No. 10-4320

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUSAN B. ANTHONY LIST,

Plaintiff-Appellant,

vs.

REP. STEVE DRIEHAUS, *et al.*,

Defendants-Appellees.

MEMORANDUM OF DEFENDANT-APPELLEE REP. STEVE DRIEHAUS IN OPPOSITION TO PLAINTIFF-APPELLANT'S EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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FACTUAL AND PROCEDURAL BACKGROUND

For the past three months, Plaintiff-Appellant Susan B. Anthony List ("SBA List") has engaged in a campaign to defeat Congressman Steve Driehaus ("Congressman Driehaus") and other pro-life Democrats by publicly disseminating a highly-charged lie: that Congressman Driehaus voted for taxpayer-funded abortion when he supported passage of the recent health care reform law ("PPACA"). When Congressman Driehaus and other organizations received word that SBA List was falsely representing his voting record, they attempted to demonstrate that (1) he is staunchly pro-life; (2) he would never have voted for taxpayer-funded abortion; and (3) the PPACA does not include any provisions that provide federal funding to pay for abortions.

Ignoring these honest efforts to explain the Congressman's position, SBA List, instead, ratcheted up the rhetoric. The problem is it had absolutely no factual support for its position. In fact, one pro-life organization challenged SBA List several times to point to any language in the PPACA that actually directed federal funding to pay for abortions. Plaintiff dismissed each request with such cavalier responses as: "I don't need to find any" places in the PPACA that provide for federal funding of abortions. *See* R.E. 7-1 (Affidavit of Kristen Day, Exhibit I to Congressman Driehaus's "Response to, and Notice of Filing Exhibits in Response to, Respondent's Filings"), p. 2.

When it became clear that good faith dialogue was futile – and when word spread that SBA List had included the false statement in ads it had disseminated and was planning to put on billboards across the Congressman's district – Congressman Driehaus filed a complaint with the Ohio Elections Commission ("OEC"). On October 5, 2010, Congressman Driehaus filed a complaint before the OEC alleging that SBA List made false statements, in violation of R.C. §§ 3517.21(B)(9) and (10) about his voting record and about him in order to promote his defeat and his opponent's victory on November 2, 2010. In his now two pending OEC complaints (R.E 7-2 and 7-3), Congressman Driehaus alleges that SBA List made the following false statements:

- "Driehaus voted FOR taxpayer-funded abortion." (R.E. 7-4, Copy of Plaintiff's billboard-ready ad, which Plaintiff pre-released to the public and the media on or about September 28, 2010 (*see* R.E. 7-5));

- "[Driehaus] voted for a health care bill that includes taxpayer-funded abortion ...." (R.E. 7-6, Copy of Plaintiff's August 2010 press release regarding its "Votes Have Consequences" project and bus tour);

- "It is a fact that that Steve Driehaus has voted for a bill that includes taxpayer funding of abortion." (R.E. 7-7, Statement issued by Plaintiff on October 7, 2010 concerning Congressman Driehaus's OEC Complaint);

- "Rep. Driehaus ordered Lamar Companies not to put up the billboards until the matter was settled by the Ohio Elections Commission ...." (*Id.*)

Congressman Driehaus's OEC complaints allege that SBA List made the foregoing false statements to promote his defeat and his opponent's victory.

At an October 14, 2010 preliminary hearing, the OEC determined that probable cause existed that SBA List's statements indeed violated O.R.C. §§ 3517.21(B)(9) and (10), and set the matter for a full review. R.E. 7-11 (Probable Cause Determination, *Driehaus v. SBA List*, Case Nos. 2010E-084, 2010E-096).

SBA List then filed suit in the United States District Court for the Southern District of Ohio, asking that court to enjoin the OEC from holding further proceedings on the ground that these statutory provisions unconstitutionally chill SBA List's First Amendment rights. SBA List also filed a motion for a temporary restraining order ("TRO") and preliminary injunction. The district court, the Honorable Timothy S. Black presiding, denied the TRO based on *Younger* abstention, without addressing the preliminary injunction, and stayed the case pending further proceedings in the OEC, the state courts, and the United States Supreme Court.

