Should people making false statements during political campaigns face jail time?

By Scott Bomboy
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In one of the more unusual cases coming to the Supreme Court next month, the Justices will hear a case about an Ohio law designed to keep people from making false statements during political campaigns, under the threat of fines and jail time.

The case of *Susan B. Anthony List v. Steven Driehaus* is about the controversial Ohio statute, the ability of groups affected by it to challenge the law, and related First Amendment free speech issues.

For now, the Court probably won't rule on the constitutionality of the law, just the standing of two groups who want to continue the legal challenges needed to contest it as a First Amendment violation.

The law is called Ohio Revised Code Section 3517.21 and it explicitly defines what is called "impermissible campaign speech." That speech is defined as making false statements claiming a candidate has been indicted or convicted of crimes; making false statements that a candidate has a mental disorder; and making false statements concerning the voting record of a candidate or public official.

In fact, there are at least 10 different ways a person can make a false statement, according to the law. In Ohio, a violation is a misdemeanor with a penalty of up to six months in jail and a $5,000 fine.

In 2010, during U.S. House race between then-Democratic Representative Steven Driehaus and a Republican opponent, the Susan B. Anthony List, an anti-abortion group, tried to start a billboard campaign accusing Driehaus of supporting taxpayer-funded abortions by voting for the Affordable Care Act.

Driehaus asked the Ohio Elections Commission to block the ads, saying his vote didn't directly fund abortions and the SBA List violated the Ohio law. The billboards never went up after Driehaus' lawyer threatened legal action. The commission agreed with Driehaus.

But the SBA List didn't agree with the claim that Driehaus' pro-Obamacare vote wasn't linked to the funding and it added that the Ohio ruling violated its First Amendment free speech rights. A second group joined the SBA List in contesting the case, saying it was fearful of criticizing Driehaus for his Obamacare support.

A federal district court dismissed the case, ruling the two groups didn't have standing to sue because they didn't face a real prosecution threat under the Ohio law. The U.S. Court of Appeals for the Sixth Circuit agreed with the lower court.

But the Supreme Court agreed to take the case at a private conference in January, with at least four of the nine Justices expressing a desire to make a ruling.

While the Court's ruling will probably be focused on the two groups' ability to sue (at least for now), the case has gotten a lot of attention because of its First Amendment implications. At least 15 states have similar laws on the books.

Almost two dozen groups have filed friend of the court briefs in the case, including an unusual, and funny, brief co-written by the Cato Institute's Ilya Shapiro and humorist P.J. O'Rourke.

And in an equally unusual twist, Ohio attorney general Mike DeWine filed briefs that supported his own state and opposed it at the same time. DeWine cited a tactic used years ago by Robert Bork in the *Buckley v. Valeo* case, where Solicitor General Bork outlined legal problems without reaching a conclusion.

DeWine says in one petition that while Ohio's law withstood previous constitutional challenges prior to 2012, he believed the law should be reconsidered after the Court's *Alvarez* decision, which struck down the Stolen Valor Act. He also believes a strict interpretation of the law would "chill" the speech used in political campaigns by bloggers and people who comment on Facebook and Twitter.

In the state's official petition to the Court, DeWine and others argue that the SBA List doesn't have standing to pursue the case.

Still other briefs argued that the Court needs to address First Amendment issues before it tackles the rights of the two groups to sue.

"This case ostensibly concerns the standing and ripeness requirements for pre-enforcement First Amendment judicial review. Those requirements, however, cannot be addressed fully without first correctly identifying Petitioners' substantive First Amendment claim," says Citizens United in its brief.

The case will probably get more attention, and more briefs, as it heads towards a public date with the Justices on April 22, the same day the Court hears another high-profile case, the Aereo lawsuit involving the four major TV networks.

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