UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PROJECT VERITAS, *et al.*,	:	**Case No. 19-cv-3130**
Plaintiffs,	:	**Hon. Edmund A. Sargus**
-vs-	:	**Magistrate Vascura**
OHIO ELECTIONS COMMISSION, *et al.*,	:	
Defendants.	:	**MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, AND MEMORANDUM IN SUPPORT THEREOF**

"'Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 346 (1995), quoting *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976). Hence, the First Amendment has "'its fullest and most urgent application'" in campaigns for public office. *Id.*

Pursuant to these principles, Plaintiffs Project Veritas, Project Veritas Action Fund, and James O'Keefe (hereinafter "Project Veritas," "PV," or "Plaintiffs") initiated this civil rights action on July 19, 2019 by filing a Verified Complaint challenging the official conduct, policies, practices, threats and intimidation by the State of Ohio by and through the Ohio Elections Commission, whereby Defendants, by and through R.C. 3517.21(A)(1)("The Reporting Restriction"), unconstitutionally inhibit Plaintiffs and others from gathering and reporting newsworthy political information that can only be acquired through undercover investigation. In further accordance, Plaintiffs hereby move, pursuant to Federal Rule of Civil Procedure 65(b), for issuance of a temporary restraining order and preliminary injunction enjoining the Ohio Elections Commission and its agents ("OEC" or "The State") from relying on the Reporting Restriction to adjudicate claims or impose penalties on Plaintiffs.

Through threatening prosecution and imprisonment of up to six months, fines of up to $5,000, and costly administrative hearings, the State, by and through the OEC, undermines and frustrates the capacity of Plaintiffs and others to effectively and efficiently communicate important information regarding political candidates and causes. If Defendants' conduct prohibiting political speech through otherwise-lawful investigative reporting is not soon immediately enjoined, Plaintiffs will continue to suffer irreparable harm for which there is no adequate remedy at law.

I. BACKGROUND

A. The State of Ohio's Suppression of Critical Investigative Reporting on Politics.

In Ohio, no citizen, journalist or otherwise, may "go undercover" within a political campaign to acquire and report unapproved information about that politician or campaign - - even if the information in question is true and very valuable to the public - - without risking subjection to OEC hearings, fines, and even imprisonment. Specifically, the Reporting Restriction provides as follows: (A) No person, during the course of any campaign for nomination or election to public office or office of a political party, shall knowingly and with intent to affect the outcome of such campaign do any of the following: (1) Serve, or place another person to serve, as an agent or employee in the election campaign organization of a candidate for the purpose . . . of reporting information to the employee's employer or the agent's principal without the knowledge of the candidate or the candidate's organization." R.C. 3517.21(A)(1). R.C. 3517.01 fails to define "intent to affect the outcome," "campaign", "outcome", or "elections campaign organization." And the Reporting Restriction applies irrespective of whether the investigative reporting constitutes an otherwise-regulable "independent expenditure." See R.C. 3517.01(A)(17).

Once "any person" files a complaint under this Section, the Ohio Elections Commission holds a mandatory hearing, as required by law: R.C. 3517.153 *requires* the OEC to "proceed" on such complaints, even if simply made "by affidavit of *any person*." R.C. 3517.153(A)(Emphasis added); see also R.C. 3517.155(A)(1) and R.C. 3717.156(A), (B), and (C). Thereafter, the OEC may "issue subpoenas to any person in the state compelling the attendance of witnesses and the production of relevant papers, books,

accounts, and reports." R.C. 3517.153(B). Once OEC proceedings are completed, a criminal prosecution may ensue, the OEC may "impose a fine," or the OEC may "refer the matter to the appropriate prosecutor." R.C. 3517.153(C); R.C. 3517.155(A)(1)(b) and (c); see also R.C. 3517.992(V) ("Whoever violates section 3517.21 or 3517.22 of the Revised Code shall be imprisoned for not more than six months or fined not more than five thousand dollars, or both.").

B. The OEC's Enforcement of the Reporting Restriction against Plaintiffs

The OEC applied the Reporting Restriction against Plaintiffs at the behest of Plaintiffs' political rival,[1] "Democracy Partners." In retaliation for the embarrassment it experienced due to prior PVAF investigative reporting, Democracy Partners - - as literally *anyone* could - - weaponized Ohio's arbitrary election regulations: on October 1, 2018, Democracy Partners "partner" Lauren Windsor filed a complaint with the Ohio Elections Commission against Project Veritas Action Fund, James O'Keefe, Allison Maass, and others. Doc 1-1. The Complaint alleges that "Project Veritas broke Ohio elections law," more specifically R.C. 3517.21(A)(1), by "*publishing videos* . . . featuring clips filed surreptitiously by different operatives within the Grove City, Ohio coordinated campaign office of the Ohio Democrat Party for the Hillary Clinton and Ted Strickland campaigns." *Id*. The Complaint triumphantly proclaims that "the problem for James O'Keefe and company is that embedding agents within political campaigns is illegal in the state of Ohio." *Id.* "Based on interviews and evidence provided by several ODP staffers, and evidence found within Project Veritas' own video publication, O'Keefe placed at least two people in the election campaign organizations of two candidates for the purpose of reporting information . . . the video itself *[reported on] the candidate's stances on contentious issues*." *Id.*

Pursuant to R.C. 3517.154, the OEC proceeded to adjudicate the case *even after* it reviewed the complaint and PVA's written objections. After a hearing which Plaintiffs attended through legal counsel, the

[1] After PVAF infiltrated and reported on wrongdoing within Democracy Partners, Democracy Partners complained that PV "infiltrated Democracy Partners' offices . . . and secretly recorded hours of conversation;" it then, in 2016, "on October 17, 18, 24 and 26th, released a series of videos to PV's YouTube channel that contained footage from . . . recordings . . . of Democracy Partners, and its clients." See *Democracy Partners v. Project Veritas Action Fund.* 285 F. Supp. 3d 109 (D.D.C. 2018).

OEC dismissed the claims against Plaintiffs, but only due to the statute of limitations, rather than on the merits. Doc. 1-1. The Commission then denied the request to find the matter frivolous." *Id.* Subsequently, OEC Director Phillip Richter observed that, on the merits, "this was probably the closest case that has ever been presented to the Commission." *Id.*

In response to the risk of such litigation, Plaintiffs have refrained from engaging in further investigative reporting in Ohio since the OEC litigation concluded, and will need to alter their plans if the Reporting Restriction persists, because the Restriction essentially criminalizes the Project Veritas reporting model: non-profit charities exempt from income taxation pursuant to Section 501(c)(3) and (c)(4) of the Internal Revenue Code using cutting-edge undercover techniques and technology to expose questionable behavior by politicians and politically-active individuals and entities.[2] These techniques consist primarily of recording and publicizing political wrongdoing or dishonesty.[3] Indeed, Plaintiffs do not take stances on controversial political topics or endorse, support, or oppose candidates for election. Doc. 1; Doc. 1-1. In Ohio in 2016, for instance, a PVA investigator used undercover tactics to ascertain then-senate-candidate Ted Strickland's "behind-the-scenes" positions on "coal and firearms," resulting in the publication of a video on the subject. *Id.* Plaintiffs now need to undertake similar investigations beginning in the fall, but the Reporting Restriction's sanctions obstruct these efforts. See *Verified Complaint,* generally.

