

Constitutionality of Proscriptions on False Statements About Candidates

Susan B. Anthony List v. Driehaus (1:10-cv-720)
and Coalition Opposed to Additional Spending & Taxes
v. Ohio Elections Commission (1:10-cv-754)
(Timothy S. Black and Susan J. Dlott, S.D. Ohio)

The Susan B. Anthony List, a public interest organization dedicated to opposition of abortion and support for the election of women to Congress who share that opposition, filed a federal action in the Southern District of Ohio on October 18, 2010, challenging the constitutionality of an Ohio statute proscribing false statements about candidates for office.¹ With its complaint, the List filed a motion for a temporary restraining order and a preliminary injunction.² The court originally assigned the case to Judge Susan J. Dlott,³ but she recused herself because an attorney in the case worked at her husband's law firm,⁴ so the case was transferred on the day it was filed to Judge Timothy S. Black.⁵

The controversy began with an intention by the List to publish a billboard in opposition to a candidate for re-election to Congress: "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion."⁶ The intended reference was a vote by Driehaus in favor of the 2010 Patient Protection and Affordable Care Act.⁷ On October 4, Driehaus filed a complaint against the List with the Ohio Election Commission, alleging that the proposed billboard violated Ohio's election false-statement statute.⁸ A commission panel found probable cause for the full commission to hear the complaint, and a hearing was set for October 28.⁹

The clerk's office has established procedures for efficiently identifying emergency election cases, and motions for immediate injunctive relief are effectively resolved pursuant to a local rule.¹⁰ On October 25, Judge Black denied the List a

1. [Complaint](#), *Susan B. Anthony List v. Driehaus*, No. 1:10-cv-720 (S.D. Ohio Oct. 18, 2010), D.E. 1; [Susan B. Anthony List v. Driehaus](#), 805 F. Supp. 2d 412, 415 (S.D. Ohio 2011); *see Anti-Abortion Group Seeks to Erect Billboards Critical of Driehaus*, Cincinnati Enquirer, Oct. 19, 2010.

2. [Motion](#), *Susan B. Anthony List*, No. 1:10-cv-720 (S.D. Ohio Oct. 18, 2010), D.E. 2.

3. For this report, Tim Reagan interviewed Judge Dlott and her law clerk Sarah Fairweather by telephone on July 30, 2012.

4. Interview with Hon. Timothy S. Black, Aug. 16, 2012; Interview with Hon. Susan J. Dlott and her law clerk Sarah Fairweather, July 30, 2012.

5. [Transfer Order](#), *id.* (Oct. 18, 2010), D.E. 6.

Tim Reagan interviewed Judge Black for this report by telephone on August 16, 2012.

6. [Complaint](#), *supra* note 1; *Susan B. Anthony List*, 805 F. Supp. 2d at 414.

7. [Complaint](#), *supra* note 1, at 3; *see Pub. L. No. 111-148*, 124 Stat. 119 (2010).

8. *Susan B. Anthony List*, 805 F. Supp. 2d at 414.

9. *Id.*; *see Elections Panel Sides with Rep. Steve Driehaus in Abortion Flap*, Cincinnati Enquirer, Oct. 15, 2010.

10. Interview with Hon. Timothy S. Black, Aug. 16, 2012; *see S.D. Ohio L.R. 65.1(a)*.

restraining order and stayed the federal action, pursuant to *Younger v. Harris*,¹¹ pending state executive and judicial proceedings.¹² On October 28, the court of appeals denied the List an injunction pending appeal.¹³ In December, the List voluntarily dismissed this appeal.¹⁴

The List and Driehaus agreed to postpone commission proceedings until after the election, which Driehaus lost.¹⁵ Thereafter, Driehaus withdrew his commission complaint.¹⁶ Judge Black lifted his stay on December 6.¹⁷

The List's action became consolidated with a similar action filed on October 27 by the Coalition Opposed to Additional Spending & Taxes (COAST) against the Ohio Election Commission, its members, and its staff attorney.¹⁸ This case also was originally assigned to Judge Dlott, who held a telephonic conference with the parties on October 28, at which she denied immediate injunctive relief.¹⁹ The case was consolidated with the List's case on November 19 and transferred to Judge Black as related to the earlier filed case.²⁰ COAST filed amended complaints in December.²¹

Judge Black resolved several motions in the two cases on August 1, 2011. He determined that the List's claims were moot because the commission action was dismissed and unripe because concerns about future actions were speculative.²²

11. 401 U.S. 37 (1971) (determining that the federal courts should not enjoin a criminal prosecution for violation of a statute that may violate the First Amendment absent a showing of bad faith, because the state courts can adjudicate the constitutional claim); *see id.* at 54 (“the possible unconstitutionality of a statute ‘on its face’ does not in itself justify an injunction against good-faith attempts to enforce it”).

