

## 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*)

Two actions filed in late October 2010 challenged the constitutionality of an Ohio statute proscribing false statements about candidates for office. The judge in the first case stayed the federal case pending state executive and judicial proceedings, pursuant to *Younger v. Harris*. The judge in the second case also denied immediate injunctive relief, and the two cases were consolidated for further proceedings after the election. Dismissals for lack of live controversies were reversed by the Supreme Court. The court of appeals affirmed a holding that the statute was unconstitutional and dismissal of a candidate's defamation counterclaim. The parties agreed to an attorney fee award of \$1.3 million.

*Subject:* Campaign activities. *Topics:* Campaign materials; matters for state courts; recusal;

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.<sup>1</sup> With its complaint, the List filed a motion for a temporary restraining order and a preliminary injunction.<sup>2</sup> The court originally assigned the case to Judge Susan J. Dlott,<sup>3</sup> but she recused herself because an attorney in the case worked at her husband's law firm,<sup>4</sup> so the case was transferred on the day that it was filed to Judge Timothy S. Black.<sup>5</sup>

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1. Complaint, *Susan B. Anthony List v. Driehaus*, No. 1:10-cv-720 (S.D. Ohio Oct. 18, 2010), D.E. 1 [hereinafter *Susan B. Anthony List* Complaint]; *Susan B. Anthony List v. Driehaus*, 573 U.S. \_\_\_, \_\_\_, 134 S. Ct. 2334, 2339 (2014) (p.4 of slip opinion filed at U.S. No. 13-193); *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 470 (6th Cir. 2016); *Susan B. Anthony List v. Driehaus*, 779 F.3d 628, 631 (6th Cir. 2015); *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.

Tim Reagan interviewed Judge Black for this report by telephone.

5. Transfer Order, *Susan B. Anthony List*, No. 1:10-cv-720 (S.D. Ohio Oct. 18, 2010), D.E. 6.

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.”<sup>6</sup> The intended reference was a vote by Driehaus in favor of the 2010 Patient Protection and Affordable Care Act.<sup>7</sup> 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.<sup>8</sup> A commission panel found probable cause for the full commission to hear the complaint, and a hearing was set for October 28.<sup>9</sup>

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.<sup>10</sup> On October 25, Judge Black denied the List a restraining order and stayed the federal action, pursuant to *Younger v. Harris*,<sup>11</sup> pending state executive and judicial proceedings.<sup>12</sup> On October 28, the court of appeals denied the List an injunction pending appeal.<sup>13</sup> In December, the List voluntarily dismissed this appeal.<sup>14</sup>

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6. *Susan B. Anthony List* Complaint, *supra* note 1; *Susan B. Anthony List*, 573 U.S. at \_\_\_, 134 S. Ct. at 2339 (p.3 of slip opinion filed at U.S. No. 13-193) (also noting, “The advertising company that owned the billboard space refused to display that message, however, after Driehaus’ counsel threatened legal action.”); *Susan B. Anthony List*, 805 F. Supp. 2d at 414.

7. *Susan B. Anthony List* Complaint, *supra* note 1, at 3; see Pub. L. No. 111-148, 124 Stat. 119 (2010); see also *Susan B. Anthony List* Complaint, *supra* note 1; *Susan B. Anthony List*, 573 U.S. at \_\_\_, 134 S. Ct. at 2339 (p.3 of slip opinion filed at U.S. No. 13-193).

8. *Susan B. Anthony List*, 573 U.S. at \_\_\_, 134 S. Ct. at 2339 (pp.3–4 of slip opinion filed at U.S. No. 13-193); *Susan B. Anthony List v. Driehaus*, 779 F.3d 628, 631 (6th Cir. 2015); *Susan B. Anthony List*, 805 F. Supp. 2d at 414.

9. *Susan B. Anthony List*, 573 U.S. at \_\_\_, 134 S. Ct. at 2339 (p.4 of slip opinion filed at U.S. No. 13-193); *Susan B. Anthony List*, 805 F. Supp. 2d at 414; 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).

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; *Susan B. Anthony List*, 573 U.S. at \_\_\_, 134 S. Ct. at 2339 (p.4 of slip opinion filed at U.S. No. 13-193); *Susan B. Anthony List*, 779 F.3d at 631; 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), D.E. 28; *Susan B. Anthony List*, 573 U.S. at \_\_\_, 134 S. Ct. at 2339 (p.4 of slip opinion filed at U.S. No. 13-193); *Susan B. Anthony List*, 805 F. Supp. 2d at 415.

14. Order, *Susan B. Anthony List*, No. 10-4320 (6th Cir. Dec. 20, 2010), D.E. 33; *Susan B. Anthony List*, 805 F. Supp. 2d at 415.

The List and Driehaus agreed to postpone commission proceedings until after the election, which Driehaus lost.<sup>15</sup> Thereafter, Driehaus withdrew his commission complaint.<sup>16</sup> Judge Black lifted his stay on December 6.<sup>17</sup>

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.<sup>18</sup> 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.<sup>19</sup> The case was consolidated with the List's case on November 19 and transferred to Judge Black as related to the earlier filed case.<sup>20</sup> COAST filed amended complaints in December.<sup>21</sup>

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.<sup>22</sup>

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

On May 13, 2013, the court of appeals agreed that actions by the List and COAST were not yet ripe.<sup>25</sup> Following a lively argument on April 22, 2014,<sup>26</sup>

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15. *Susan B. Anthony List*, 573 U.S. at \_\_\_\_, 134 S. Ct. at 2339–40 (p.4 of slip opinion filed at U.S. No. 13-193); *Susan B. Anthony List*, 779 F.3d at 631 & n.2; *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; *Susan B. Anthony List*, 573 U.S. at \_\_\_\_, 134 S. Ct. at 2340 (p.5 of slip opinion filed at U.S. No. 13-193); *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 470 (6th Cir. 2016).

