



## Can politicians lie? Court will decide

By Amber Hunt  
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For better or worse, political campaigns in Ohio could be vastly different come November if a federal judge decides that the state's ban on political lies is unconstitutional.

U.S. District Judge Timothy Black is set to hear a challenge Thursday to the 19-year-old law that bans political falsehoods. The case comes back to Black after the U.S. Supreme Court in June ruled that an anti-abortion organization and a Cincinnati anti-tax group could challenge the law's constitutionality.

Here's the case history: In 2010, the national anti-abortion group the Susan B. Anthony List planned to buy a billboard accusing then-U.S. Rep. Steve Driehaus of supporting taxpayer-funded abortions. Their logic? He voted in favor of the Patient Protection and Affordable Healthcare Act.

Driehaus said the allegation was a lie – he, in fact, ran as an anti-abortion Democrat – and filed a complaint with the Ohio Elections Commission. With the threat of legal action looming, the billboard owner decided not to run the ad. Driehaus dropped his complaint after he lost his re-election bid, but not before the commission found "probable cause" in a preliminary review that the Susan B. Anthony List had violated the state law.

The organization used the case to challenge the constitutionality of the political lies ban, and the anti-tax group COAST joined in, saying that it, too, wanted to criticize Driehaus but didn't for fear of running afoul of the law.

At first, the district court dismissed the suit, ruling that the two organizations didn't have the right to sue because no criminal charges were filed and the billboard never erected, but the case got punted all the way to the U.S. Supreme Court, which decided the groups could sue after all.

On Thursday, lawyers from both sides will present their cases to Black, whose decision could dramatically affect the future of political campaigns in Ohio. Black, in allowing Driehaus to sue the Susan B. Anthony List for defamation, already has said that the organization made untrue statements when it tied Driehaus' vote on health care reform to support for taxpayer-funded abortions. Now he will decide if lying is legally protected speech.

Chris Finney, a lawyer and co-founder of COAST, is optimistic that Black will strike down the ban and end what he calls the elections commission's "reign of intimidation."

"The reality is we live in Ohio under threat of criminal prosecution and administrative harassment by a 'ministry of truth' that really almost no other state has to the extent that we do," Finney said Wednesday. "The reality is that it's constitutionally offensive."



Black.(Photo: Provided)

While some 15 states outlaw campaign distortions, Ohio's is considered the broadest. It's so devious, in fact, that Attorney General Mike DeWine wrote a brief condemning it as a constitutional violation, even though lawyers from his office are to defend the law in the courtroom.

DeWine wrote that the law "fails to provide adequate safeguards (including prompt judicial review) against the chilling of political speech."

Supporters of the law disagree. State Solicitor Eric Murphy argued before the Supreme Court that those challenging the law weren't able to show it had stifled their speech in the past or would do so in the future. He also said the state has a "compelling interest" in policing false speech in campaigns because such statements have the power to sway voters at the polls.

Critics say it's dangerous to rely on the commission – a seven-member governmental panel – to determine what's true and what's false. They say that politicians should be able to sling whatever accusations they want and duke it out in ads and debates so that voters can decide what's true.

"It sounds wrong, saying you're defending the right to lie," Finney said. But with the law as it stands, he said "you have to empower somebody to say what's a lie and what's the truth. You're entrusting flawed human beings with making those close calls. At what point is lying just shading the truth?"

It appears the law has drawn more critics than supporters, based on court filings. Among them was an amicus brief written by political satirist P.J. O'Rourke on behalf of the Cato Institute, which argued for the importance in political campaigns of "truthiness" – a term coined by comedian Stephen Colbert to mean a truth you feel in your gut, logic and evidence be damned.

O'Rourke wrote that truthiness is 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."

Richard Hasen, a professor of law and political science at the University of California, Irvine, said that Ohio's law might be in danger even if Black upholds it. Various courts have ruled that lies are protected free speech, the most recent ruling having come Tuesday when an appellate court struck down a 101-year-old Minnesota law that made it a crime to make false political statements about a ballot question.

"If (Ohio's case) ends up back at the Supreme Court, the law could well be declared unconstitutional," Hasen said Wednesday.

Black isn't expected to rule Thursday, but rather issue a written ruling after he weighs the arguments.