II. LAW AND ANALYSIS

In determining whether to grant the present motion for issuance of a preliminary injunction, the Court is to consider four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether the issuance of a temporary restraining order or preliminary injunction would cause substantial harm to others; and (4) whether the public

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[2] Courts have previously described Project Veritas ("PV") and Project Veritas Action Fund ("PVAF") as "both nonstock, nonprofit corporations founded by James O'Keefe," whereby "PVAF is an 'arm' of PV, and O'Keefe is the President of both corporations." See *Democracy Partners v. Project Veritas Action Fund.* 285 F. Supp. 3d 109 (D.D.C. 2018).

[3] One District Court recently quoted Plaintiff O'Keefe in striking down a Massachusetts recording limitation, "I would love to probably secretly record a whole bunch of people because that's what I do. I think it's a very important and valuable kind of journalism." *Martin v. Gross,* 340 F. Supp. 3d 87 (D. Mass 2018).

interest would be served by the issuance of a temporary restraining order or preliminary injunction. *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (*en banc*). These factors are to be *balanced* against one another and should not be considered prerequisites to the granting of a temporary restraining order or preliminary injunction. *See United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.,* 163 F.3d 341, 347 (6th Cir. 1998). This balance of interests weighs strongly in favor of the Plaintiffs and the granting of the present motion: undercover investigation of politicians and their campaigns, for the purposes of publicizing newsworthy findings, is suppressed by the Reporting Restriction but protected by the First Amendment.

A. Plaintiffs are highly likely to succeed on the merits of their free speech claim.

The First Amendment affords the broadest protection to such political expression in order "to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, at 484 (1957). Accordingly, "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs . . . of course includ(ing) discussions of candidates." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley,* supra. Thus, "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). For these reasons, with respect to political dialogue, even expression that most may "detest" is protected. *United States v. Alvarez,* 567 U.S. at 729-30, 132 S.Ct. 2537.

The Reporting Restriction transgresses these central principles because it (1) suppresses and hinders important political expression; (2) suppresses and hinders this political expression on the basis of its content and the identity of the speaker; and (3) is neither tailored nor the least restrictive means of hindering such expression.

i. ***The Reporting Restriction suppresses Plaintiffs' protected expression.***

The very thing hindered and suppressed by the Reporting Restriction - - Plaintiffs' practice of investigating politicians and their campaigns for the sole purpose of reporting political information - - constitutes protected expressive activity.

First, creation and collection of information for the purpose of dissemination is protected by the First Amendment. "The creation and dissemination of information are speech within the meaning of the First Amendment. Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Sorrell v. IMS Health Inc.,* 131 S.Ct. 2653, 2667 (2011); *Bartnicki v. Vopper,* 532 U.S. 513, at 527 (2001) ("[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct" (some internal quotation marks omitted)); see also *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1150–51 (2017); *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674, 741 (D.C. Cir. 2016)("The Supreme Court has explained that the First Amendment comes "into play" where "particular conduct possesses sufficient communicative elements").

Accordingly, "investigative journalism has long been a fixture in the American press." *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d. at 1189. (D. Utah 2017)(Utah law criminalizing the recording of images at agricultural operations under false pretenses facially unconstitutional under the First Amendment). To this end, <u>government may not "suppress any unflattering coverage" or "suppress information from reaching the press by prosecuting newsgathering activities that serve as the foundation of investigative journalism</u>." *Animal Legal Def. Fund v. Reynolds,* No. 417CV00362JEGHCA, 2019 WL 140069, at pp. 1–10 (S.D. Iowa Jan. 9, 2019); see also *W. Watersheds Project v. Michael*, No. 15-CV-169-SWS, 2018 WL 5318261, at p. 10 (D. Wyo. Oct. 29, 2018) (invalidating, in part, a Wyoming statute criminalizing entry on private land for the purpose of data collection relating to land use, including animal species, as facially unconstitutional under the First Amendment); see also *Animal Legal Def. Fund v. Otter*, 118 F.Supp.3d 1195, 1200-09 (D. Idaho 2015) (Idaho law criminalizing interference with agricultural

production facilities facially unconstitutional under the First Amendment); *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018).

More specifically, newsgathering through recording while undercover, especially with the intent to communicate or broadcast, is protected by the First Amendment. Regulation that "broadly criminalizes making misrepresentations to access . . . as well as making audio and video recordings of the facility without the owner's consent" are subject to First Amendment scrutiny, particularly when the regulation "criminalizes whistleblower activity and undercover investigative reporting—a form of speech that has brought about important and widespread change to . . . an arena at the forefront of public interest." *Id.,* at 1190. And limitations on such recordings "cover protected speech under the First Amendment and cannot survive constitutional scrutiny." *Id.* The Ninth Circuit recently elaborated on the rationale for this right:

> We easily dispose of Idaho's claim that the act of creating an audiovisual recording is not speech protected by the First Amendment. This argument is akin to saying that even though a book is protected by the First Amendment, the process of writing the book is not. Audiovisual recordings are protected by the First Amendment as recognized "organ[s] of public opinion" and as a "significant medium for the communication of ideas." . . . <u>It is no surprise that we have recognized that there is a "First Amendment right to film matters of public interest."</u> <u>It defies common sense to disaggregate the creation of the video from the video or audio recording itself. The act of recording is itself an inherently expressive activity</u>; * * * Because the recording process is itself expressive and is "inextricably intertwined" with the resulting recording, the creation of audiovisual recordings is speech entitled to First Amendment protection as purely expressive activity.

Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1203-1205 (9th Cir. 2018); *see also ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech."); *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017) ("The First Amendment protects actual photos, videos, and recordings ... and for this protection to have meaning the Amendment must also protect the act of *creating* that material.") (emphasis added).[4]

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[4] The District Court in *Herbert* chronicled many of the cases affirming "the right to record": "Several circuits have more directly confronted the question, and have reached the same conclusion. The Seventh Circuit, for example, determined that "[t]he act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." Indeed, the undisputed right to *broadcast* a video recording would mean very little, the court explained, if the government could circumvent that right by regulating with impunity the *making* of the recording instead. Other circuits are in accord. The Eleventh Circuit concluded

Likewise, in a separate matter implicating Plaintiffs, a District Court recently affirmed that newsgathering through recording politicians and government officials is entitled to significant constitutional protection:

> "Ensuring the public's right to gather information about their officials not only aids in the uncovering of abuses, but also may have a salutary effect on the functioning of government more generally." * * *[T]he diminished privacy interests of government officials performing their duties in public must be balanced by the First Amendment interest in newsgathering and information-dissemination. The First Amendment prohibits the "government from limiting the stock of information from which members of the public may draw." "An important corollary to this interest in protecting the stock of public information is that '[t]here is an undoubted right to gather news from any source by means within the law.'"

