ohio Rev. Code §§ 3517.156,

¹Once Driehaus lost the election, he withdrew his complaint with the Commission and from this litigation.

3517.21 (1995). Under the former statute, the Commission did not issue probable cause findings, but waited until its investigation was complete before making any ruling on a complaint. See Ohio Rev. Code § 3599.091(C) (1986). Further, while the former statute provided the Commission with subpoena power, the accused party may not have been compelled to defend itself until there was a finding that it had in fact violated the political false-statements laws. See Ohio Rev. Code § 3599.091(D) (1986).

Second, several post-*Pesttrak* Supreme Court rulings call our decision into question. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 351–53 (1995); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992). But the Supreme Court's decision in *United States v. Alvarez*, 132 S. Ct. 2537 (2012), most clearly abrogates *Pesttrak*'s reasoning. In *Alvarez*, the Supreme Court struck down the Stolen Valor Act, a law that prohibited persons from falsely claiming they won the Congressional Medal of Honor, regardless of if the false statement was made knowingly.

Alvarez abrogates *Pesttrak*'s holding that knowing false speech merits no constitutional protection. In *Pesttrak*, we determined that, on their face, Ohio's political false-statements laws were constitutional because "false speech, even political speech, does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth." *Pesttrak*, 926 F.2d at 577. However, in *Alvarez* the Supreme Court unanimously rejected the "categorical rule . . . that false statements receive no First Amendment protection." *Alvarez*, 132 S. Ct. at 2545 (plurality opinion); see *id.* at 2254–55 (Breyer, J., concurring in the judgment); *id.* at 2563 (Alito, J., dissenting). In particular, *Alvarez* distinguished the cases on which *Pesttrak* relied, noting that these cases did not depend on the falsity of the statements, but on the fact that they were defamatory, fraudulent, or caused some other "legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation." *Alvarez*, 132 S. Ct. at 2545 (plurality opinion); see also *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003) (upholding a statute prohibiting fraudulent speech, but advising that a "[f]alse statement alone does not subject a [speaker] to fraud liability" unless there is also intent to deceive); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) (prohibiting damages for

a defamatory remark concerning a public official unless the statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not”); *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964) (same). This undermines *Pesttrak*’s fundamental premise that false statements, without more, deserve no constitutional protection.

Alvarez further repudiates *Pesttrak*’s assumption that the government can selectively regulate false statements on certain topics. It posited that giving governments this power could lead to unwanted consequences and abuses. *Alvarez*, 132 S. Ct. at 2547–48 (plurality opinion) (“Permitting the government to decree this speech to be a criminal offense . . . would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle.”); *id.* at 2553 (Breyer, J., concurring in the judgment) (“[T]he pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more. And those who are unpopular may fear that the government will use that weapon selectively . . .”). Finally, *Alvarez* confirms that the First Amendment protects the “civic duty” to engage in public debate, with a preference for counteracting lies with more accurate information, rather than by restricting lies. *Id.* at 2550 (plurality opinion); *id.* at 2556 (Breyer, J., concurring in the judgment).

Accordingly, we are not bound by *Pesttrak*’s determination that Ohio’s political false-statements laws are constitutional and, to the extent today’s holding conflicts with *Pesttrak*, it has been abrogated by *Alvarez*.

B. Level of Scrutiny

The first step in a constitutional inquiry is which level of scrutiny applies. In this instance, strict scrutiny applies, whether we apply old First Amendment law or more recent First Amendment law.

1. Burdening Core Speech

Under prior jurisprudence, before analyzing whether a speech prohibition was constitutional, courts had to determine whether a challenged restriction burdened core First Amendment speech or non-core speech that warranted less protection. *See, e.g., McIntyre*,

514 U.S. at 347. Core-protected speech received the highest level of review under strict scrutiny, while speech further from the core received a lower level of review. *Id.* at 344–47.

Political speech is at the core of First Amendment protections. *See id.* at 346; *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976); *Sullivan*, 376 U.S. at 269–70. Though combining protected speech with unprotected speech does not afford the speaker absolute immunity for lies, *see Garrison*, 379 U.S. at 75, “the power to proscribe [speech] on the basis of *one* content element (e.g., obscenity) does not entail the power to proscribe it on the basis of *other* content elements,” *R.A.V.*, 505 U.S. at 386. Even false speech receives some constitutional protection. *E.g.*, *Alvarez*, 132 S. Ct. at 2545.

On their face, Ohio’s political false-statements laws target speech at the core of First Amendment protections—political speech. Contrary to the Commission’s arguments, Ohio’s laws reach not only defamatory and fraudulent remarks, but *all* false speech regarding a political candidate, even that which may not be material, negative, defamatory, or libelous. *Compare* Ohio Rev. Code § 3517.21(B)(9) (prohibiting false statements about a candidate’s voting record), *with* § 3517.21(B)(10) (a catchall provision, prohibiting, in general, “a false statement concerning a candidate.”). Accordingly, strict scrutiny is appropriate.