19. Docket Sheet, *Coalition Opposed to Additional Spending & Taxes*, No. 1:10-cv-754 (S.D. Ohio 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, 2011 WL 3296174; *Susan B. Anthony List*, 573 U.S. at \_\_\_\_, 134 S. Ct. at 2340 (p.6 of slip opinion filed at U.S. No. 13-193); see *Driehaus Wins Abortion Billboard Battles*, Aug. 2, 2011 [hereinafter *Driehaus Wins*].

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

24. *Id.* at 417–23; *Susan B. Anthony List*, 573 U.S. at \_\_\_\_, 134 S. Ct. at 2339 (p.4 of slip opinion filed at U.S. No. 13-193).

25. *Susan B. Anthony List v. Driehaus*, 525 F. App'x 415 (6th Cir. 2013); *Susan B. Anthony List*, 573 U.S. at \_\_\_\_, 134 S. Ct. at 2340 (p.6 of slip opinion filed at U.S. No. 13-193).

the Supreme Court ruled unanimously on June 16 that the challenges to the statute were justiciable after all.<sup>27</sup> On September 11, Judge Black declared the false-statements statute unconstitutional: “Lies have no place in the political arena and serve no purpose other than to undermine the integrity of the democratic process. The problem is that, at times, there is no clear way to determine whether a political statement is a lie or the truth.”<sup>28</sup>

On February 24, 2016, the court of appeals agreed, “Ohio’s political false-statements laws are content-based restrictions targeting core political speech that are not narrowly tailored to serve the state’s admittedly compelling interest in conducting fair elections.”<sup>29</sup>

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.”<sup>30</sup> In 2011, Judge Black denied the List summary judgment on the defamation counterclaim.<sup>31</sup> In 2013, on reconsideration in light of intervening Supreme Court decisions and observing, “Sometimes even a person with excellent vision does not see the forest for the trees,” Judge Black dismissed the counterclaim as inconsistent with the First Amendment: “as a matter of law, associating a

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26. Docket Sheet, *Susan B. Anthony List v. Driehaus*, No. 13-193 (U.S. Aug. 13, 2013); see *Susan B. Anthony List v. Driehaus*, 571 U.S. 1118 (2014) (granting certiorari); see also Robert Barnes, *Justices Suspicious of Law Criminalizing False Speech About Candidates*, Wash. Post, Apr. 23, 2014, at A6.

Tim Reagan attended the argument.

27. *Susan B. Anthony List*, 573 U.S. \_\_\_, 134 S. Ct. 2334 (slip opinion filed at U.S. No. 13-193); see Adam Liptak, *Justices Permit Challenge to an Ohio Law Banning Lies During Campaigns*, N.Y. Times, June 17, 2014, at A14.

28. *Susan B. Anthony List v. Driehaus*, 45 F. Supp. 3d 765, 769 (S.D. Ohio 2014); see Sabrina Eaton, *Ohio Law on Political Lies Illegal, Judge Rules*, Cleveland Plain Dealer, Sept. 12, 2014, at A1; Kurtis Lee, *Judge Kills Ohio Ban on False Political Speech*, L.A. Times, Sept. 14, 2014, at 8; Dan Sewell & Lisa Cornwell, *Ohio’s Curbs on Campaign Speech Voided*, Bos. Globe, Sept. 12, 2014, at A11; Chrissie Thompson, *Law Can’t Stop Political Lies, Judge Rules*, Cincinnati Enquirer, Sept. 12, 2014, at A8.

Based on a long life in the law in and in a free society, I recognize the fundamental truth in a democracy, that the response to false speech in politics is counterspeech that is truthful such that there is a robust discussion of the issues in what is the truth or not the truth if, in politics, the truth can even be determined.

Transcript at 69, *Susan B. Anthony List v. Driehaus*, No. 1:10-cv-720 (S.D. Ohio filed Sept. 4, 2014, Dec. 19, 2014), D.E. 144 (closing remarks by Judge Black).

29. *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 476 (6th Cir. 2016).

30. 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.

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

political candidate with a mainstream political position, even if false, cannot constitute defamation.”<sup>32</sup>

The court of appeals affirmed Judge Black’s defamation judgment, but rejected his reasoning, on March 6, 2015.<sup>33</sup> “The district court’s broad First Amendment proclamation is a misstatement of First Amendment defamation law and the grant of summary judgment based on that misstatement is clearly incorrect.”<sup>34</sup> Instead, the candidate loses because the advocacy group’s statements were not completely devoid of truth and they were not said with actual malice.<sup>35</sup>

On July 5, Judge Black entered a stipulated attorney fee award of \$1.3 million.<sup>36</sup>

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32. Opinion at 1, 6, *Susan B. Anthony List*, No. 1:10-cv-720 (S.D. Ohio Jan. 25, 2013), D.E. 108, 2013 WL 308748; see *Judge Dismisses Driehaus Defamation Suit*, Cincinnati Enquirer, Jan. 30, 2013, at B1.

33. *Susan B. Anthony List v. Driehaus*, 779 F.3d 628 (6th Cir. 2015).

34. *Id.* at 632.

35. *Id.* at 632–34.

36. Stipulated Judgment, *Susan B. Anthony List*, No. 1:10-cv-720 (S.D. Ohio July 5, 2016), D.E. 150 (awarding \$975,000 to Susan B. Anthony List and \$325,000 to COAST).