Martin v. Gross, 340 F. Supp. 3d 87, at 107-108 (D. Mass. 2018)("Section 99 is not narrowly tailored to protect a significant government interest when applied to law enforcement officials discharging their duties in a public place")(citations omitted), citing *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 344, 94 S.Ct. 2997 (1974) ("An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs.").

Here, R.C. 3517.21(A) suppresses serving on or around a campaign *if and only if* for purpose of "reporting" *unapproved* political information. This expressive activity constitutes quintessential newsgathering: creation (recording) and publication of information. Consequently, the Reporting Restriction implicates core protected expression of investigative reporting on politics.

Furthermore, the Reporting Restriction hinders, suppresses, deters, and punishes newsgathering because it is *triggered by an intention to engage in protected newsgathering and reporting.* "Regulations that are triggered solely by speech are in fact regulations of speech." *Commonwealth Brands, Inc. v. U.S.* Not Reported in F. Supp. 2d, 2009 WL 3754273 (W.D. Ky. 2009); see also *Thompson v. Western States Med. Ctr.,* 535 U.S. 357, 370, 122 S.Ct. 1497 (2002); *Pagan v. Fruchey,* 492 F.3d at 766, at 772 (6th Cir. 2007). Plaintiffs investigate and record precisely *so that they may*

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there is "a First Amendment right, subject to reasonable time, manner, and place restrictions, to photograph or videotape police conduct." Similarly, the First Circuit concluded, with little discussion, that filming a town hall meeting is an "exercise of ... First Amendment rights.'"

broadcast findings of corruption and dishonesty to the public, thereby better informing it about candidates for office and other important public issues.

Deterring and hindering newsgathering, rather than directly prohibiting it, is sufficient to trigger First Amendment scrutiny and protection. "Generally speaking, government action which chills constitutionally protected speech or expression contravenes the First Amendment," and "[t]he threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potently as the actual application of sanctions." *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 794 (1988); *NAACP v. Button,* 371 U.S. 415, 433 (1963). Accordingly, the Sixth Circuit's understanding of this matter is that "the harassment necessary to rise to a level sufficient to deter an individual is 'not extreme.'" *See Siggers-El v. Barlow,* 412 F.3d 693, 701 (6th Cir. 2005) (remarking that because "there is no justification for harassing people for exercising their constitutional rights, [the deterrent effect] need not be great in order to be actionable"). Thus, Plaintiffs' brand of investigative journalism is protected by the First Amendment.

ii. The reporting restriction is subject to strict scrutiny and presumptively invalid.

The Reporting Restriction is subject to strict scrutiny because it is content-based, speaker-based, and burdens core political speech. Both the Sixth Circuit and Ohio courts have already concluded that R.C. 3517.21 is content-based and burdens core political speech. Meanwhile, courts beyond Ohio have consistently subjected state restrictions on investigative reporting, particularly when one topic or subject is singled out, to strict scrutiny.

The Reporting Restriction applies only to the investigation of and reporting on a political campaign by those who intend to critically scrutinize the campaign, without imposing similar reporting limits on other topics, subjects, operations, or organizations. Meanwhile, it applies only to the creation of information by those who engage the campaign with a critical viewpoint and the willingness to report information not "approved" by politicians (those who are well-intentioned toward the campaign or who obtain approval beforehand are entirely free to report the exact same information). Thus, reporters may freely go undercover and secretly investigate meat-packing plants, coal operations, or medical offices. But Ohio obstructs

undercover reporting for just one topic: political campaigns. It is therefore a content-based and speaker-based restriction.

Strict scrutiny is warranted when "the statute disfavors speech with a particular content as well as particular speakers." *Sorrell,* supra., at Syllabus. In *Reed v. Town of Gilbert*, the Supreme Court explained that "[a] law that is content-based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed v. Town of Gilbert*, 135 S.Ct. 2218, at 2229 (2015). *Reed* explains that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." 135 S. Ct. at 2227 (citation omitted). Thus, whether the regulation involves "defining regulated speech by particular subject matter ... [or] by its function or purpose" is ultimately irrelevant. *Id.* "Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* The Supreme Court then chronicled factors governing the identification of a content-based restrictions on speech:

> [A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. <u>For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed.</u> The Town's Sign Code likewise singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter. Ideological messages are given more favorable treatment than messages concerning a political candidate . . . That is a paradigmatic example of content-based discrimination.

Id. (Emphasis added, citations omitted).

Pursuant to these axioms, state and federal courts have already concluded that several divisions of R.C. 3517.21 consist of content-based regulations due to that statute's singular focus on certain types of "political" speech. Recently in *Susan B. Anthony List,* the Sixth Circuit concluded as follows: "Ohio's political false-statements laws <u>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</u>."

Susan B. Anthony List v. Driehaus, 814 F.3d 466, at 473 (2016).[5] Likewise in *Magda,* an Ohio appellate court explained: "Based on the reasoning in *Susan B. Anthony List,* we find that R.C. 3517.21(B)(1) governs specific content or subject matter, that being false statements of whether or not the candidate holds the office he or she is seeking. Accordingly, we hold R.C. 3517.21(B)(1) to be a content-based restriction on the exercise of pure political speech; it is, therefore, presumptively invalid and subject to strict scrutiny." *Magda v. Ohio Elections Commission*, 58 N.E.3d 1188 (2016), *citing Susan B. Anthony List.,* supra.

Further, restrictions on critical investigation of certain topics, for the purpose of reporting, are content-based and speaker-based. Recently in *Reynolds,* the District Court invalidated an Iowa proscription on undercover newsgathering as content and speaker-based:

> Both regulations contained within § 717A.3A are content-based on their face. Subsection (a) explicitly distinguishes between a person who obtains access to an agricultural production facility by false pretenses and a person who obtains access by other means. Subsection (b) distinguishes between a person who makes a true statement as part of an application for employment at an agricultural facility yet possesses an intent to commit an unauthorized act, and a person with the same intent who makes a false statement. To determine if a person has violated either of these provisions, one must evaluate what the person has said. This makes § 717A.3A a content-based restriction on speech.

