Testimony of Kimberly McCullough, Legislative Director
In Support of HB 2430
House Committee on Rules
March 7, 2017

Chair Williamson and Members of the Committee:

The American Civil Liberties Union of Oregon[1] has concerns that HB 2430 may be unconstitutionally invalid under the First Amendment.

In *United States v. Alvarez*, 132 S. Ct. 2537 (2012), the Court held that The Stolen Valor Act, which makes it a crime to falsely claim receipt of military decorations or medals, was unconstitutional under the First Amendment. There, the respondent attended his first public meeting as a board member of a city water district board. At that meeting, he introduced himself as a retired marine and falsely stated that he had been awarded the Congressional Medal of Honor. After being prosecuted under the statute, the respondent plead guilty but reserved his right to appeal on First Amendment grounds. The Ninth Circuit found that the Act was invalid and reversed his conviction, and the Supreme Court affirmed in a plurality opinion.

Deeming the Act to impose a content-based restriction on speech, the plurality applied a strict scrutiny test. *Id.* at 2540. In doing so, the Court rejected the government's position that false statements "have no First Amendment value in themselves" and thus "are protected only to the extent needed to avoid chilling fully protected speech," stating that apart from a "few historical and traditional categories . . . long familiar to the bar," there is not "any general exception to the First Amendment for false statements." *Id.* at 2544. While the Court agreed that the government had a compelling interest in protecting the integrity of the Medal of Honor system, it held that the government had failed to show that the Act was necessary to achieve the government's interest.

Indeed, to the contrary, the Court stated: "The Government has not shown, and cannot show, why counterspeech, would not suffice to achieve its interest. *Id.* at 2549. The facts . . . indicate that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie." The Court further stated: "The remedy for speech that is false is speech that is true. *Id.* at 2550. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth." The Court noted that the respondent had lied at a public meeting, and that even before the FBI began to investigate, the respondent was "perceived as a phony," "was ridiculed online," and that there

[1] The American Civil Liberties Union of Oregon (ACLU of Oregon) is a nonpartisan organization dedicated to the preservation and enhancement of civil liberties and civil rights. We have more than 37,000 members in the State of Oregon, and that number is growing as we speak.

were calls for his resignation. The Court stated that there "is good reason to believe that a similar fate would befall other false claimants." *Id.* at 2549-50.

Of particular note also is Justice Breyer's concurring opinion, in which Justice Kagan joined. While Justice Breyer would have applied an intermediate level of scrutiny to the case, because he perceived that the "dangers of suppressing valuable ideas are lower where, as her the regulations concern false statements about easily verifiable facts," he too found that the Act was invalid under the First Amendment. In rejecting the government's position that the false statements enjoyed no protection under the First Amendment, he stated:

> Further, the pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, *provides a weapon to a government broadly empowered to prosecute falsity without more*. *And those who are unpopular may fear that the government will use that weapon selectively, say by prosecuting a pacifist who supports his cause by (falsely) claiming to have been a war hero, while ignoring members of other political groups who might make similar false claims*.

Id. at 2553 (emphasis added).

While he conceded that a number of statutes and common law doctrines do make certain kinds of false statements unlawful, he noted that such prohibitions tended to be more narrowly drawn or limited in the scope of their application by requiring proof of specific harm to identifiable victims, by requiring that the lies be made in contexts in which tangible harm is more likely to occur or by limiting the lies to those that are particularly likely to cause harm. As an example, he noted that fraud statutes typically require a showing of materiality, reliance and actual injury and that perjury statutes are limited to sworn statements, while also requiring a showing of materiality.

Like the plurality, Justice Breyer found that the government had demonstrated a substantial justification for the statute. He found, however, that the government could have achieved its purpose in a less burdensome way by more finely tailoring the statute. In connection with this analysis, he noted:

> I recognize that in some contexts, *particularly political contexts*, such a narrowing will not always be easy to achieve. *In the political arena, a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas.*

Id. at 2556 (emphasis added)

In *Susan B. Anthony List, et al., v. Ohio Elections Comm'n,* 814 F.3d 466 (6th Cir. 2016), the Susan B. Anthony List and the Coalition Opposed to Additional Spending and Taxes sued the Ohio Elections Commission alleging that Ohio's political false-statements laws, Ohio Rev. Code § 3517.21(B)(9)–(10), violate the First and Fourteenth Amendments. The district court agreed and entered summary judgment and a permanent injunction in favor of SBA List and COAST. The Sixth Circuit affirmed, holding that "the laws are content-based restrictions that burden core protected political speech and are not narrowly tailored to achieve the state's interest in promoting fair elections."

Ohio's political false-statements laws prohibit persons from disseminating false information about a political candidate in campaign materials during the campaign season "knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the *election*, nomination, or defeat of the candidate." Ohio Rev. Code § 3517.21(B)(10) (emphasis added). The statutes specifically prohibit false statements about a candidate's voting record, but are not limited to that.