2. Content-Based Prohibitions

The Supreme Court’s 2015 decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, sought to clarify the level of review due to certain speech prohibitions. That test focused on whether a law was content-based at all, rather than the type of content the law targeted. The *Reed* Court held that strict scrutiny is the appropriate level of review when a law governs any “specific subject matter . . . even if it does not discriminate among viewpoints within that subject matter.” *Id.* at 2230 (citing *Consol. Edison Co. of N.Y. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 530, 537 (1980)). Content-based laws “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed*, 135 S. Ct. at 2226. Ohio’s political false-statements laws only govern speech about political candidates during an election. Thus, they are content-based restrictions focused on a specific subject matter and are subject to strict scrutiny.

C. Constitutional Analysis

Laws subject to strict scrutiny are presumptively unconstitutional and can only survive if they (1) serve a compelling state interest and (2) are narrowly tailored to achieve that interest. *Id.*; *McIntyre*, 514 U.S. at 346–47. “[I]t is the ‘rare case in which a speech restriction withstands strict scrutiny.’” *Reed*, 135 S. Ct. at 2236 (Kagan, J., concurring in the judgment) (citation and alterations omitted).

Here, Ohio’s interests in preserving the integrity of its elections, protecting “voters from confusion and undue influence,” and “ensuring that an individual’s right to vote is not undermined by fraud in the election process” are compelling. *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion); *see also McIntyre*, 514 U.S. at 349 (Ohio’s interest in preventing fraud and libel “carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large.”), *id.* at 379 (Scalia, J., dissenting) (“[N]o justification for regulation is more compelling than protection of the electoral process. Other rights, even the most basic, are illusory if the right to vote is undermined.” (internal quotation marks and citation omitted)); *Eu v. San Francisco Cnty. Democratic Central Comm.*, 489 U.S. 214, 231 (1989) (noting that a state has a “compelling interest in preserving the integrity of its election process”). But Ohio’s laws do not meet the second requirement: being narrowly tailored to protect the integrity of Ohio’s elections. Thus, this is not such a “rare case” that survives strict scrutiny.

The Commission argues that Ohio’s political false-statements laws should receive the less-exacting intermediate scrutiny. It did not address SBA List’s and COAST’s argument that the law is subject to strict scrutiny. Therefore, it is not surprising that the Commission’s arguments are insufficient to survive strict scrutiny. Ohio’s laws do not pass constitutional muster because they are not narrowly tailored in their (1) timing, (2) lack of a screening process for frivolous complaints, (3) application to non-material statements, (4) application to commercial intermediaries, and (5) over-inclusiveness and under-inclusiveness.

First, the timing of Ohio’s administrative process does not necessarily promote fair elections. While the laws provide an expedited timeline for complaints filed within a certain

number of days before an election, complaints filed outside this timeframe are free to linger for six months. Ohio Rev. Code §§ 3517.154(A)(2)(a), 3517.155, 3517.156(B)(1). Even when a complaint is expedited, there is no guarantee the administrative or criminal proceedings will conclude before the election or within time for the candidate's campaign to recover from any false information that was disseminated. Indeed, candidates filing complaints against their political opponents count on the fact that "an ultimate decision on the merits will be deferred until after the relevant election." *Driehaus*, 134 S. Ct. at 2346 (quoting Br. of Amicus Curiae Ohio Att'y Gen. Michael DeWine in Supp. of Neither Party (filed U.S. Mar. 3, 2014) (No. 13-193), 2014 WL 880938, at *14–15 ("DeWine Amicus Br.")). A final finding that occurs *after* the election does not preserve the integrity of the election. On the other hand, in many cases, "a preelection probable-cause finding . . . itself may be viewed [by the electorate] as a sanction by the State," *Driehaus*, 134 S. Ct. at 2346 (quoting DeWine Amicus Br., 2014 WL 880938, at *13), that "triggers 'profound' political damage, even before a final [Commission] adjudication," *Ohio Elections Comm'n*, 45 F. Supp. 3d at 772 (quoting DeWine Amicus Br., 2014 WL 880938, at *6). The timing of Ohio's process is not narrowly tailored to promote fair elections.

Second, Ohio fails to screen out frivolous complaints prior to a probable cause hearing. *See* Ohio Rev. Code § 3517.154(A)(1). While this permits a panel of the Commission to review and reach a probable cause conclusion on complaints as quickly as possible, it also provides frivolous complainants an audience and requires purported violators to respond to a potentially frivolous complaint. "Because the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents." *Driehaus*, 134 S. Ct. at 2345; *see also* Ohio Rev. Code §§ 3517.21(C), 3517.153. There is no process for screening out frivolous complaints or complaints that, on their face, only complain of non-actionable statements, such as opinions. *See* Ohio Rev. Code § 3517.154(A)(1). Indeed, some complainants use the law's process "to gain a campaign advantage without ever having to prove the falsity of a statement . . . tim[ing] their submissions to achieve maximum disruption . . . forc[ing political opponents] to divert significant time and resources . . . in the crucial days leading up to an election." *Driehaus*, 134 S. Ct. at 2346 (quoting DeWine Amicus Br., 2014 WL 880938, at *7, *14–15). The potential for attorney's fees and the costs for frivolous complaints does not save the law because

this finding of frivolity does not occur until *after* a probable cause finding or a full adjudicatory hearing. *See* Ohio Rev. Code § 3517.155(E). The process of designating a panel, permitting parties to engage in motion practice, and having a panel conduct a probable cause review for plainly frivolous or non-actionable complaints is not narrowly tailored to preserve fair elections.