Animal Legal Def. Fund v. Reynolds, 297 F. Supp. 3d 901, 919–20 (S.D. Iowa 2018). In a *Hebert,* a similar investigation and reporting proscription in Utah was deemed content-based:

> The provision at issue here criminalizes "obtain[ing] access to an agricultural operation under false pretenses." Thus, whether someone violates the Act depends on what they say. * * * The next question is whether the *recording* provisions of the Act are content based. Each provision criminalizes "record[ing] an image of, or sound from, [an] agricultural operation." * * * In short, if a person walks off an agricultural facility with a recording, the only way to know whether she is criminally liable under the Act is to view the recording. That makes the provision content based, and subject to strict scrutiny.

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[5] Meanwhile, restrictions singling out *political* expression are often deemed content-based. *Whitton v. Gladstone,* 54 F.3d 140 (8th Cir. 1995)("Although Gladstone's justification for enacting the durational limitations was to curtail the traffic dangers which political signs pose and to promote aesthetic beauty, Gladstone has not seen fit to apply such restrictions to *identical signs* displaying nonpolitical messages which present *identical concerns* . . we conclude that despite Gladstone's laudable asserted purposes for enacting the durational limitations, whether or not a sign falls within the limitations imposed by § 25–45 is based solely upon the message conveyed by the sign, i.e., is it a "political" sign…").

Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1209–11 (D. Utah 2017).; see also *Animal Legal Def. Fund v. Wasden,* 878 F.3d 1184, at 1204-1205 (9th Cir. 2018)("This provision is an obvious example of a content-based regulation of speech because it defin[es] regulated speech by particular subject matter").

Here, the Reporting Restriction regulates on the basis of the topic discussed and idea expressed: what is prohibited is the reporting of information about a political campaign learned while undercover during that political campaign, when the information is not approved by that campaign. Further, when the speaker has obtained the campaign or candidate's approval, such reporting is not prohibited. The proscription is analogous to a prohibition on the purchases or rentals of "sound trucks" by those who intend to use them to broadcast unapproved political messages. Further, "intent to report" with "intent to harm" (whatever that means) depends on content: favorable or approved information is implicitly permitted, while critical information is suppressed, hindered, deterred, and penalized (except in the unlikely event that the campaign elects to "approve" of the publication of unfavorable information about itself). Moreover, Project Veritas could perform the exact same investigation and reporting on agricultural facilities, or even government offices, think tanks, or lobbyists without running afoul of the Reporting Restriction: only when the content of the investigation and reporting regards a political *campaign* is the reporting restriction triggered.

Finally, in addition to the foregoing, the Reporting Restriction is subject to strict scrutiny because it burdens *core political speech*. In *Susan B. Anthony List,* the Sixth Circuit agreed that "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. Accordingly, strict scrutiny is appropriate." *SBA List*, at 472-473 (citations omitted). Accordingly, the Reporting Restriction is subject to strict scrutiny on the basis that it (1) is content-based; (2) is speaker-based; and (3) burdens core speech.

iii. The Reporting Restriction fails to withstand scrutiny.

When strict scrutiny of content-based regulation is required, the regulation is presumed unconstitutional, and the government must show that the statute is the least restrictive means among available, effective alternatives of furthering the asserted compelling state interest. *Brown v. Entertainment*

Merchants Assn., 564 U.S. 786, 799 (2011). Accordingly, *the burden is on the state* to prove that the reporting restriction "furthers a compelling governmental interest and is narrowly tailored to that end." *Reed,* supra.

Here, the State has previously argued, and courts have recognized, that the purposes of the campaign regulations in R.C. 3517.21 are "to promote fair elections" and to maintain "the integrity of Ohio's election process." See *Magda,* supra., and *Susan B. Anthony List,* supra., respectively ("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"); *see also McIntyre v. Ohio Elections Commission,* 514 U.S. at 349, 115 S.Ct. 1511 (1995)(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."). More recently, the Ohio Election Commission's Director has indicated that "it has always been my understanding that this statute is intended to prevent 'spies' from being placed on an opponent's committee." Doc. 1-1, Page 18.

However, the OEC cannot carry its burden with respect to such interests: like the other portions of R.C. 3517.21 that have recently been invalidated, the Reporting Restriction fails strict scrutiny (and intermediate scrutiny as well) because it (1) fails to advance any compelling governmental interest; (2) is neither a direct nor actually necessary means of achieving whatever the claimed governmental interest may be; (3) is neither the least restrictive nor a narrowly-tailored means of achieving any governmental interests; (3) is both an over-inclusive and under-inclusive means of achieving any governmental interest; and (4) fails to require falsity, malice, or damages before otherwise-protected speech is hindered, deterred, or punished.

a. The State cannot demonstrate that the Reporting Restriction is actually necessary to advance any compelling governmental interest.

First, protecting politicians from the scrutiny of reporters from non-profits like Project Veritas - - is neither a compelling nor legitimate governmental interest. The Supreme Court has "repeatedly rejected the

argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech." *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 749–751 (2011)("Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election, —a dangerous enterprise and one that cannot justify burdening protected speech.").

Further, courts, including the Sixth Circuit, have repeatedly recognized that protecting a discrete interest group from competition is not a legitimate governmental purpose. *Craigmiles v. Giles,* 312 F.3d 220, 224 (6th Cir. 2002), citing *City of Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978); *see also Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 411 (1983) (distinguishing between legitimate state purposes and "providing a benefit to special interests").

Finally, the Supreme Court has counseled that this nation maintains a compelling interest in *exposing* public officials and politicians *to, rather than protecting them from*, even the most rapacious scrutiny:

> 'Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. * * * The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. * * * If judges are to be treated as 'men of fortitude, able to thrive in a hardy climate,' surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.
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> '(I)t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great and the chance of injury to private character so small that such discussion must be privileged.' * * * Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer.

New York Times Co. v. Sullivan, 376 U.S. 254, 264–92 (1964)(Internal citations omitted).

The Reporting Restriction protects politicians, public officials, or campaigns from unwanted disclosure of information they would rather have kept secret. The quest for such protection - - certainly from

non-partisan investigators seeking to report newsworthy political information - - fails to amount to a compelling governmental interest.

Simply put, there is no legitimate, much less compelling, government interest in protecting one class of citizens alone – political candidates – from criticism or negative publicity. To the contrary, the quest for such protection *undermines* the compelling interests underlying the First Amendment itself, as articulated by the Supreme Court in *Sullivan* and *Bennett.*

Second, even if a legitimate government interest - - such as election integrity or the promotion for fair elections - - were implicated by the Reporting Restriction, seeking to protect public officials, politicians, and campaigns from critical scrutiny fails to *directly advance* such an interest. To the contrary, the Restriction *hinders* the participation of an informed public in fair elections by suppressing helpful facts.

