



Ohio case before U.S. Supreme Court could decide whether states can criminalize campaign lies

By Sabrina Eaton

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WASHINGTON, D. C. - The U.S. Supreme Court on Tuesday will hear arguments on an [Ohio law](#) that criminalizes deliberate lies about political candidates in a high-profile case that could overturn campaign speech restrictions around the nation.

The controversy over whether Ohio's law violates free speech has forged unlikely allies of the abortion-rights American Civil Liberties Union and the anti-abortion Susan B. Anthony List. It has also pitted Ohio Attorney General Mike DeWine against himself as he defends the law in his official capacity while criticizing the law in a separate court filing.

Even political satirist P. J. O'Rourke has weighed in with a U.S. Supreme Court brief that claims "the law at issue undermines the First Amendment's protection of the serious business of making politics funny."

"Laws like Ohio's here, which criminalize 'false' speech, do not replace truthiness, satire and snark with high-minded ideas and 'just the facts,'" it continues. "Instead, they chill speech such that spin becomes silence."

Violations of Ohio's law against political lies are considered a first-degree misdemeanor, punishable by a penalty of up to six months in jail and a \$5,000 fine.

The court might not rule on the law's constitutionality after hearing next week's arguments. Legal experts say it may well limit its decision to the narrower issue of whether a party that hasn't been convicted of violating the law can challenge it. At least 15 other states have similar laws, and the group challenging Ohio's law says all "are almost certainly unconstitutional."

Ohio State University election law expert Daniel Tokaji predicts the court will reverse lower court decisions that said the Susan B. Anthony List couldn't challenge the law on constitutional grounds because it wasn't found guilty of a violation.

"It could be unanimous," Tokaji predicts. "One of the big things to look for at argument is whether or not the justices tip their hands much on the merits, or confine themselves to the standing issues."

The controversy began when the anti-abortion group wanted to erect a billboard in the Cincinnati area as part of a 2010 nationwide campaign against Affordable Care Act backers. It claimed the law - supported by then-congressman Steve Driehaus - allows taxpayer-funded abortions.

"Shame on Steve Driehaus!" the billboard was to say. "Driehaus voted FOR taxpayer-funded abortions!"

Driehaus, a Cincinnati-area Democrat who opposes abortion, said that statement was false because [the law stipulated](#) no federal funds could be spent to pay for abortions. Anti-abortion Democrats including Driehaus, backed the bill only after President Barack Obama issued an [executive order](#) that specified insurance plans in the health care exchanges wouldn't use tax dollars for abortion, except in cases of rape, incest or when pregnancy would endanger a woman's life.

The executive order did not satisfy the concerns of some anti-abortion groups, who insisted the law would still allow tax dollars to pay for abortions.

The company that owned the billboard declined to post the Susan B. Anthony List's message after Driehaus threatened legal action. Driehaus also complained to the Ohio Elections Commission about the group's ads. Although two commissioners found probable cause for a hearing, Driehaus withdrew his complaint after losing his re-election bid to Cincinnati-area Republican Steve Chabot, so the case was never decided.

The Susan B. Anthony List proceeded with a federal lawsuit to challenge Ohio's law on free speech grounds, claiming Ohio's criminalization of false political speech violates First Amendment rights in a similar fashion to the Stolen Valor Act. In [United States v. Alvarez](#), the Supreme Court decided that the Stolen Valor Act, which criminalized lies about receiving military honors or decorations, violated constitutional free speech rights.

In legal briefs, the Susan B. Anthony List says laws like Ohio's "play a troubling, harassing role in every political campaign" in the states where they exist. It contends lower court decisions that blocked its case from being heard prevent "even meritorious challenges to laws that suppress speech, resulting in self-censorship, chill and degradation of political discourse - the very evils that the First Amendment is designed to combat."

The American Civil Liberties Union filed papers at the Supreme Court that agree with the Susan B. Anthony List's viewpoint.

"The First Amendment interests at stake are obvious and significant," its filing said.

Acting in their official capacity to defend state law, DeWine and Ohio State Solicitor Eric Murphy urged the court to uphold the [Sixth Circuit Court of Appeals finding](#) that Susan B.

Anthony List's challenge of the law "is not ripe for review." Their brief says the election commission would have to find a violation before any criminal enforcement happened, and the group could subsequently appeal those findings to state courts, presenting their constitutional claims in the process.

DeWine filed a separate "friend of the court" brief "in fulfillment of his duties as Ohio's chief law officer" to point out "the potentially chilling effect" the Ohio law has "on civic participation by ordinary citizens."

"In practice, Ohio's false statements law allows the state's legal machinery to be used extensively by private actors to gain political advantage in circumstances where malicious falsity cannot ultimately be established," DeWine's brief continued.

By far the most entertaining brief filed in the case was submitted by O'Rourke and the libertarian Cato Institute. It cites well-known presidential dissembling, such as Richard Nixon's "I am not a crook," statement and Bill Clinton's claim that "I did not have sexual relations with that woman" before asking:

"Where would we be without the knowledge that Democrats are pinko-communist flag-burners who want to tax churches and use the money to fund abortions so they can use the fetal stem cells to create pot-smoking lesbian ATF agents who will steal all the guns and invite the UN to take over America?"

On a more serious note, it says Ohio's law violates the First Amendment, conflicts with the *Alvarez* decision and the Supreme Court should "terminate it with extreme prejudice."

"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," it concludes.