

# Le-gal In-sur-rec-tion

www.legalinsurrection.com

\lĕ-g \l \ in(t)-s - rek-sh n\ : "a rising up against established authority; rebellion; revolt" "in conformity with or permitted by law"

## SBA List v. Driehaus: The Perils of Regulating Political Speech

**More speech, not less.**

By Jack Park  
June 17, 2014

On its face, Monday's unanimous decision by the U.S. Supreme Court in *SBA List v. Driehaus* is about when a claim of future injury is sufficiently well-grounded to allow someone to file a lawsuit to stop it. But, the decision is really about the regulation of political speech.

In their incisive and hilarious friend of the court brief, the Cato Institute and P. J. O'Rourke noted, "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." Ohio (and others, including some in Congress) thinks that's a problem.

In the 2010 congressional cycle, the Susan B. Anthony List (SBA List) wanted to put up a billboard stating, "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion." That billboard didn't go up because its target, then-U.S. Representative Steve Driehaus threatened legal action. Driehaus also filed a complaint with the Ohio Elections Commission asserting that SBA List's billboard violated Ohio law because it was "false."

The Commission found probable cause to think Driehaus was right and scheduled a hearing. That probable cause determination turned Driehaus loose to pursue discovery, which he did intrusively, noticing depositions of SBA List employees and others and asking for not just evidence supporting SBA List's interpretation of the Affordable Care act but also for its "communications with allied organizations, political party committees, and Members of Congress and their staffs."

SBA List filed suit to challenge the constitutionality of Ohio's false statement laws. The election intervened, however, and Driehaus dismissed his complaint after he was defeated. The district court then dismissed SBA List's lawsuit because it was no longer ripe, and the Sixth Circuit affirmed that ruling.

The Supreme Court unanimously reversed the Sixth Circuit, allowing SBA List and others to challenge the restrictions on their political speech.

What is the Ohio Elections Commission, and what's it doing regulating political speech? The simple answer is that Ohio law prohibits the making of "false statements" about a candidate's or public official's voting record. Ohio law also bans False statements that "concern[] a candidate either knowing the same to be false or with reckless disregard of whether it is false or not." And, Ohio law empowers the Ohio Elections Commission to investigate and refer complaints by "any person" that someone has made a prohibited false statement "during the course of any campaign for nomination or public office or office of a political party" for prosecution.

All in all, this is nothing less than a recipe for mischief. It gives politicians and their supporters a club to use against their opponents. As Ohio's Attorney General noted, in one of the two briefs filed for his office in this case, the Commission has "no system for weeding out frivolous complaints." Ohio's Attorney General also pointed out, "[T]he practical effect" is "to permit a private complainant ... to gain a campaign advantage without ever having to prove the falsity of a statement."

A larger problem is that the wrong remedy is at work. Ohio's false statement regime, and others like it, is founded on the belief that less political speech is best. Any such regime does not just capture false statements, it chills speech. In this case, SBA List's billboard didn't go up because Driehaus threatened the billboard company with a lawsuit. Similarly, a group known as COAST decided not to distribute a mass e-mail and other materials critical of Driehaus' vote for the Affordable Care Act because it "fund[s] abortions with tax dollars" after the Elections Commission started the proceedings against SBA List.

The better solution is more speech, not less. Only two years ago, in the "stolen valor" case of *United States v. Alvarez*, the Court wrote, "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth." The market has its own correction mechanisms which will always be more efficient than a regulator.

One final point is the substantial irrelevance of falsity in this context. Even if couched as a factual assertion, the contention that a vote for Obamacare is a vote for taxpayer-funded abortion is fundamentally an expression of opinion, which cannot be said to be true or false. As the Cato Institute and P. J. O'Rourke put it, the linkage between the law and taxpayer-funded abortion "is a question of legal, economic, and even theological interpretation." At its core, that question involves beliefs which "are as politically important as their factually pure counterparts" because "voters' beliefs [are] more important and relevant than the technical truths about the underlying legislation."

The Court's unanimous decision allowing SBA List to go forward with its challenge is not much of a surprise. The real question is whether the lower courts will get the First Amendment issue right when they consider it.