AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era—Democratic Rights/Free Speech

**Susan B. Anthony List v. Driehaus, 814 F.3d 466** (6th Cir. 2016)

*The state of Ohio made it a criminal offense for persons to disseminate false information about a political candidate in campaign materials during campaign season “knowing the same to be false or with reckless disregard of whether it was false or not.” In 2010, United States Representative Steven Driehaus filed a complaint with the Ohio Elections Commission alleging that the Susan B. Anthony List, a pro-life advocacy group, had violated the false-statements law by issuing a press release accusing Driehaus of voting for “taxpayer-funded abortion” by virtue of his voting for the Affordable Care Act. The commission found probable cause that the advocacy group had violated the law.*

*The Susan B. Anthony List filed suit against Driehaus and various state officials in federal district court seeking an injunction against the enforcement of the law. Although the state declined to pursue the complaint to the point of a criminal prosecution, the U.S. Supreme Court allowed the case to proceed as a facial challenge to the law. The district court held that the law was unconstitutional. On appeal, a federal circuit court affirmed that ruling. Doing so required departing from the circuit’s own prior determination that the law was constitutionally valid in light of subsequent decisions by the U.S. Supreme Court.*

JUDGE COLE.

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*United States v. Alvarez* (2012) abrogates *Pestrak v. Ohio Election Commission*’s (6th Cir. 1991) holding that knowing false speech merits no constitutional protection. In *Pestrak,* we determined that, on their face, Ohio's political false-statements laws were constitutional because "false speech, even political speech, does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth." However, in *Alvarez* the Supreme Court unanimously rejected the "categorical rule . . . that false statements receive no First Amendment protection." In particular, *Alvarez* distinguished the cases on which *Pestrak* relied, noting that these cases did not depend on the falsity of the statements, but on the fact that they were defamatory, fraudulent, or caused some other "legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation." *New York Times v. Sullivan* (1964). . . This undermines *Pestrak*'s fundamental premise that false statements, without more, deserve no constitutional protection.

*Alvarez* further repudiates *Pestrak's* assumption that the government can selectively regulate false statements on certain topics. It posited that giving governments this power could lead to unwanted consequences and abuses. . . . Finally, *Alvarez* confirms that the First Amendment protects the "civic duty" to engage in public debate, with a preference for counteracting lies with more accurate information, rather than by restricting lies.

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On their face, Ohio's political false-statements laws target speech at the core of First Amendment protections — political speech. Contrary to the Commission's arguments, Ohio's laws reach not only defamatory and fraudulent remarks, but *all* false speech regarding a political candidate, even that which may not be material, negative, defamatory, or libelous. Accordingly, strict scrutiny is appropriate.

The Supreme Court’s decision in *Reed v. Town of Gilbert* (2015) sought to clarify the level of review due to certain speech prohibitions. That test focused on whether a law was content-based at all, rather than the type of content the law targeted. The *Reed* Court held that strict scrutiny is the appropriate level of review when a law governs any "specific subject matter ... even if it does not discriminate among viewpoints within that subject matter." Content-based laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Ohio's political false-statements laws only govern speech about political candidates during an election. Thus, they are content-based restrictions focused on a specific subject matter and are subject to strict scrutiny.

Laws subject to strict scrutiny are presumptively unconstitutional and can only survive if they (1) serve a compelling state interest and (2) are narrowly tailored to achieve that interest. . . .

Here, Ohio's interests in preserving the integrity of its elections, protecting "voters from confusion and undue influence," and "ensuring that an individual's right to vote is not undermined by fraud in the election process" are compelling. . . . But Ohio's laws do not meet the second requirement: being narrowly tailored to protect the integrity of Ohio's elections. Thus, this is not such a "rare case" that survives strict scrutiny.

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First, the timing of Ohio's administrative process does not necessarily promote fair elections. While the laws provide an expedited timeline for complaints filed within a certain number of days before an election, complaints filed outside this timeframe are free to linger for six months. Even when a complaint is expedited, there is no guarantee the administrative or criminal proceedings will conclude before the election or within time for the candidate's campaign to recover from any false information that was disseminated. Indeed, candidates filing complaints against their political opponents count on the fact that "an ultimate decision on the merits will be deferred until after the relevant election." . . .

Second, Ohio fails to screen out frivolous complaints prior to a probable cause hearing. . . . Indeed, some complainants use the law's process "to gain a campaign advantage without ever having to prove the falsity of a statement . . . tim[ing] their submissions to achieve maximum disruption . . . forc[ing political opponents] to divert significant time and resources ... in the crucial days leading up to an election." . . .

Third, Ohio's laws apply to *all* false statements, including non-material statements. . . . Thus, influencing an election by lying about a political candidate's shoe size or vote on whether to continue a congressional debate is just as actionable as lying about a candidate's party affiliation or vote on an important policy issue, such as the Affordable Care Act. Further, the law prohibits false statements regarding a political candidate — even outside the political arena — so long as the statement is "designed to promote the election, nomination, or defeat of the candidate," and is made in broadly defined "campaign materials." Penalizing non-material statements, particularly those made outside the political arena, is not narrowly tailored to preserve fair elections.

Fourth, Ohio's laws apply to anyone who advertises, "post[s], publish[es], circulate[s], distribute[s], or otherwise disseminate[s]" false political speech. Such a broad prohibition "applies not only to the speaker of the false statement but also to commercial intermediates like the company that was supposed to erect SBA List's billboard in 2010." Conducting hearings against or prosecuting a billboard company executive, who was simply the messenger, is not narrowly tailored to preserve fair elections.

Fifth, the law is both over-inclusive and underinclusive. Causing damage to a campaign that ultimately may not be in violation of the law, through a preliminary probable cause ruling, does not preserve the integrity of the elections and in fact undermines the state's interest in promoting fair elections. At the same time, the law may not timely penalize those who violate it, nor does it provide for campaigns that are the victim of potentially damaging false statements. . . .

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*Affirmed*.