

Supreme Court case today channels Colbert among others

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Today, the Supreme Court will consider a case about politics and free speech that also channels opinions from humorists P.J. O'Rourke and Stephen Colbert, and comments from a gaggle of lawyers.

There isn't anything usual about the case of *Susan B. Anthony List v. Steven Driehaus*, which is about the ability of two groups to challenge a controversial Ohio statute that punishes people for making false statements during political campaigns.

Constitution Daily contributor Lyle Denniston [has a detailed analysis of the case's finer points](#) on SCOTUSblog, where he points out the two questions asked by the petitioners *aren't* about the constitutionality of that Ohio law.

"One of the main tasks facing the Justices as they take up this case will be to discipline themselves to keep their attention focused on the questions they have actually agreed to decide: that is, how and when may a court case go forward against a law that aims at limiting expression protected by the First Amendment," he says.

That distraction could be formidable, given that the Susan B. Anthony List and the Coalition Opposed to Additional Spending and Taxes, the two groups suing the state of Ohio, made light of the law in the first sentence of their court petition's case statement.

"Believe it or not, it is a criminal offense in Ohio to make a knowingly or recklessly 'false' statement about a political candidate or ballot initiative," said Michael A. Carvin, the attorney arguing the case in front of the Supreme Court on Tuesday.

But it was a [humor- and satire-laden brief filed by the Cato Institute](#)'s Ilya Shapiro and humorist (and former *National Lampoon* editor) P.J. O'Rourke that made waves in legal circles.

"Can a state government criminalize political statements that are less than 100% truthful?" they asked in their 24-page brief. And as an original source on the idea of "truthiness," they cited the early comedic work of TV personality Stephen Colbert.

“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,” the brief says, crediting Colbert as the father of “truthiness” in a footnote.

And while there is some debate about Colbert as the first person to use the word, a sketch about “truthiness” was part of the successful pilot episode of the Colbert Report back in October 2005.

The Cato brief then applied the doctrine of “truthiness” through American political history, from campaigns involving Thomas Jefferson and John Quincy Adams up to recent presidential elections.

The clerks for the Supreme Court Justices read all these briefs, so the odds are good that there has been and will be some “truthiness” talk behind closed doors at the Court.

The remaining briefs in the case are an unusual collection of opinions, because all the documents come from people who rarely agree about anything. The American Civil Liberties Union, Citizens United, the General Conference of the Seventh-Day Adventists, the Republican National Committee and the Obama administration are all on the same page, for the most part, about opposing the Ohio law.

However, the Justice Department wants the Supreme Court to decide just the issue of the Ohio law’s legality, and not the issues about how and when a court case can proceed involving the First Amendment. It wants the Court to allow the case to start anew, under the Constitution’s Article III provisions that limit the conditions of how such cases wind up in federal courts.

Still other briefs argue 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.

And in an unusual twist, Ohio attorney general Mike DeWine filed briefs that supported his own case 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 said in one petition that while Ohio’s law withstood previous constitutional challenges prior to 2012, he believed the false-statement 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.

But 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.