"To survive strict scrutiny * * * a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest." *Burson v. Freeman,* 504 U.S. 191, 199 (1992); *see also Animal Legal Def. Fund v. Herbert,* 263 F. Supp. 3d 1193, 1212–13 (D. Utah 2017)("It is not at all clear from the record that the Act is actually necessary to address perceived threats to animals and employees from undercover investigators."). Put otherwise, "if the state is going to restrict protected speech, the restriction must be 'actually necessary' to achieve the state's compelling interest." *Alvarez,* 567 U.S. at 725, quoting *Brown v. Enter. Merchs. Ass'n,* supra, at 799("A prohibition is actually necessary if there is a 'direct causal link between the restriction imposed and the injury to be prevented'"); *Animal Legal Def. Fund v. Reynolds*, No. 417CV00362JEGHCA, 2019 WL 140069, at p. 1–10 (S.D. Iowa Jan. 9, 2019)("Defendants have produced no evidence that the prohibitions of § 717A.3A are actually necessary to protect perceived harms to property and biosecurity . . . Protecting biosecurity is therefore purely speculative and cannot constitute a compelling state interest."), citing *281 Care Comm. II,* 766 F.3d at 787-790 ("Even though the effect of election fraud or detecting the fraud itself, arguably, is a bit more amorphous and difficult to detect, *only* relying upon common sensibilities to prove it is taking place still falls short," and rejecting the state's reliance on "common sense" instead of "empirical evidence"); *Arizona Free Enter.*

Club's Freedom Club PAC v. Bennett, supra, at 750-751 ("Burdening a candidate's expenditure of his own funds on his own campaign does not further the State's anticorruption interest…").

Here, the Reporting Restriction deters and suppresses the publication of truthful and potentially-important political information by neutral intermediaries at the very time that the public may most benefit from that information. Moreover, given that politicians may "lie" about material issues during their campaigns in the wake of *Susan B. Anthony List,* Plaintiffs' brand of investigation and reporting of "unapproved" information is the exact type of "counter-speech" the Sixth Circuit envisioned as a check on such lies when it invalidated the proscription on false statements during campaigns. Without investigation, political dialogue is limited to candidates, their opponents, and a traditional media that often merely announces campaigns from afar as though they were horse-races. Further, the Reporting Restriction does not require - - prior to prosecution, imprisonment, or fine - - that the information reported be false or misleading, or even otherwise secretive. Information reported may simply confirm a recognized truth to be, in fact, true.

Consequently, no matter what the governmental interest (which is unlikely to be compelling), the Reporting Restriction is unnecessary to directly advance such an interest. To the contrary, the restriction actually *hinders* and *subverts* the governmental interests the State has previously claimed to support R.C. 3517.21.

b. Less restrictive alternatives are available to accomplish whatever governmental interest the Reporting Restriction seeks to effectuate.

"If a less restrictive alternative would serve the [g]overnment's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 813 (2000). Further, "[t]o meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 134 S.Ct. 2518, 2540 (2014).

First, district courts adjudicating analogous reporting restrictions routinely observe that there are less restrictive means than suppressing undercover investigation and reporting, such as applying already-

generally-applicable (but more tailored) tort and contract law. *Animal Legal Def. Fund v. Reynolds,* No. 417CV00362JEGHCA, 2019 WL 140069, at p. 1–10 (S.D. Iowa Jan. 9, 2019)([t]he Court need not look far to learn that both the state's proffered interests could be served by alternative measures . . . the state could also rely upon Iowa's existing trespass law, Iowa Code § 716.7(2), to protect its proffered interests without chilling speech."); *Animal Legal Def. Fund v. Wasden,* 878 F.3d 1184, at 1204-1205 (9th Cir. 2018)(citations omitted)("Because there are 'various other laws at [Idaho's] disposal that would allow it to achieve its stated interests while burdening little or no speech,' the law is not narrowly tailored. For example, agricultural production facility owners can vindicate their rights through tort laws against theft of trade secrets and invasion of privacy. To the extent the legislators expressed concern that fabricated recordings of animal abuse would invade privacy rights, the victims can turn to defamation actions for recourse. Even still, as *Alvarez* points out, "[t]he remedy for speech that is false is speech that is true"—and not, as Idaho would like, the suppression of that speech").

Likewise here, there are numerous less restrictive alternatives available. Most obviously, political campaigns can *protect themselves* - - just as all other legitimate organizations do - - through screening the backgrounds of job applicants and volunteers, insisting upon confidentiality agreements, and requiring liquidated damages when any such agreements are breached. Campaigns may also defend themselves through counter-speech by denouncing, disputing, or marginalizing objectionable investigative reports. See *Desnick v. American Broadcasting Companies,* 44 F.3d 1345, at 1354 (7th Cir. 1995) ("a healthy skepticism is a better protection against being fooled by [undercover reporters] than the costly remedies of the law"). Further, Ohio already maintains statutory proscriptions against fraud, trespass, and theft, not to mention common law claims available through contract and agency law and defamation and libel.

Finally,if the concern is that investigators such as PV are insufficiently neutral, they can be required to register as a Political Action Committee or Independent Expenditure group, such that their expenditures are *disclosed*, rather than its newsgathering *forbidden*. And if proscribing "spying on the opposition" is truly the governmental interest at stake, then it is more narrowly tailored to sanction only the *opposing campaign*

that attempts to or succeeds in embedding a spy within an opposing campaign, rather than independent neutral investigators.

Despite these less restrictive alternatives, the Reporting Restriction suppresses investigative reporting even in situations where no statutory or contractual limit has been breached, even where no defamation or libel has taken place, even where "the opposition" is not doing the investigation, and even where disclosure could counter-balance potentially biased reporting. These less restrictive alternatives more than suffice to protect whatever governmental interest is at stake.

c. The Reporting Restriction's timing and screening strictures are not tailored.

The Sixth Circuit Court of Appeals, in *Susan B. Anthony List v. Driehaus,* found, concerning R.C. 3517.21(B)(9) and (10), that, "Ohio's laws do not meet the second requirement: being narrowly tailored to protect the integrity of Ohio's elections." *Susan B. Anthony List* 814 F.3d 466, at 474. The Sixth Circuit found that, "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." *Driehaus,* supra., at 474. The decision was recently summarized when a state court invalidated yet *another* portion of R.C. 3517 in *Magda v. Ohio Elections Commission:*

> 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. The timing of Ohio's process is not narrowly tailored to promote fair elections. Thus, the inherent timing problems with the Commission's statutory and regulatory processes may actually hinder fair elections.
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> ***
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> Concerning lack of a screening process for frivolous complaints, the Sixth Circuit Court of Appeals in *Susan B. Anthony List* said: 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." *see* 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 . . ."
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> Finally, the Sixth Circuit Court of Appeals found Ohio's false statement statutory scheme as contained in R.C. 3517.21(B)(9) and (10) to be "both over-inclusive and underinclusive," examining the pitfalls and weaknesses of the Commission's processes in "promoting fair elections." * * * Such glaring oversteps are not narrowly tailored to preserve fair elections.