LEGAL ARGUMENT

Feigning the prospect of permanently losing its First Amendment rights, SBA List uses the filing of this interlocutory appeal as an excuse to ask this Court to issue the relief the district court wisely declined to issue. But as it did before the district court, SBA List has failed again to offer any evidence establishing a legally-sufficient basis for injunctive relief, in that: (1) SBA List's lawsuit is unequivocally subject to *Younger* abstention, and, as such, has no likelihood of

success on the merits; (2) SBA List cannot demonstrate it will suffer irreparable harm in the absence of an injunction because the OEC hearing can fully protect any interests of concern to SBA List; (3) Congressman Driehaus would be irreparably harmed if an injunction is issued and SBA List is allowed to continue disseminating false statements regarding his voting record with impunity; and (4) the public's interest in fair and honest elections would be eviscerated in the event an injunction issued. Accordingly, for the reasons discussed in detail below, Congressman Driehaus respectfully asks this Court to deny SBA List's motion.

The factors this Court considers in determining whether to grant an emergency injunction pending appeal are: (1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm without relief; (3) the probability that granting relief will cause substantial harm to others; and (4) whether the public interest is advanced by granting relief. *See Congregation Lubavitch v. City of Cincinnati,* 923 F.2d 458, 460 (6th Cir.1991). These factors mirror those that the district court applied in exercising its discretion to deny the TRO.

I. SBA List Has Not Established a Strong or Substantial Likelihood of Success on the Merits.

A. This Is An Appeal From A Non-Appealable Order.

The threshold obstacle to success on the merits, which SBA List cannot overcome, is that this Court lacks jurisdiction over the appeal because it was taken

from an order denying a TRO. A ruling denying a TRO generally is a non-appealable order. *Office of Pers. Mgmt. v. Am. Fed. of Gov't Employees*, 473 U.S. 1301, 1303-1304 (1985). Although the Supreme Court has sanctioned interlocutory review of such an order if it "might have a 'serious, perhaps irreparable, consequence'" and "can be 'effectively challenged' only by immediate appeal," *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981), this is not such a situation. SBA List's motion does not explain why it cannot effectively challenge the district court's TRO denial on appeal from a final decision of that court. There is no reason why this Court could not just as effectively review the district court's order under 28 U.S.C. § 1291 at a later time. Nor does SBA List give any plausible explanation why the TRO denial causes it to suffer "a 'serious, perhaps irreparable, consequence.'" *Id.*

Without offering any evidence either to this Court or the district court, SBA List nakedly asserts that the ongoing OEC proceeding has caused two specific consequences. Upon closer inspection, both asserted consequences are simply fabricated out of whole cloth.

First, SBA List claims "it can no longer run the Advertisement" and "will be forever chilled from taking advantage of heightened political interest prior to the November 2, 2010 election to run its Advertisement in locations of its choice." Motion, pp. 4, 9. The only example of this alleged "chilling effect" is that "Lamar,

the billboard company contracted to run the Advertisement" has not put up the billboards. Motion, p. 2. But, as even SBA List implicitly acknowledges, Lamar did so not due to any order by the OEC[1] or other state action, but rather due to the billboard company's voluntary decision not to post the ad. *Id*. ("... if Lamar agreed not to run the Advertisement"). And far from being unable to run the ad anywhere, SBA List appears to be running it everywhere, except on Lamar's billboards. For example, it is undisputed that:

- The version of the ad that SBA List currently is running on three Cincinnati radio stations (WLW, WKRC, and WCVX) repeats three times the false message that Congressman Driehaus voted for taxpayer-funded abortion. *See* R.E. 7-16.

- The photo of the false ad that SBA List disseminated with its press release announcing the billboard campaign has been everywhere on the internet for at least the past four weeks. *See* R.E. 7-4 & 7-5.

- On August 9, 2010, SBA List issued a press release on its website stating that Congressman Driehaus "voted for a health care bill that includes taxpayer-funded abortion ...." *See* R.E. 7-6.

