



## Supreme Court to rule on political campaigns' pretty little lies

*The Supreme Court may affirm a basic element of American campaigns: saying whatever they please, true or not*

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It turns out that there is a tenet in American politics that groups as diverse as the [American Civil Liberties Union](#), [the Obama administration](#), the anti-abortion group [the Susan B. Anthony List](#) and [the Republican National Committee](#) can agree on: Elections thrive on free speech, even if that speech contains obfuscations, mudslinging, half-truths and, occasionally, blatant lies.

[The Supreme Court](#) will hear oral arguments Tuesday in *Susan B. Anthony List v. Driehaus*, a case that turns on whether an Ohio law that prohibits “false statements” about candidates during a political campaign violates the right to free speech enshrined in the First Amendment.

As far as political spats go, this one started out unremarkably: In 2010 incumbent Rep. Steve Driehaus, a Democrat, felt — as many candidates do during the course of an election cycle — lied about and mischaracterized.

The anti-abortion group Susan B. Anthony List (SBA) was planning a billboard campaign accusing him of supporting taxpayer-funded abortions because of his vote in favor of the Affordable Care Act — despite the fact that Driehaus considers himself pro-life and voted for the law only after the Obama administration issued an executive order specifying that no taxpayer dollars would go to abortion providers.

In some states, Driehaus might have had to swallow what he saw as a false attack on his record, but in Ohio, statutes prohibiting false statements about candidates have been on the books in some form since the 1960s.

He filed a complaint with the Ohio Elections Commission, an independent seven-member body charged with evaluating such claims and passing them on to the county prosecutor if it believes the law was broken. Before the commission made a ruling, the billboard owner — fearing liability — refused to run SBA’s advertisements, and Driehaus withdrew his complaint.

Still, the SBA challenged the state law as unconstitutional, arguing that the threat of prosecution had “a chilling effect” on its speech and that of others.

The Supreme Court is expected to rule on the narrower question of whether the SBA has the standing to challenge the law at all, given that the group never faced a ruling or a penalty under the Ohio statute.

But it’s the sexier First Amendment issue that has brought out a kaleidoscopic array of opponents who say that, despite Americans’ [bemoaning dirty](#) politics, criminalizing any political speech falls beyond the pale.

“It’s driven by this nannyish sentiment that it’ll clean up our politics,” said Rick Wilson, a Florida-based GOP media consultant. “[Politics] is supposed to be a big brutal bar fight. It is supposed to be people contesting their ideas, policies and organizational skills. It is not supposed to be arbitrated with these people with their glasses hooked over the ends of their noses, wagging their fingers at what can and can’t be said.”

Even the Ohio attorney general, whose staff is tasked with defending the law, seems to partially agree. Republican Mike Dewine had attorneys in his office work up a brief defending the Ohio law — as they are obligated to do — but [he also filed a separate brief](#) with the Supreme Court outlining his personal view that the provision “may chill constitutionally protected political speech.”

The most common complaint about the Ohio law is that it is both unnecessary and unenforceable. Most political language made for mass audiences falls somewhere between totally true and totally false — impossible for any government body to make a fair ruling on, some argue.

“Who goes out and says, ‘I’m going to produce some lying political communication?’” said Fred Davis, a prominent GOP ad maker who brought 2010 Senate candidate Christine O’Donnell’s “I’m not a witch ad” to living rooms across Delaware, [among other notable advertisements](#). “There are gray areas in politics.”

Moreover, in an age of instantaneous fact checkers and Google, campaign practitioners said, it is increasingly difficult for anyone to get away with political lies without being taken to task by voters and reporters as well as professional fact checkers.

“There is less and less latitude for B.S. in ads these days, and there’s more and more ‘How do you deliver a message that will move the numbers when you don’t want to be in the weeds of Politifact crapping all over you for three days?’” Wilson said, referring to the fact-checking website that issues rulings on various political statements. “When I do a television ad, I like to be

as truthful as possible. I want voters to understand what we're talking about, but I do not want to have to go and build something that will satisfy a group of finger pointers."

Philip de Vellis, a Democratic strategist who produced ads for Barack Obama's 2008 and 2012 campaigns and the Democratic National committee, said that although the constant mudslinging takes a toll on voter turnout and enthusiasm, attempts to mislead voters rarely work.

"Voters have been skeptical for a long time, and they're becoming more skeptical," he said. "[Lying] usually doesn't work, and it's not good political communications. I have very rarely seen people be fooled by an ad."

Among the dozens of briefs filed in support of the SBA in the case, perhaps the most amusing [came from the libertarian think tank](#) the Cato Institute. In it, the authors, including political satirist P.J. O'Rourke, argue that America's tradition of bare-knuckle political brawls — with its rich history of spectacular fibbing — dates to America's founding.

"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," the brief reads. "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.'"

The last line is a widely circulated reference to how opponents of the former president labeled him in the 1800 presidential election.

The brief cited other famous false political pronouncements — by Richard Nixon ("I am not a crook"), Bill Clinton ("I did not have sexual relations with that woman"), Obama ("If you like your plan, you can keep it") — as evidence that citizens usually ferret out lies one way or another.

"The issue isn't about truth is better than falsehood. It's about whether the government gets to make decisions about what's not truthful enough and stamp out things that they deem over the line," said Ilya Shapiro, one of the brief's co-authors and a senior fellow of constitutional studies at Cato. "We have slander and libel laws. Speech that falls short of those standards should be left to be dismantled in the public square."

About 12 other states have laws similar to Ohio's, although the degree to which they are enforced varies. Even in Ohio, where the election commission receives 20 to 90 complaints every year, according to staff attorney Phillip C. Richter, only five incidents in 17 years have been referred to the county prosecutor.

And that's kind of the point, said Brooks Jackson, director emeritus of FactCheck.org, another website dedicated to stamping out untruths in political discourse.

"Politicians have been doing it — making stuff up and spinning and fabricating since the Greeks invented democracy," he said. "I am skeptical that any law is going to cure that."

