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Nothing But The Truth May Be Too Strict For Politics, Supreme Court Rules

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An Ohio law that prompted one of the funniest Supreme Court briefs ever may be in for closer constitutional scrutiny after the high court ruled that the threat of being putting in jail for speaking less than the truth about politicians is enough to give plaintiffs standing to challenge the law.

In a unanimous decision penned by Justice Clarence Thomas, the court said the Susan B. Anthony List had the right to sue the Ohio Elections Commission in federal court over its potential prosecution for accusing a Democratic member of Congress of voting for federally funded abortions when he actually voted in favor of the Affordable Care Act. The State of Ohio argued the Susan B. Anthony List and another group didn't have judicial standing because no action had been taken against them.

The Sixth Circuit Court of Appeals agreed and threw out the cases, but the Supreme Court reversed that decision. The fact that the Susan B. Anthony List had been investigated by the Elections Commission and faced the threat of criminal prosecution met the constitutional test for standing, which according to Court precedent requires an "injury in fact" that can include the threat of prosecution. The Supreme Court rejected the Sixth Circuit's reasoning that it was extremely unlikely the Susan B. Anthony List was in danger since the Ohio law also requires defendants to knowingly lie about a candidate and the conservative group believed it was true that a vote for Obamacare was equivalent to a vote for federally funded abortions.

> The Sixth Circuit misses the point. SBA's insistence that the allegations in its press release were true did not prevent the Commission panel from finding probable cause to believe that SBA had violated the law the first time around. And, there is every reason to think that similar speech in the future will result in similar proceedings, notwithstanding SBA's belief in the truth of its allegations. Nothing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law.

Thomas's opinion was the very definition of dry legal writing. Not so the friend-of-the-court brief submitted by the Cato Institute's Ilya Shapiro and cowritten by P.J. O'Rourke, the former National Lampoon editor and humorist who is not burdened by a law degree. He opens his argument with these well-known political statements that might have drawn the Ohio Election Commission's scrutiny:
"I am not a crook."
"Read my lips: no new taxes!"
"I did not have sexual relations with that woman."
"Mission accomplished."
"If you like your healthcare plan, you can keep it."
But that is only after an initial footnote in which he states that "*amici* and their counsel, family members, and pets have all won the Congressional Medal of Honor."
Moving on, he says:

> The campaign promise (and its subsequent violation), as well as disparaging statements about one's opponent (whether true, mostly true, mostly not true, or entirely fantastic), are cornerstones of American democracy. Indeed, mocking and satire are as old as America, and if this Court doesn't believe amici, it can ask Thomas Jefferson, "the son of a half-breed squaw, sired by a Virginia mulatto father." Or perhaps it should ponder, as Grover Cleveland was forced to, "Ma, ma, where's my pa?"

The government has no compelling interest in eliminating such "truthiness" — a phrase coined by humorist Stephen Colbert — from political discourse, he says, "because any injury that candidates suffer from false statements is best redressed by pundits and satirists—and if necessary,civil defamation suits."

> There is no lie that can be told about a politician that will not be more damaging to the liar once the truth is revealed. A crushing send-up on The Daily Show or The Colbert Report will do more to clean up political rhetoric than the Ohio Election Commission ever could.

The Supreme Court didn't actually decide whether this is true. Instead it ordered the case back for reconsideration of whether other requirements for standing, including if a court ruling could remedy the damage complained about. Interestingly, the court also refused to say whether this case ended the threatened doctrine of "prudential" standing, under which judges can deny standing to plaintiffs who otherwise seem to fit the requirements under a law. That doctrine took a major hit in this year's *Lexmark vs. Static Controls*, in which Justice Antonin Scalia upheld another Sixth Circuit decision allowing a company to sue over Lexmark's claims its chips in remanufactured toner cartridges might be illegal.
"We need not resolve the continuing vitality of the prudential ripeness doctrine" because the plaintiffs in the Ohio speech case meet other requirements, Thomas wrote.