



Cincinnati political brawl lands before SCOTUS

By Deirdre Shesgreen

March 17, 2014

WASHINGTON – What could bring together the American Civil Liberties Union, the Cincinnati anti-tax group COAST and one-time National Lampoon editor P.J. O'Rourke?

How about a four-year-old Cincinnati political brawl turned Supreme Court case that touches on everything from abortion to Obamacare to the First Amendment?

At its heart, the case is a constitutional challenge to an Ohio law that bars lying about candidates during an election.

In arguments set for next month, the Supreme Court will consider a narrower question, but the legal tussle has already generated some surprising twists and turns.

This billboard, which spurred the case the Supreme Court will hear, was never put up during Driehaus' 2010 re-election bid.(Photo: Provided)

So how many Pinocchios does the Ohio law allow?

For starters, the Ohio Attorney General's office is weighing in on both sides of the case – filing one brief that favors the plaintiffs and another that supports the defendants. The Obama administration has also entered the fray, and probably not the way one might expect.

Then there's O'Rourke's hilarious-yet-serious legal filing to the high court, a 24-page defense of the political lie – filed by a top lawyer at the libertarian Cato Institute – that uses razor-sharp wit to go to bat for the First Amendment.

"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 Cato Institute's Ilya Shapiro writes in the filing his organization submitted with O'Rourke to the high court.

The Cato-O'Rourke brief pokes fun at the notion that government entities like the Ohio Elections Commission could figure out where to draw the line in today's mudslinging political arena.

"Two Pinocchios out of five is OK, but three is illegal?" Shapiro asks in his brief, referring to the system used by the Washington Post's fact checker that doles out up to four Pinocchios for political assertions that it determines are "whoppers."

Case's origins lie with a nonexistent billboard

With legal arguments like that, it's perhaps no wonder the case is generating legal and political buzz from Washington to Cincinnati.

The case started during the 2010 1st District U.S. House race between then-Democratic Rep. Steven Driehaus and his GOP challenger, Steve Chabot of Westwood. An anti-abortion group called the Susan B. Anthony List wanted to launch a billboard campaign accusing Driehaus of supporting taxpayer-funded abortions by voting in favor of the federal health-reform law.

Driehaus sought a ruling from the Ohio Elections Commission to block the ads, saying they violated a provision in Ohio election law that bars knowingly or recklessly making false statements about a candidate. The billboards never went up after Driehaus' lawyer threatened legal action.

After the Ohio Elections Commission concluded Driehaus had probable cause to proceed with his complaint, SBA List challenged the Ohio law in federal district court, arguing it violated the group's free-speech rights. Cincinnati-based COAST (Coalition Opposed to Additional Spending and Taxes) filed a separate suit on the same grounds, saying it also wanted to criticize Driehaus for his vote in favor of Obamacare but that its speech was "chilled" by the law.

The district court dismissed the suits, ruling that COAST and SBA List didn't have legal standing to sue because they didn't face a real threat of prosecution under the law. The U.S. Court of Appeals for the Sixth Circuit affirmed that decision.

The Supreme Court agreed to hear the case in January and scheduled oral arguments for April 22. The justices will not decide whether Ohio's law is constitutional but instead will examine whether SBA List and COAST have standing – the right to sue if they've been injured by the law.

Experts say that question, while seemingly technical, is important. And the underlying issues, touching on politics and free speech, are even more vital. At least 15 states have similar laws barring false statements made during political campaigns, according to both the SBA List and the Ohio Elections Commission.

"In a broad sense, what's at stake is access to court," said Daniel Tokaji, a law professor at Ohio State University who specializes in election law and voting rights. "And access to court is especially important in cases involving elections and politics."

Obama administration sides with SBA List, COAST

The high stakes help explain why so many groups are scrambling to influence the Supreme Court's decision. More than 20 groups have filed briefs in the case so far, and some of the legal arguments defy predictable political patterns.

Who would think, for example, that the Obama administration would side with the SBA List over that group's right to assert that the Affordable Care Act allows taxpayer-funded abortions – a claim the president worked hard to counter when he signed the law? But the U.S. Solicitor General's office, part of the Department of Justice, filed a brief arguing that SBA List and COAST should get their day in court.

"Petitioners have adequately established a credible threat of prosecution under Ohio's false-electoral-speech laws," the government's brief says.

As for Ohio's Attorney General Mike DeWine, his office is required by law to defend the Ohio Elections Commission, which along with Driehaus is named as a defendant in the case. In that capacity, DeWine's office filed a brief last fall urging the Supreme Court to let the lower court's dismissal stand, noting that SBA List was able to broadcast its anti-Driehaus message in radio ads and other forums without ever being charged with violating the law.