In affirming the lower court, the Sixth Circuit rejected its prior precedent in *Pestrack v. Ohio Elections Commission*, 926 F.2d 573 (6th Cir. 1991), in which the court had upheld Ohio's political false-statements laws as constitutional because "false speech, even political false speech, does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregard's the truth." *See Susan B. Anthony List,* 814 F.3d at 471-72. In doing so, the Sixth Circuit noted that in *Alvarez*, the Supreme Court had "unanimously rejected the 'categorical rule . . . that false statements receive no First Amendment protection.'" *Id.* at 472. Moreover, the court held that because the Ohio political false-statements laws "target speech at the core of First Amendment protections—political speech" and "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*, the Sixth Circuit held that strict scrutiny was appropriate. *Id.* at 473 (emphasis added).

In applying that test, the court determined that 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'" were compelling. *Id.* at 473. The court held that the Ohio laws were constitutionally invalid, however, as they were not narrowly tailored to achieve that objective. While the court held that the laws were not sufficiently tailored based on several aspects of the laws that are not relevant to the analysis of HB 2430, the court did note that the laws were not sufficiently tailored in that they applied to "all false statements, including non-material statements . . . . [t]hus, influencing an election by lying about a political candidate's . . . vote on whether to continue a congressional debate is just as actionable as lying about a candidate's party affiliation or vote on an important policy issue." *Id.* at 475. Citing *Alvarez,* the court further noted that the "courts have consistently erred on the side of permitting more political speech than less."

HB 2430 raises First Amendment issues under both *Alvarez* and *Susan B. Anthony*. As the Court made clear in *Alvarez*, and the Sixth Circuit reiterated in *Susan B. Anthony*, there is not a general exception to the First Amendment for intentionally false statements. Where, as here, a content regulation is at issue, under both *Alvarez* and *Susan B. Anthony List*, a court is likely to apply strict scrutiny, even where the false statement is knowingly made.

A court may well find that Oregon has a compelling interest in protecting the integrity of its election process. *See Alvarez,* 132 S. Ct. at 2549-50 *(*plurality finding that the government had a compelling interest in protecting the medal of honor system); *Susan B. Anthony List*, 814 F.3d at 473 (holding that Ohio had a compelling interest in protecting the integrity of its election system, 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"). The issue, however, is likely to turn on whether a Court would find that governmental regulation of knowingly false statements by a candidate was necessary to achieve that goal.

Under both *Alvarez* and *Susan B. Anthony*, there is certainly the argument that counterspeech is a sufficient deterrent to achieve that interest without the need for the governmental imposition of criminal liability. Also, as in *Susan B. Anthony List*, HB 2430 purports to encompass all false statements submitted by a candidate in his candidate statement, if such statements are made knowingly made, and does not contain any language limiting such statements to "material" statements. While ORS 251.085, which HB 2430 was introduced to amend, states that "the candidate's statement shall begin with a summary of the following: [o]ccupation, educational and occupational background, and prior governmental experience," which is arguably "material," candidate statements also include other information as well, including a "statement of the reasons the candidate should be nominated or elected." See ORS 251.065.

Please also note:

The ACLU filed an *amicus* brief in *Alvarez in* support of the respondent, *see* *http://mediacoalition.org/files/litigation/us-alvarez-amicus-brief-aclu.pdf*, as did a number of media and other First Amendment organizations. *See* *http://mediacoalition.org/us-v-alvarez*.

The ACLU also filed an *amicus* brief in *Susan B. Anthony List* on behalf of Appellees Susan B. Anthony List and COAST: http://www.acluohio.org/wp-content/uploads/2016/02/SBAListV.Driehaus-SixthCircuitAmicusBrief2015_0407.pdf.

Other relevant cases include:

281 Care Comm. v. Arneson, 766 F.3d 774, 785 (8th Cir. 2014) ("[N]o amount of narrow tailoring succeeds because [Minnesota's political false-statements law] is not necessary, is simultaneously overbroad and underinclusive, and is not the least restrictive means of achieving any stated goal."), *cert. denied*, 135 S. Ct. 1550 (2015).

Commonwealth v. Lucas, 34 N.E.3d 1242, 1257 (Mass. 2015) (striking down Massachusetts' law, which was similar to Ohio's).

Rickert v. State Pub. Disclosure Comm'n, 168 P.3d 826, 829–31 (Wash. 2007) (striking down Washington's political false-statements law, which required proof of actual malice, but not defamatory nature).

We hope this information is helpful for this committee understanding that HB 2430 is likely unconstitutional under the First Amendment. It may further be unconstitutional under Article I, section 8 of the Oregon Constitution, which provides even more protection for free speech. Please feel free to contact me if you have questions or concerns.