12. Order, *Susan B. Anthony List v. Driehaus*, No. 1:10-cv-720 (S.D. Ohio Oct. 25, 2010), D.E. 14; *Susan B. Anthony List*, 805 F. Supp. 2d at 415; *see Court Stays Out of Driehaus Billboard Spat*, Cincinnati Enquirer, Oct. 26, 2010.

13. Order, *Susan B. Anthony List v. Driehaus*, No. 10-4320 (6th Cir. Oct. 28, 2010); *Susan B. Anthony List*, 805 F. Supp. 2d at 415.

14. Order, *Susan B. Anthony List*, No. 10-4320 (6th Cir. Dec. 20, 2010); *Susan B. Anthony List*, 805 F. Supp. 2d at 415.

15. *Susan B. Anthony List*, 805 F. Supp. 2d at 415; *see Chabot Back to Congress*, Nov. 3, 2010.

16. *Susan B. Anthony List*, 805 F. Supp. 2d at 415.

17. Order, *Susan B. Anthony List*, No. 1:10-cv-720 (S.D. Ohio Dec. 6, 2010), D.E. 20; *Susan B. Anthony List*, 805 F. Supp. 2d at 415.

18. *Motion for Temporary Restraining Order and Preliminary Injunction*, Coalition Opposed to Additional Spending & Taxes v. Ohio Elections Comm'n, No. 1:10-cv-754 (S.D. Ohio Oct. 27, 2010), D.E. 2; *Complaint*, *id.* (Oct. 27, 2010), D.E. 1.

19. *Docket Sheet*, *id.* (Oct. 27, 2010).

20. Order, *id.* (Nov. 19, 2010), D.E. 9; *Susan B. Anthony List*, 805 F. Supp. 2d at 416; Interview with Hon. Timothy S. Black, Aug. 16, 2012.

21. *Second Amended Complaint*, Coalition Opposed to Additional Spending & Taxes, No. 1:10-cv-754 (S.D. Ohio Dec. 22, 2010), D.E. 12; *First Amended Complaint*, *id.* (Dec. 2, 2010), D.E. 10.

22. Order, *Susan B. Anthony List*, No. 1:10-cv-720 (S.D. Ohio Aug. 1, 2011), D.E. 65, available at 2011 WL 3296174; *see Driehaus Wins Abortion Billboard Battles*, Aug. 2, 2011 [hereinafter *Driehaus Wins*].

COAST's strategies on abortion are similar to the List's, and COAST alleged that the administrative action against the List chilled its speech.²³ Judge Black also found COAST's claims too speculative for federal court jurisdiction.²⁴

Appeals by the List²⁵ and COAST²⁶ were heard on July 25, 2012.

Driehaus's answer to the List's complaint included a counterclaim for defamation, alleging that the List "defamed Mr. Driehaus by impugning his professional reputation as a pro-life Member of Congress and by falsely characterizing his performance and conduct in the office he held."²⁷ Judge Black denied the List summary judgment on the defamation counterclaim.²⁸ He certified an interlocutory appeal,²⁹ but the List filed its petition with the court of appeals too late.³⁰ A jury trial is pending.³¹

23. *Susan B. Anthony List*, 805 F. Supp. 2d at 415–17.

24. *Id.* at 417–23.

25. Docket Sheet, *Susan B. Anthony List v. Driehaus*, No. 11-3894 (6th Cir. Aug. 19, 2011).

26. Docket Sheet, *Coalition Opposed to Additional Spending & Taxes v. Driehaus*, No. 11-3925 (6th Cir. Aug. 26, 2011).

27. *Driehaus Answer and Counterclaim* at 16, *Susan B. Anthony List*, No. 1:10-cv-720 (S.D. Ohio Dec. 3, 2010), D.E. 18; *Susan B. Anthony List v. Driehaus*, 805 F. Supp. 2d 423, 426 (S.D. Ohio 2011); see *Driehaus Sues Anti-Abortion Group*, Cincinnati Enquirer, Dec. 4, 2010.

28. *Susan B. Anthony List*, 805 F. Supp. 2d 423; see *Driehaus Wins*, *supra* note 22.

29. *Order*, *Susan B. Anthony List*, No. 1:10-cv-720 (S.D. Ohio Dec. 3, 2010), D.E. 75, available at 2011 WL 5299378.

30. *Order*, *In re Susan B. Anthony List*, No. 11-3894 (6th Cir. Nov. 17, 2011); see *Order*, *Susan B. Anthony List*, No. 1:10-cv-720 (S.D. Ohio Apr. 2, 2012), D.E. 81 (denying a second request for an interlocutory appeal).

31. *Docket Sheet*, *Susan B. Anthony List*, No. 1:10-cv-720 (S.D. Ohio Oct. 18, 2010).