- Not the least bit slowed by the filing of the OEC complaint on October 5, SBA List published another statement on October 7, explicitly stating, "It is a fact that that Steve Driehaus has voted for a bill that includes taxpayer funding of abortion." *See* R.E. 7-7.

- And, when the OEC found probable cause that it violated O.R.C. §§ 3517.21(B)(9) and (10), SBA List responded with a blast email that asked for money ("Please stand with us now by contributing the most you can")

[1] Indeed, Lamar refused to run the ad before the OEC complaint was filed and more than a week before the OEC found probable cause. *See* R.E. 7-7 (SBA List statement complaining, falsely, that "Rep. Driehaus ordered" Lamar not to put up the billboards).

> and again contained the false statement that Congressman Driehaus cast a "vote for taxpayer funding of abortion ...." *See* R.E. 7-17.

In short, despite the pendency of the OEC proceeding, SBA List has taken advantage of every opportunity to do exactly what it promised to do when the OEC complaint was filed – "we will spend more resources to make sure that Steve Driehaus's constituents know the truth of his vote." R.E. 7-7. This is not an organization whose First Amendment rights have been chilled in the least. This is an organization that wants this Court to let it do with impunity what it has done for the past three months and continues to do every day – knowingly misrepresent Congressman Driehaus's voting record.

Second, SBA List claims it has been diverted "away from its crucial political-speech efforts" as a result of being subjected to "burdensome discovery" in the OEC proceedings, with "inadequate safeguards to protected past expressive and associational documents ...." Motion, p. 4. But, as the above litany shows, nothing in or related to the OEC proceeding has deterred SBA List one iota from disseminating its false statements about Congressman Driehaus. Nor has SBA List even attempted to invoke any safeguards in the OEC proceeding, such as by filing protective order motions. To the contrary, just yesterday, SBA List joined with Congressman Driehaus in a motion to continue the OEC hearing *so that discovery could continue*. Appendix, p. 1. In that motion, the parties jointly asked the OEC's Executive Director to "establish a discovery schedule," based on their *shared belief*

that the discovery already served in that proceeding "is necessary for the preparation of their case" and that "justice will be served by allowing discovery to take place in an orderly and comprehensive fashion prior to ruling on the underlying complaint." *Id.* Thus, SBA List has embraced the OEC discovery process that it here claims is "inadequate" and dangerous to its rights.

Third, SBA List's feigned urgency about the approach of the November 2, 1010 election illustrates its disingenuousness. Plaintiff pretends it desperately needs this Court's intercession in order to disseminate its false message about Congressman Driehaus before November 2 (although, as demonstrated above, it does not). But it curiously denies any intent to defeat Congressman Driehaus on November 2. *See* R.E. 7-15, p. 14. SBA List is doing this delicate dance not because it wants to see him win but because it does not want to admit that it made its false statements to defeat him – because promoting a candidate's defeat is one of the elements of a violation of O.R.C. § 3517.21. It would prefer that the Court view it merely as a lobbying organization that is coincidentally trying to take advantage of "heightened" public interest over the next several days. So, in effect, Plaintiff is claiming that this Court urgently must prevent the OEC from applying to SBA List Ohio election laws that apply only to those promoting a candidate's defeat, even as Plaintiff denies trying to promote a candidate's defeat. R.E. 7-15, p. 14 ("The SBA List Is Not Advocating The Election Or Defeat Of A Candidate.").

If it truly is not promoting Congressman Driehaus's defeat, as it has claimed before the OEC, then SBA List has no hope of prevailing on the merits here, because it could establish no vulnerability to O.R.C. § 3517.21.

Fourth, SBA List's attempt to shoehorn this appeal into the collateral order doctrine cannot succeed. Far from being separate from the merits, a ruling on a TRO motion hinges on an assessment of the merits.

