

Opinion: Ohio's false-statement law is unconstitutional

By Kenneth Craycraft

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In April, the United States Supreme Court will hear oral arguments in the case, Susan B. Anthony List and Coalition Opposed to Additional Spending and Taxes (COAST) v. Driehaus. The case is of special local interest for at least two reasons: First, it unites perhaps the most diverse set of political voices ever assembled before the Supreme Court; Second, it directly involves COAST, which is represented by well-known Cincinnati attorney, Christopher Finney.

While the court has been asked to address a narrow technical issue of when a challenge may be brought, it is going to wrestle with the broader question of whether a law that makes it a crime to make a “false” statement in political campaign advertising, such as currently exists in Ohio and several other states, violates the United States Constitution. Should the veracity of campaign rhetoric be judged by individual voters as they weigh competing claims in the hurly-burly of political campaigns – where one person’s “facts” are another person’s “lies” – or by election board bureaucrats?

The case originated in the 2010 election, when the pro-life Susan B. Anthony List (“SBA”) accused Congressman Steve Driehaus (who was running for re-election against Steve Chabot) of supporting taxpayer funded abortion by his vote in favor of the so-called Affordable Care Act. The pro-life group was prepared to pay for billboard ads that would have said, “Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion.” Driehaus filed a complaint with the Ohio Election Commission, arguing that the proposed statement was false and in violation of Ohio’s false-statement election law.

Violation of the false-statement law is a first-degree misdemeanor, providing for a six-month jail term and \$5,000 fine. A second violation would result in the person losing his or her right to vote. The election commission found in favor of Driehaus, and the billboard company refused to post the ads under threat of prosecution under the law. COAST agreed with SBA’s criticism of Driehaus, and wanted to distribute the following statement: “Despite denials, Driehaus did vote to fund abortions with tax dollars.” COAST was restrained from doing that, however, for fear of prosecution under the false-statement law. Instead, SBA and COAST filed separate federal lawsuits arguing that the law violates the free speech clause of the First Amendment to the Constitution. (The cases have been consolidated.)

The “facts” about what the the health care law funds in relation to abortion are complicated and murky. While it has specific provisions that pay lip-service to prohibiting direct funding of abortion, other provisions provide for ways that abortion will still be funded, albeit less directly. The effect of the law is to criminalize campaign rhetoric, rather than to allow voters to decide who is being more or less truthful. As the facts of the very case before the court make clear, this has a strong chilling effect on free speech.

This “fact” has caused a remarkably disparate number of interest groups to file what are known as “amicus briefs” with the U.S. Supreme Court, in support of SBA and COAST. From the leftist American Civil Liberties Union, to the libertarian Cato Institute, to the Republican National Committee, nearly 20 organizations and coalitions have filed briefs in support of SBA and COAST. After all, one man’s opinion that “Barack Obama is a socialist” or that “George Bush is a war criminal,” is another man’s falsehood, punishable under the law.

Democracy is not served by such an outcome. The Supreme Court should, and almost certainly will, declare Ohio’s false-statement campaign law to violate the First Amendment to the Constitution. Regardless of one’s politics, everyone should be grateful to SBA and COAST for pressing the issue, as the right outcome will benefit even those who strongly disagree with their political and social agendas.

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