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Challenge to Ohio speech law has DeWine straddling issue

Office backs speech statute he opposes

By Jim Provance

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COLUMBUS — A challenge to an Ohio law prohibiting knowing or reckless "false statements" in campaigns has put state Attorney General Mike DeWine on both sides of the issue and served as fodder for a political satirist who wonders where the likes of Jon Stewart and Stephen Colbert would be if ads were scrubbed of political lies.

The U.S. Supreme Court will hear arguments on April 22 to a decades-old Ohio law that has been used to hold candidates to task for their campaigns' false statements as well as manipulated by the candidates themselves so they can run their own ads stating that their opponents were caught lying.

Despite a 1995 decision by the Cincinnati-based U.S. 6th Circuit Court of Appeals mostly upholding Ohio's law, the Supreme Court's 2012 ruling that even false speech can be constitutionally protected suggests the state law may not survive.

Mr. DeWine's office, as the lawyer for the Ohio Elections Commission and the other state defendants, is obligated to defend the law, and he insists it "continues zealously" to do so.

But in a separate brief filed with the court, the Republican attorney general said he personally believes the law has a "potentially chilling effect" on free speech and that he has an obligation to speak up even when he thinks his client is wrong.

"… such [commission] hearings can be manipulated by complainants so that the costs they impose on a political opponent form part of the complainant's campaign strategy," reads the opinion filed for Mr. DeWine. "There is reason to believe that some complainants do precisely that.

"It is not surprising, then, that a review of the commission's files shows that a great many charges that result in a finding of probable cause are dismissed by the complainant after the

election," it reads. "It is not overly cynical to believe that in many cases, this is the complainant's intended strategy from the beginning."

Under the law, a complaint can be filed with the seven-member, bipartisan elections commission, most of which is appointed by the governor, to determine whether an ad, pamphlet, Internet site, or some other campaign material includes a false statement made knowingly or recklessly without regard to its falsity.

A smaller probable-cause panel, made up of some members of the commission, first holds a hearing to determine whether there is cause to believe a violation occurred. If it finds there is, the full commission holds a hearing in the matter and then, if it finds a violation, to decide punishment, if any.

At worse, the commission can refer the case to a prosecutor for possible action. A conviction carries a maximum potential penalty of six months in jail and a $5,000 fine.

The commission could also just issue a letter of reprimand or impose no penalty. Referrals for prosecution have been extremely rare. The commission has been more likely to be accused of being toothless when it comes to responding to political falsehoods once a candidate has already benefited or been harmed politically by them.

For example, during the 2007 special election primary to select a Republican candidate to run to replace the late U.S. Rep. Paul Gillmor in mostly rural northwest Ohio, the dueling campaigns of Bob Latta and Steve Buehrer, state legislators at the time, were both found to have lied about the other.

Mr. Latta received a letter of reprimand. No punishment was imposed on Mr. Buehrer. Mr. Latta won the primary and general election and serves in Washington. Mr. Buehrer is administrator of the Ohio Bureau of Workers' Compensation.

Political satirist and Toledo native P.J. O'Rourke, in a brief filed on behalf of the Cato Institute research foundation and with tongue only partly planted in cheek, said Ohio's law criminalizes false speech when it would be better left to opposing candidates, journalists, and even political satirists to make a lying candidate regret his words.

"It is difficult to imagine life without it, and our political discourse is weakened by Orwellian laws that try to prohibit it," he wrote. "After all, 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 ATF agents who will steal all the guns and invite the U.N. to take over America?

"Voters have to decide whether we'd be better off electing Republicans, those hateful, assault-weapon-wielding maniacs who believe that George Washington and Jesus Christ incorporated the nation after a Gettysburg re-enactment and that the only thing wrong with the death penalty is that it isn't administered quickly enough to secular-humanist professors of Chicano studies," Mr. O'Rourke wrote.

The current Supreme Court case was brought by the Susan B. Anthony List and the Cincinnati-based Coalition Opposed to Additional Spending and Taxes in connection with a complaint filed in 2010 by then-U.S. Rep. Steven Driehaus, a Cincinnati Democrat.

Mr. Driehaus challenged the Susan B. Anthony List's claim that his vote for the federal health-care law was a vote for taxpayer-funded abortions. A commission panel voted 2-1 to find probable cause that the statement was false, but the case was dismissed before it reached the full commission after Mr. Driehaus lost re-election.

Both organizations claimed the law's existence serves a chilling effect on their future political speech.

But Mr. DeWine's own office in defense of the law argues that the fact that the case against the Susan B. Anthony List was dismissed before fully litigated showed there had been no harm. The law's effect on possible future activities of the organizations is speculative and shouldn't be considered by the courts now, it argues in its brief.

"Ohio's false-statement laws reflect its elected representatives' view that 'the use of the known lie as a [political] tool is ... at odds with the premises of democratic government,'" the brief reads. "Disagreeing with that choice, [the organizations] assert the broadest attack — to facially eradicate the representatives' work and prohibit them from readjusting it in the future — before any state court or agency has decided whether the laws even cover [their] proposed speech."