Not only has it not established a strong or substantial likelihood of success on the merits in this case, Plaintiff's chances of successfully persuading this Court to abandoned well-settled, controlling precedent and rule in its favor are next to zero. Indeed, on multiple occasions, the Sixth Circuit has addressed Plaintiff's exact claims here – that O.R.C. §§ 3517.21(B)(9) and (10) deprive plaintiffs of their First Amendment rights – and abstained from exercising jurisdiction over such claims; and where it did agree to entertain such a challenge, this Court has held that these provisions do not violate the First Amendment. Congressman Driehaus will briefly address this controlling precedent below, although he will defer to the Ohio Attorney General's arguments in support of the statutory provisions' constitutionality, and incorporate them by reference into this Memorandum.

B. *Younger* Abstention And This Court's Refusal To Exercise Jurisdiction Over Ongoing Ohio Elections Commission Proceedings Render SBA List Unlikely To Succeed On The Merits.

In 2005, this Court decided this exact case – holding that the district court properly abstained from exercising jurisdiction over a political group's claim that that O.R.C. §§ 3517.21(B)(9) and (10) deprive plaintiffs of their First Amendment rights. *Citizens for a Strong Ohio v. Marsh*, 123 Fed. Appx. 630 (6th Cir. 2005). In that case, the political group filed suit in the Southern District of Ohio "seeking a judgment declaring that the OEC's application of [R.C. §§ 3517.21(B)(9) and (10)] violated the First Amendment and *Buckley" v. Valeo*, 424 U.S. 1 (1976). *Id*. at 632. The district court dismissed the case on the ground that *Younger v. Harris*, 401 U.S. 37 (1971) "required federal court abstention." *Id*. Under *Younger*, the Sixth Circuit noted, federal courts "must abstain" from exercising jurisdiction where the following apply: (1) there are ongoing state judicial proceedings; (2) these proceedings implicate important state interests; and (3) parties have an adequate opportunity in such proceedings to raise constitutional challenges. *Id*. (citing *Fieger v. Thomas*, 74 F.3d 740, 744 (6th Cir. 1996)). Applying *Younger*'s three-part abstention test to the political group's First Amendment claims, this Court agreed that "the district court properly dismissed" the case. *Id*. at 634.

Recognizing *Younger's* three-pronged test, SBA List itself conceded below that *Younger* abstention "appears to be implicated." R.E. 2, p. 7. As to the first prong, state judicial proceedings are ongoing – the OEC hearing will take place following the completion of discovery. As to the second prong, as the Court has

noted, "the OEC's oversight of state and local elections is clearly an important state interest." *Citizens*, 123 Fed. Appx. at 634. As to the third prong, "litigants before the OEC have an adequate opportunity to raise constitutional claims. . . . Indeed, the OEC has previously addressed and rejected constitutional claims identical to the arguments raised here . . . ." *Id*. *See also Chamber of Commerce v. OEC*, 135 F.Supp.2d 857 (S.D. Ohio 2001) (invoking *Younger* abstention on the ground that the plaintiffs had an adequate opportunity to present their constitutional challenges before the OEC); R.E. 7-18, Copy of *Krikorain v. Ohio Elections Commission*, Case No. 1:10-cv-00103 (S.D. Ohio October 19, 2010) (in suit by an OEC respondent against the OEC, the court declined to exercise jurisdiction where R.C. § 3517.21 claims were pending in the OEC, citing *Younger* abstention grounds for the reasons discussed in *Citizens*). Moreover, SBA List itself recognized its right to assert First Amendment challenges before the OEC by raising the exact constitutional challenges it raises here in its "Answer and Affirmative Defenses to Rep. Driehaus' Complaint," R.E. 7-15 at 17-20 (filed with the OEC on or about October 12, 2010). With each of these elements met, there can be no serious dispute that *Younger* abstention applies in this case – just as the Court concluded in *Citizens*.

SBA List rests its argument for not applying *Younger* abstention on the ground that the statutory provisions "chill" its First Amendment rights.[2] *Younger* itself, however, expressly rejected this assertion, noting "the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." *Younger*, 401 U.S. at 51. At bottom, *Younger* abstention is warranted in this exact situation; and SBA List has offered no compelling justification for this Court to ignore its binding precedent. With SBA List unable to demonstrate a substantial likelihood of success on the merits, this Court should deny its motion on this ground alone.