Magda, at 1203 (¶31-¶36)("On its face and with particular application to the appellants' situation, R.C. 3517.21(B)(1) is overbroad and unconstitutional. R.C. 3517.21(B)(1) represents a broad-sweeping effort to control the election process beyond what is necessary to achieve election integrity. The Commission has not presented sufficient evidence that R.C. 3517.21(B)(1) is actually needed to achieve this aim or even that it does achieve this aim, beyond what counterspeech may feasibly remedy"), citing *Commonwealth v. Lucas,* 472 Mass. 387, 402, 34 N.E.3d 1242 (2015) ("A statute which, in the claimed interest of free and honest elections, curtails the very freedoms that make possible exercise of the franchise by an informed and thinking electorate . . . cannot be squared with the First Amendment."). Like in *Susan B. Anthony List,* the *Magda* court found to be a critical factor "<u>[t]he fact that anyone may file a complaint, for what ultimately could be punished as a crime, poses the further risk that an individual unbound by ethical restrictions imposed on government officials might file a meritless application</u>." *Magda,* supra. ("[W]e conclude that R.C. 3517.21(B)(1) does not satisfy strict scrutiny. . . R.C. 3517.21(B)(1) is more burdensome than necessary to accomplish the State's asserted objectives and is not narrowly tailored to serve the State's compelling interest in protecting the integrity of Ohio elections. R.C. 3517.21(B)(1) is therefore unconstitutional on its face").

Finally, the Reporting Restriction maintains similar features to *yet 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 statements that were "not even arguably false or misleading," made by "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,* supra., at 351–52.

Similarly here, a probable cause hearing regarding an alleged violation of the Reporting Restriction can be triggered by *anyone*, including a rival with a vendetta. Indeed, that is precisely what has happened to Plaintifffs here: an entirely unaffected Washington D.C. political entity, Democracy Partners, filed the claim against PVA regarding information it reported on the Strickland campaign because PVA investigated Democracy Partners in the past, exposing its corruption and causing it embarrassment. And like previously-invalidated restrictions in R.C. 3517.21, the Reporting Restriction's timing fails to remedy any defects in elections integrity due to the lengthy two-year statute of limitations. Here again, the Reporting Restriction claim was raised against PVA *for the first time* in October of 2018, *two full years* after the Strickland campaign (and political career) ended. Thus, even if PVA had engaged in misdeeds, highlighting those in 2018 did nothing to advance fair elections in 2016. Finally, the Reporting Restriction permits punishment even where the information reporting is trivial, helpful to the public, or entirely truthful and accurate. Consequently, the Reporting Restriction is insufficiently tailored due to its lack of screening for immaterial frivolous complaints from rivals and its invitation of claims long after elections has passed.

d. The Reporting Restriction impermissibly punishes protected speech even without malice, falsity, defamation, or damage, and is therefore overbroad and over-inclusive.

Further, a restriction may not be overinclusive by "unnecessarily circumscrib[ing] protected expression." *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002) (citation omitted). Nor can it be "'overbroad' if in its reach it prohibits constitutionally protected conduct." *Grayned v. Rockford* , 408 U.S. 104, 114 (1972). In considering an overbreadth challenge, the court must decide "whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Id*., at 115; *Martin v. Gross,* 340 F. Supp. 3d 87, 93–109 (D. Mass. 2018)("In short, Section 99 prohibits all secret audio recording of any encounter with a law enforcement official or any other government official. It applies regardless of whether the official being recorded has a significant privacy interest and

regardless of whether there is any First Amendment interest in gathering the information in question. [B]y legislating this broadly -- by making it a crime to audio record <u>any</u> conversation, even those that are <u>not</u> in fact private -- the State has severed the link between [Section 99's] means and its end.")(Emphasis in original).

In protecting undercover reporting restriction in *Food Lion*, the Fourth Circuit reasoned that an "end-run" around First Amendment limits on *civil* actions triggered by speech is impermissibly over-inclusive and overbroad insofar as it punishes speech that is neither malicious, false, defamatory, nor damaging:

> What Food Lion sought to do, then, was to recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim. We believe that such an end-run around First Amendment strictures is foreclosed by *Hustler* [in that] "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i.e.,* with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Hustler* confirms that when a public figure plaintiff uses a law to seek damages resulting from speech covered by the First Amendment, the plaintiff must satisfy the proof standard of *New York Times.*

Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 509–26 (4th Cir. 1999), citing *Hustler Magazine, Inc. v. Fallwell,* 485 U.S. 46, at 56, 108 S.Ct. 876 (1988); *New York Times Co. v. Sullivan,* 376 U.S. 254, 279–80, 84 S.Ct. 710 (1964)(disavowing the constitutional availability of "sanctions upon expression critical of the official conduct of public officials," affirming that "injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error," and observing that not even "factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct."). In *Sullivan,* the Supreme Court took for granted that a state may not punish expression critical of politicians through a criminal statute, highlighting the Alien and Sedition Acts and *extending that protection to civil actions*. *Id.*

Clearly, then, the opposite is true as well: a *state* may not *criminally* (or civilly) punish expression that could not be non-frivolously subjected to even a libel or defamation action. And further, expression critical of public figures such as candidates may not be punished "unless the statement was made with actual

malice – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.,* 725. This is because, otherwise, any "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true," and any "rule [that] dampens the vigor and limits the variety of public debate [] is inconsistent with the First and Fourteenth Amendments." *Id*., at 725, 726.

Nevertheless, pursuant to the Reporting Restriction, a journalist can be imprisoned even if the information reported is *entirely true and helpful to the public*, not to mention *neither defamatory nor libelous*. This is true even if the journalist is working for a non-profit public charity, like PV, with no stake in the outcome of the election and without the legal capacity to spend to influence an election. Further, the Reporting Restriction applies even if no actual identifiable damages are proven or even *alleged*. Accordingly, the Restriction attempts to *criminalize and prosecute* political expression that could not even be adjudicated through *civil* causes of action such as defamation or libel, i.e. expression that it not to aid a political rival, not false, not fraudulent, and not malicious. Such an end-run around constitutional protections of accurate political expression is impermissibly overbroad and over-inclusive.

e. Whatever the governmental interest, the State cannot demonstrate that the Reporting Restriction is anything other than an under-inclusive method of effectuating it.