Earlier this month, however, DeWine filed a second brief arguing that the Ohio law is overly broad, open to abuse, and probably unconstitutional. In an interview, DeWine said it's unusual but not unprecedented for an attorney general to fight against a law he is supposed to defend. He said he felt compelled to highlight problems with the law for the nine justices.

Under the statute, DeWine said, private citizens could be forced to defend themselves before the elections commission if they make a comment that another person claims is false on social media or in another forum about a candidate or even a ballot referendum.

In addition, DeWine said, the law is vulnerable to abuse by candidates who don't like criticism they're fielding during an election. All they have to do, he said, is file a complaint with the elections commission to ensnare foes in a potentially frivolous legal battle.

Driehaus: Voters deserve what's 'truthful and fair'

Driehaus, now director of the U.S. Peace Corps in Swaziland, said the Ohio law is needed to protect voters from being inundated with millions of dollars in false campaign ads by out-of-town interest groups.

"The voters deserve the opportunity to get information that's truthful and fair," Driehaus said in a phone interview.

DeWine's deputy, State Solicitor Eric Murphy, will be defending the Ohio Elections Commission before the Supreme Court. He'll be charged with persuading the court that SBA List and COAST shouldn't be allowed to go forward with their First Amendment challenge to the law.

In the November brief urging the Supreme Court not to hear the case, DeWine's office portrays the elections commission as a relatively powerless entity that does not pose a threat to free speech.

"The commission cannot initiate investigations on the front end, nor can it prosecute or impose penalties on the back end," the brief states.

Despite the flurry of legal filings that touch on the First Amendment, it's not clear the justices will delve into that question. But all sides are hoping that the justices talk about the free speech questions, anyway.

Driehaus said Ohio's law is more important than ever because of the increasingly powerful role that well-funded outside groups play in contested races.

The Cato Institute's Shapiro said the free market of ideas, not a government entity, should be trusted to decide what's true and what's false.

As he wrote in his brief: "A crushing send-up on 'The Daily Show' or 'The Colbert Report' will do more to clean up political rhetoric than the Ohio Elections Commission ever could." ?

Highlights from court briefs

Excerpts from briefs filed in the U.S. Supreme Court case Susan B. Anthony List,

et al., v. Steve Driehaus, et al. The [case is Docket No. 13-193](#).

From U.S. Solicitor General's office

Petitioners have sufficiently alleged that a credible threat of prosecution will chill them from engaging in speech relating to elections for public office, the very type of speech to which the First Amendment "has its fullest and most urgent application."

As petitioners explain, . . . under Ohio law, candidates who are the subject of such speech can try to silence it by complaining to the Commission and thereby tying up the speaker in administrative litigation during the short window of time in which the electoral speech would be most effective.

From Cato Institute and P.J. O'Rourke

In modern times, "truthiness" – a "truth" asserted "from the gut" or because it "feels right," without regard to evidence or logic – is also a key part of political discourse. It is difficult to

imagine life without it, and our political discourse is weakened by Orwellian laws that try to prohibit it.

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 lesbian ATF agents who will steal all the guns and invite the UN 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 reenactment and that the only thing wrong with the death penalty is that it isn't administrated quickly enough to secular-humanist professors of Chicano studies.

From Ohio Attorney General Mike DeWine

The law at issue here does not merely apply to candidates who choose to run for office, or to political committees who form to advocate an issue. It can reach any "person" who speaks her mind, and recent history suggests that the law polices not just "false" speech, but speech that indisputably is protected under the First Amendment. The Attorney General has concluded that his solemn duty in these circumstances requires him to speak out through the filing of this amicus brief.

The other side

Amicus briefs supporting the state law and Driehaus have not been filed. They're due to the court in a few weeks.

About the elections commission

The Ohio Elections Commission was created in 1974 to enforce the state's campaign-finance and fair-campaign laws. As part of a 1995 campaign finance-reform package, the commission was revamped to become an independent government agency with seven members.

The governor appoints six of the commission's members, based on recommendations by the Democratic and Republican caucuses of the General Assembly. Those six members appoint the seventh, who is barred from being affiliated with either major political party.

The commission can begin a proceeding only after a complaint is filed with the agency, whether from an individual, an election board, or the Secretary of State. If the commission finds a violation of Ohio's false statement law after an investigation and hearing, it can refer the matter to the appropriate county prosecutor. That prosecutor then determines whether to file charges. The commission can also find there is "good cause" not to refer a violation to a local prosecutor. The commission can impose fines in campaign finance, disclaimer, and corporate activities matters.

Source: Ohio Elections Commission