C. This Court Already Has Determined That These Statutory Provisions Are Constitutional.

Plaintiff admitted in its brief below that this Court "reviewed a provision that is identical to Revised Code Section 3517.21(B)(10), and concluded that the Ohio Election Commission's 'truth-declaring' role [is] a constitutional role of the

[2] Plaintiff cited below a single case in support of its "chilling" argument: *Blankenship v. Blackwell*, 341 F.Supp.2d 911, 918 (S.D. Ohio 2004). In that case, the court exercised jurisdiction over a matter that was concurrently pending before the Ohio Supreme Court on the ground that it involved a Presidential campaign. Rather than being a false statement case like *Citizens*, *Chamber of Commerce* and this one, however, *Blankenship* dealt with whether a candidate could have access to the ballot. Indeed, the court explicitly recognized the distinction: "the *Chamber of Commerce* case [the analog to this case] was essentially an enforcement action, making *Younger* abstention appropriate." *Id*. at 919. Plaintiff's own case law, therefore, demonstrates unequivocally that *Younger* abstention applies here.

government." R.E. 2 at 8-9 (citing *Pestrak v. Ohio Elections Commission*, 926 F.2d 573 (6th Cir. 1991)). Plaintiff further admitted that "*Pestrak* remains good law, and this Court is bound by its determination." *Id.* at 9. With this concession, Plaintiff has explicitly recognized that its arguments to the contrary have little or no chance of success on the merits. Accordingly, Congressman Driehaus respectfully asks this Court to deny the motion.

II. SBA List Will Not Suffer Irreparable Injury Without the Injunction.

As an initial matter, neither *Buckley* nor the First Amendment has ever protected false speech, and, as such, Plaintiff cannot suffer any injury by being prevented from disseminating false statements with impunity. And, even if it could demonstrate to the OEC that it incorrectly found probable cause that these statements violate R.C. §§ 3517.21(B)(9) and (10), Plaintiff's claimed injuries would be immediately and fully reparable. In other words, even under a best-case scenario, Plaintiff cannot demonstrate *irreparable* injury in this context. Irreparable injury occurs where a historic building is about to be knocked down or a corporation's trade secret is about to be unlawfully shared with a competitor. Without injunctive relief in these types of cases, the aggrieved party would have no meaningful ability to redress its injury should it succeed on the merits of its claims – the building remains demolished and the trade secret remains pirated. In this case, however, an OEC finding favorable to Plaintiff would provide it with full

redress for its claimed injuries. As such, there is nothing irreparable about the harm Plaintiff alleges it is suffering. Moreover, as demonstrated above, the OEC proceeding and the district court's denial of a TRO halting that proceeding have not in any way prevented SBA List from continuing to disseminate its false statements about Congressman Driehaus. Plaintiff's inability to establish that it will suffer irreparable injury without an injunction further demonstrates why its motion must be denied.

III. Congressman Driehaus Will Suffer Irreparable Injury If The Court Issues The Injunction.

Courts are loathe to issue an injunction that will injure other parties. *Overstreet v. Lexington-Fayette Urban Co. Gov't*, 305 F.3d 566, 579 (6th Cir. 2002) (denying motion for preliminary injunction, in part, because, contrary to the moving party's assertion that it would be irreparably harmed without a preliminary injunction, the issuance of an injunction would actually cause substantial harm to the non-moving party). In this case, Plaintiff devotes exactly one conclusory sentence to the issue of whether the requested injunction would harm Congressman Driehaus – incredibly suggesting that "Rep. Driehaus has not demonstrated harm resulting from the SBA List's speech." Motion, p. 19. To begin with, Plaintiff has the burden of production exactly backwards. It is Plaintiff, and not Congressman Driehaus, who must come forward with evidence that an injunction will not substantially injure others. And, here, Plaintiff offers nothing more than its own

self-serving belief that neither Congressman Driehaus nor the State of Ohio will be harmed if the OEC is barred from conducting a full hearing as to Plaintiff's false statements. Without more, Plaintiff has failed to offer evidence that an injunction will not substantially injure others.

