



Does the First Amendment Include the Right to Tell Lies?

By Crystal Sheppard
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In 2010, Steven Driehaus was the Congressional representative for Ohio's 1st District, which encompasses Cincinnati. The first term congressman was part of the Democratic majority during the initial two years of President Obama's first term that helped push through some key legislative victories, including the Affordable Care Act. He was also one of many Democrats who were challenged by ultraconservative Republican opponents in the midterm elections. His vote for the ACA was a target for anti-choice groups, including the Susan B. Anthony List (SBAL). One of the key missions of the political action committee is to elect women and men who are against abortion. They supported Driehaus' opponent.

As part of their support, the organization ran ads in the district claiming that Driehaus voted for taxpayer funded abortion. Their "proof" was his vote in support of the ACA. At the time, Republican ACA opponents were claiming that the law allowed for federally subsidized abortion, a patently false claim. It was just part of the noise to discredit the ACA, ignoring the fact that the Hyde Amendment already precluded any federal funds being used for abortion, not to mention that President Obama signed an executive order reiterating the government's position.

The Susan B. Anthony List insisted on repeating the lie. They even planned to put up billboards about it.

Rep. Driehaus filed a claim with the Ohio Elections Commission that the proposed billboards were false political ads, in violation of Ohio's election law prohibiting candidates and groups from intentionally making false statements. Violation of the law can result in criminal prosecution. The case was eventually dropped, though the OEC did make a finding that SBAL probably did violate the law and blocked the billboards.

In the end, Driehaus lost his reelection bid as well as his defamation suit against the organization.

After the commission's ruling, SBAL filed a federal lawsuit claiming that Ohio's False Statement Law violated the group's First Amendment Rights. A district court dismissed the lawsuit because the group had not been harmed by the commission's decision and, therefore, did not have standing to bring a suit. An appeals court upheld the ruling.

The Susan B. Anthony List appealed to the Supreme Court, which has agreed to hear arguments in the case.

SABL is asking for two specific rulings from the Court in *Susan B. Anthony List v Driehaus*. The first goes to the district court's ruling that SABL did not have standing because they were not harmed. SABL argued that the threat of prosecution essentially puts a "chilling effect" on its free speech in violation of their First Amendment rights. This allowed them, in their belief, to bring a "preemptive" claim to challenge the law. Meaning, even though nothing had happened, something could happen and, therefore, they had a right to challenge the law. The court ruled that in order for the organization to be able bring a claim they must admit that the statement they made was indeed false and admit that they intended to make false statements in the future.

Of course doing so could make the organization subject to criminal prosecution, not to mention severely damage their reputation. Yet, the court ruled they needed to have a credible risk of prosecution in order to claim harm and have standing to file suit. SABL would not admit that their statement was false, causing the case to be dismissed.

SABL feels that the simple threat of prosecution should be reason enough to file suit.

The second point goes to the law itself. Their suit alleges that any law which prohibits the use of "false" statements, so long as the speaker maintains that the speech is true, violates First Amendment rights. This should apply even if others who enforce the law claim that the statements are not true.

In other words, the SABL wants the Supreme Court to decide if lying is protected under the First Amendment.

The Cato Institute, a conservative think tank, filed a supporting brief in support of SABL. They cite *Citizens United*, the now infamous case in which SCOTUS ruled that corporations have free speech rights, pointing to the Court's statement that the "First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." They argue that because any person can bring a complaint to the elections commission, putting any kind of limits on political speech would allow the threat of prosecution to be used as a preventative strike, essentially silencing opponents.

This should not be allowed, even if the opponents are lying.

As with any Constitutional right, the Supreme Court has ruled that no right is absolute. It has ruled that government can limit who can have access to guns, even while declaring the right to own them an absolute right. The same goes with the First Amendment. The Supreme Court has already ruled that at least five specific areas — commercial speech, defamation (libel and slander), speech that may be harmful to children, speech broadcast on radio and television, and public employees' speech — do not warrant full protection. Furthermore, it has also ruled that limits on time, place and manner of the expression can also be placed on even the most extensive of protections.

However, is lying protected political speech?

The court has said that false statements in commercial speech (advertising) are not protected. It has also said that in cases of defamation (either written, as in libel, or spoken, as in slander) private citizens can sue for damages. Public figures and officials, however, can only sue for damages if they can prove that the defamation was done with malice. This means that the speaker must have known the statement was false and proceeded to make the statement without regard for its lack of truthfulness.

The state of the Ohio claims their law does exactly that.

The Ohio statute specifies that the statements must be made with knowledge and malice. Furthermore, the commission cannot prosecute violators and only has the authority to make rulings regarding campaign activities and, in this case, the finding was not published. Only county prosecutors are responsible for bringing prosecution. It is for these reasons the state of Ohio has argued in its reply brief that the Supreme Court should uphold the lower courts' rulings.

The Supreme Court is expected to hear oral arguments in March.