Finally, the Reporting Restriction is wildly under-inclusive and therefore not "narrowly tailored to serve a compelling interest." 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, supra.,* 2231–32, citing *Republican Party of Minn. v. White,* 536 U.S. 765, 780 (2002). "Where a regulation restricts a medium of speech in the name of a particular interest but leaves unfettered other modes of expression that implicate the same interest, the regulation's underinclusiveness may 'diminish the credibility of the government's rationale for restricting speech in the first place.'" *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994)). That is, an underinclusive prohibition should raise "serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown, supra.,* at 802; see also *Animal Legal Def. Fund v. Reynolds, supra*. ("Here, §

717A.3A does nothing to deter the exact same alleged harms—trespass and biosecurity breaches—from individuals who proceed to access or enter a facility without false pretense or misrepresentation.") The Supreme Court most recently applied this reasoning in *Reed:*

> [The Town] has offered only two governmental interests in support of the distinctions the Sign Code draws: preserving the Town's aesthetic appeal and traffic safety. Assuming for the sake of argument that those are compelling governmental interests, the Code's distinctions fail as hopelessly underinclusive. Starting with the preservation of aesthetics, temporary directional signs are "no greater an eyesore," than ideological or political ones. Yet the Code allows unlimited proliferation of larger ideological signs while strictly limiting the number, size, and duration of smaller directional ones. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem . . .

Reed, at 2231–32. Here, those who have first cleared their reporting with the campaign may discover and report the exact same information without any penalty whatsoever. Additionally, whistleblowers are free to investigate and report the same type of information while working *in government for an elected official who is subject to reelection*, even though doing so may hinder a future campaign for reelection. Moreover, *approved* information can be reported at any time, meaning that the real aim of the Reporting Restriction is to embolden a candidate to present a carefully-manicured public image and set of policy positions that may in-fact be entirely deceptive.

Finally, formal "campaign" organizations today comprise only an increasingly-small fragment of the electoral politics ecosystem, and all other organizations remain unprotected. Donors and lobbyists remain subject to undercover investigation. As do Political Action Committees and Independent Expenditure Groups. As do ideological organizations, trade associations, think tanks, and influential private corporations, including Democracy Partners, labor unions, the Chamber of Commerce, the Heritage Foundation, the Center for American Progress, Planned Parenthood, or Facebook. Only *politicians* are "protected" from critical review in this manner, leaving the public less-informed. Indeed, Plaintiffs have identically-investigated and reported on numerous politically-active entities and would face no liability for doing so in Ohio. Even more arbitrary, reporting *approved* by the politician does not violate the statute - - only that *not* approved is actionable.

Given that investigative reporting is permitted on all other politicized fronts and permitted if approved by the politician or campaign, the government's rationale for selectively suppressing investigative reporting is diminished to the point that it cannot be logically defended.

f. The Reporting Restriction is not saved by the requirement that one harbor "the intent to affect the outcome of the campaign" prior to penalty.

At first blush, the fact that one must be found to have intended to "affect the outcome of the campaign" prior to penalization pursuant to R.C. 3517.21(A) would appear to narrow the statute to a small ill-willed class. However, this apparent *mens rea* requirement fails to adequately protect helpful and otherwise-protected investigative reporting from the Reporting Restriction for several reasons: (1) the meaning of "intent to affect the outcome of a campaign" is vague and arbitrary; (2) even if deemed sufficiently clear, "intending to harm a political campaign" is not a crime - - to the contrary, Americans do it all of the time in many contexts; and (3) proving an intent to harm, even if considered materially identical to "malice", fails to sufficiently narrow the Reporting Restriction because truthful and non-damaging expression is still hindered by the Restriction.

First, requiring an "intent to affect the outcome of the campaign" fails to validate the Reporting Restriction because that phrase is both vague and conducive to arbitrary enforcement. It is, by now, a "basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A law "can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado,* 530 U.S. 703, 732, 120 S.Ct. 2480 (2000).

"[S]tandards of permissible statutory vagueness are strict in the area of free expression." *NAACP v. Button*, 371 U.S. 415, 432 (1963). "When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.;* see also *Reno v. Am. Civil Liberties Union,* 521 U.S. 844, 871–72 (1997) ("The vagueness of [content-based regulations of speech] ... raise[s]

special First Amendment concerns because of its obvious chilling effect on free speech."); *Winters v. New York,* 333 U.S. 507, 509, 68 S.Ct. 665 (1948) ("It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment."). Vague laws force potential speakers to "'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked," thus silencing more speech than intended. *Baggett v. Bullitt,* 377 U.S. 360, 372 (1964). Accordingly, "government may regulate in the area" of First Amendment freedoms "only with narrow specificity." *Button*, 371 U.S. at 433. To this end, the Supreme Court has explained that "the First Amendment does not permit laws that force speakers to retain a campaign finance attorney … before discussing the most salient points of our day" and "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 324 (2009).

Accordingly, with respect to regulating political expression, the "use of unmoored terms," such as "political" and "designed to influence or impact voting," particularly in the face of "haphazard interpretations the State has provided" or no interpretation at all, are insufficiently precise:

> [T]he State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out. <u>Here, the unmoored use of the term "political" in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota's restriction to fail even this forgiving test.</u> Again, the statute prohibits wearing a "political badge, political button, or other political insignia." It does not define the term "political." And the word can be expansive . . . We consider a State's "authoritative constructions" in interpreting a state law. But far from clarifying the indeterminate scope of the political apparel provision, the State's "electoral choices" construction introduces confusing line-drawing problems. . . [And] the next example—"[i]ssue oriented material designed to influence or impact voting," raises more questions than it answers.

Minnesota Voters All. v. Mansky, 138 S. Ct. 1876, 1888–91 (2018); see also *Reed,* supra ("Nor do the Sign Code's distinctions hinge on 'whether and when an event is occurring.' * * * it requires Town officials to determine whether a sign is <u>'designed to influence the outcome of an election'</u> (and thus 'political') or merely 'communicating a message or ideas for noncommercial purposes' (and thus 'ideological')");

Wollschlaeger v. Governor, Fla., 848 F.3d 1293, 1319–23 (11th Cir. 2017)("In addition to failing heightened scrutiny, FOPA's ban on only <u>unnecessary</u> harassment is incomprehensibly vague. While FOPA proscribes "unnecessarily harassing" behavior, a definition of what such conduct entails is markedly absent from the pages of the Florida Statutes. Reasonable doctors are thus left guessing as to when their "necessary" harassment crosses the line and becomes "unnecessary" harassment—and wrong guesses will yield severe consequences. With so much at risk, a statute written in muted shades of gray will not suffice.").

Here, the requisite "intent to affect the outcome of the campaign" fails to sufficiently narrow the Reporting Restriction. *First*, the phrase is undefined and, without definition, insufficiently clear. Does raising public awareness of a candidate's stances on issues "affect the outcome of the campaign"? What if doing so causes *some* individuals to vote differently? Does the investigator's reporting need to have proximately caused a victory for the opponent of the investigated candidate or issue? What if the publication of facts raises the total number of votes cast in the election - - perhaps on both sides? What if the investigator subjectively intended all or any of this? What if the investigator subjectively intended none of this, and just wanted to broadcast the truth, irrespective of the consequences, or "recklessly indifferent" as to the consequences? What if the investigator simply wishes to undermine the credibility of *the political class in general* or socialist, libertarian, or conservative-leaning candidates in particular, to drive home a more systematic point regarding political philosophy?