Third, Ohio's laws apply to *all* false statements, including non-material statements. *See* Ohio Rev. Code § 3517.21(B)(9)–(10). Though the Commission argues that the political false-statements laws require that the false statement be material, no such requirement exists on the law's face, *see* Ohio Rev. Code § 3517.21(B), nor has either party cited any case in which courts have imputed a materiality requirement to the political false-statements laws. Thus, influencing an election by lying about a political candidate's shoe size or vote on whether to continue a congressional debate is just as actionable as lying about a candidate's party affiliation or vote on an important policy issue, such as the Affordable Care Act. *See* Ohio Rev. Code § 3517.21(B)(10). Further, the law prohibits false statements regarding a political candidate—even outside the political arena—so long as the statement is “designed to promote the election, nomination, or defeat of the candidate,” and is made in broadly defined “campaign materials.” *See* Ohio Rev. Code § 3517.21(B)(10). Penalizing non-material statements, particularly those made outside the political arena, is not narrowly tailored to preserve fair elections.

Fourth, Ohio's laws apply to anyone who advertises, “post[s], publish[es], circulate[s], distribute[s], or otherwise disseminate[s]” false political speech. *See* Ohio Rev. Code § 3517.21(B)(10). Such a broad prohibition “applies not only to the speaker of the false statement but also to commercial intermediates like the company that was supposed to erect SBA List's billboard in 2010.” *Ohio Elections Comm'n*, 45 F. Supp. 3d at 778. Conducting hearings against or prosecuting a billboard company executive, who was simply the messenger, is not narrowly tailored to preserve fair elections.

Fifth, the law is both over-inclusive and underinclusive. Causing damage to a campaign that ultimately may not be in violation of the law, through a preliminary probable cause ruling, does not preserve the integrity of the elections and in fact undermines the state's interest in promoting fair elections. At the same time, the law may not timely penalize those who violate it, nor does it provide for campaigns that are the victim of potentially damaging false statements.

“[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.” *Reed*, 135 S. Ct. at 2232 (internal quotation marks and citation omitted). Though Ohio’s interests “are assuredly legitimate, we are not persuaded that they justify [such an] extremely broad prohibition.” *McIntyre*, 514 U.S. at 351. Indeed, courts have consistently erred on the side of permitting more political speech than less. *See, e.g., Alvarez*, 132 S. Ct. at 2550.

Finally, Ohio’s political false-statements laws have similar features to another Ohio election law that the Supreme Court found unconstitutional. In *McIntyre*, the Supreme Court struck down Ohio’s election law prohibiting anonymous leafleting because its prohibitions included non-material statements that were “not even arguably false or misleading,” made by candidates, campaign supporters, and “individuals acting independently and using only their own modest resources,” whether made “on the eve of an election, when the opportunity for reply is limited,” or months in advance. *McIntyre*, 514 U.S. at 351–52. Ohio’s political false-statements laws have all of the same flaws. Such glaring oversteps are not narrowly tailored to preserve fair elections.

Other courts to evaluate similar laws post-*Alvarez* have reached the same conclusion. *See 281 Care Comm. v. Arneson*, 766 F.3d 774, 785 (8th Cir. 2014) (“[N]o amount of narrow tailoring succeeds because [Minnesota’s political false-statements law] is not necessary, is simultaneously overbroad and underinclusive, and is not the least restrictive means of achieving any stated goal.”), *cert. denied*, 135 S. Ct. 1550 (2015); *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1257 (Mass. 2015) (striking down Massachusetts’ law, which was similar to Ohio’s); *see also Rickert v. State Pub. Disclosure Comm’n*, 168 P.3d 826, 829–31 (Wash. 2007) (striking down Washington’s political false-statements law, which required proof of actual malice, but not defamatory nature); *c.f. Serafine v. Branaman*, 810 F.3d 354, 361 (5th Cir. 2016) (striking down a Texas law regulating use of the professional title “psychologist” because it was not narrowly tailored to serve the state’s compelling interest in protecting mental health “where it regulates outside the context of the actual practice of psychology . . . [to a] political website or filing forms for political office”).

IV. CONCLUSION

Ohio's political false-statements laws are content-based restrictions targeting core political speech that are not narrowly tailored to serve the state's admittedly compelling interest in conducting fair elections. Accordingly, we affirm the district court's judgment finding the laws unconstitutional.