In fact, the precise opposite is true. Issuing an injunction in this case – and thereby allowing Plaintiff to escape punishment for disseminating false statements to sway the outcome of an Ohio election – will irreparably harm Congressman Driehaus. If the Court were to halt the OEC proceedings days before the election and before Congressman Driehaus is set to conduct the discovery due him under OEC regulations, based on First Amendment concerns that this Court already has held are not implicated, it would unfairly deprive Congressman Driehaus of his right under Ohio law to present Plaintiff's false statements to the OEC and invoke the Commission's truth-declaring functions. *See Pestrak*, 926 F.2d at 579 (the OEC's "'truth-declaring' functions" do not implicate free speech rights). With his political future in the hands of the voters, including many who are daily availing themselves of early voting, preventing Congressman Driehaus from proceeding with his OEC complaint and precluding the OEC from making truth-declaring pronouncements would leave him unjustly vulnerable to the unseemly prospect of Plaintiff's blatant and malicious falsehoods taking hold with the public. Against the backdrop of this Court's unambiguous statements in *Pestrak* – that "false

speech, even political speech, does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth" and that Ohio's unfair campaign practices statute "is directed against . . . speech that is not constitutionally protected," *Pestrak*, 926 F.2d at 577 – there can be no justification whatsoever under the law for giving Plaintiff free rein to continue heaping falsehood after falsehood on Congressman Driehaus with impunity.

Plaintiff also devotes one conclusory sentence to the State of Ohio's interest in this case: "And the State of Ohio, acting through the Commission, has no compelling interest in regulating SBA List's speech." Motion at 19. Plaintiff, however, ignores case law recognizing Ohio's compelling interest in doing precisely that, which one Ohio court of appeals expressed as follows:

> There is indeed a compelling state interest in preventing the publication of false statements concerning candidates for election to office where such statements are purposely published with full knowledge of the falsity thereof and are designed to promote the election or defeat of a candidate for office. It is a very compelling state interest to promote honesty in the election of public officers. Freedom of speech does not include a right to purposely, with knowledge of its falsity, publish a false statement about a candidate for public office with the intent to promote the election or defeat of such candidate.

DeWine v. Ohio Elections Comm., 61 Ohio App.2d 25, 29 (1978); *see also Citizens*, 123 Fed. Appx. at 634. This valid interest clearly outweighs any interest Plaintiff (or any other disseminator of false election propaganda) could conceivably claim, particularly given this Court's unmistakable conclusion in

Pestrak that false speech, even political speech, does not implicate *Buckley* or the First Amendment.

IV. An Injunction In This Context Will Not Further The Public Interest.

Finally, in a terse paragraph at the end of its memorandum, Plaintiff ignores the public's interest in fair and honest elections. *Citizens*, 123 Fed. Appx. at 634. Implying that the public's interest lies in letting Plaintiff continue saying whatever it wishes about Congressman Driehaus with no risk of punishment, Plaintiff wraps itself in the protection of the First Amendment, heedless of Sixth Circuit case law that negates giving such protection to Plaintiff's false statements. It is telling, indeed, that nowhere in its Motion does Plaintiff even bother trying to show that its statements about Congressman Driehaus's voting record are true. Instead, its arguments assume, contrary to Sixth Circuit precedent, that the public actually would benefit from hearing Plaintiff make up and repeat false statements about Congressman Driehaus's voting record. The exact opposite is true: the public, which is being asked to choose between Congressman Driehaus and his opponent, has a manifest interest in preserving the OEC's ability to call out false statements that are meant to mischaracterize the Congressman's voting record and turn voters against him under false pretenses.

CONCLUSION

For the foregoing reasons, Congressman Driehaus respectfully requests this Court to deny Plaintiff's motion for an emergency injunction pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2010 a copy of the foregoing was filed using the Court's electronic filing system, resulting in service upon the following parties via electronic mail:

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