Further, the OEC concedes this lack of clarity and the Commission's members interpret the phrase in broad and arbitrary manners. OEC Executive Director Phil Richter concedes "the Commission has not had the opportunity to offer any direction, advice or opinion on this area of law . . . to my knowledge, there has never been a statement by the Commission that further defines it . . . <u>presumably any type of work on a campaign could potentially invoke the 'intent' language</u>." Doc. 1-1 (Emphasis added). Indeed, the Chairwoman of the OEC even posited that any publication regarding a political issues within 60 days of an election (including Plaintiffs' YouTube Video about Strickland) would outright demonstrate sufficient "intent to affect the outcome of the campaign," arguing "30, 60 days prior to an election is a key time when

people are paying attention . . . and that's when this was aired. So I'm not clear on how you claim this wasn't with the intent to [a]ffect the outcome of a campaign? . . . [It's] clear that it's meant to [a]ffect the outcome of the election. You didn't continue airing it afterwards, and you aired it in a very specific time frame right before the election. What other purpose would it be aired for?" *See Doc. 1-1.*

In the absence of clarity, the Reporting Restriction's limitation on newsgathering fails to withstand scrutiny, and its requirement of an "intent to affect" a campaign fails to alter this reality.

Second, even if the requisite mental state were clear, it would fail to "save" the constitutionality of the Reporting Restriction: it is no crime to intend to or actually "affect the outcome of a campaign." The Ohio Supreme Court recently explained, in scrutinizing a statute implicating protected speech in a manner parallel to how "reporting" is implicated by the Reporting Restriction, that "[t]he statute fails to require that the prohibited solicitation, coaxing, enticing, or luring occur with the intent to commit any unlawful act, and there is no requirement that the offender be aggressive toward the victim . . .The statute's broad language can support criminal charges against a person in many innocent scenarios." *State v. Romage,* 2014-Ohio-783, ¶¶ 6-18, 138 Ohio St. 3d 390, 392–96 (refusing to narrowly construe the statute to save it, for even a narrow construction of "solicit" "would still criminalize a substantial amount of activity protected by the First Amendment."); see also *Herbert,* supra ("The Act does not define "false pretenses," * * * [T]he State argued for the first time that the court should read a causation requirement into "false pretenses" to narrow its scope solely to lies that are material to a person's access. * * * Setting aside the potential vagueness doctrine implications for reading this type of subjective requirement into a criminal statute, the State's proposed solution likely does not save the Act from First Amendment review.").

In *Desnick*, for instance, the Seventh Circuit concluded that undercover ABC investigators who represented themselves to an ophthalmic clinic as potential patients and then covertly filmed their visit could not face liability for their reporting, even though the clinic "would not have agreed to the entry of the test patients into its offices had it known they wanted eye examinations only in order to gather material for a

television expose of the Center and that they were going to make secret videotapes of the examinations." *Desnick,* supra., at 1353.

Romage, Desnick, and similar precedents elucidate that a First Amendment violation is not rendered permissible simply because the regulation requires an intent that is neither quintessentially criminal nor something other than benign. Indeed, if harboring an intent to affect the outcome of a campaign were elicit, then every partisan statement lauding or deriding a campaign or candidate would render the speaker an outlaw, not to mention shackling the opposing campaign, the very purpose of which is (often) to win by harming the campaign of an opponent. Merely combining such a benign and non-actionable mental state with constitutionally-protected newsgathering fails to transform the Reporting Restriction into a permissible limit on protected newsgathering.

Finally, the intent requirement fails to limit political rivals from filing frivolous complaint against Plaintiffs and others with the OEC. In response, Plaintiffs must appear and substantively explain their intent to the satisfaction of a panel of laymen apparently required to function as telepaths. Enduring such proceedings in response to political speech is a harm in and of itself. See *Driehaus,* supra.

In conclusion, the Reporting Restriction burdens, hinders, and suppresses constitutionally-protected political newsgathering in a manner that is content-based, speaker-based, over-inclusive, under-inclusive, and untailored to any legitimate governmental interest. Consequently, Plaintiffs are highly likely to prevail on their merits of their claims.

B. Plaintiffs are confronted with irreparable injury.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373, (1976) (plurality); *accord id.* at 374–75, 96 S.Ct. at 2690 (Stewart, J., concurring); *see also Newsom v. Norris,* 888 F.2d 371, 378 (6th Cir.1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."). Thus, satisfaction of the first prong of the preliminary injunction standard – demonstrating a strong likelihood of success on the merits –

also satisfies the irreparable injury standard. *Id.* (holding that if a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated); *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (finding that "when a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor").

Additionally, courts enjoining other portions of R.C. 3517.21 have acknowledged the irreparable injury created by such restrictions on political expression. See *Driehaus,* supra ("Plaintiffs have demonstrated a substantial likelihood of success on the merits. As such, Plaintiffs will suffer irreparable injury if Defendants are not immediately enjoined from pursuit of their unconstitutional suppression of Plaintiffs' speech. Further, and perhaps most importantly to Plaintiffs, with an election just months away, Plaintiffs are unable to fully and effectively engage with their fellow citizens, through their message of choice, at this most critical time."); see also *Magda,* supra ("A finding that a constitutional right has been threatened or impaired mandates a finding of irreparable injury as well . . . granting of an injunction against the enforcement of the statute is warranted.").

C. **No public interest is served by continued threats, intimidation, and harassment against Plaintiffs, nor would be private harm accrue.**

Neither Defendants nor others will suffer any harm if they are enjoined from enforcing this unconstitutional policy against Plaintiffs. The unconstitutional character of Reporting Restriction leaves no legitimate interest in its continued application. And as the OEC has itself acknowledged, violations of this Restriction are exceedingly rare and Plaintiffs are amongst the few, if not the only, affected by it. On the other hand, the public interest is served by protecting free expression, maximizing political activity, striking down policies that chill speech, and by vindicating Plaintiffs' constitutional rights. *See G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("it is always in the public interest to prevent the violation of a party's constitutional rights"). Meanwhile, a government's interest in protecting

campaigns from scrutiny is far from sufficiently compelling to override citizens' need for information in advance of election.

III. CONCLUSION

For the foregoing reasons, this Court must at once enjoin the State from enforcing - - through threats, orders, fines, prosecution, imprisonment, or other penalties - - R.C. 3517.21(A)(1) against Plaintiffs and others similarly situated, insofar as that Division prohibits undercover investigation of and reporting on political campaign.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion and memorandum in support, as well as the verified complaint filed in this action has been served upon the following, via e-mail, on the date of filing:

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