

Another Ohio court strikes down false campaign speech regulation

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For the second time in as many weeks, the courts have gutted Ohio laws banning false statements in campaigns, deeming them unconstitutional. On September 24, the Ohio Supreme Court issued a ruling finding that a portion of the Rules of Judicial Conduct are unconstitutional and thus unenforceable. [In re Judicial Campaign Complaint Against O'Toole, Slip Opinion No. 2014-Ohio-4046](#). Rule 4.3(A) prohibits a judicial candidate from “knowingly or with reckless disregard” doing any of the following:

Post, publish, broadcast, transmit, circulate, or distribute information concerning the judicial candidate or an opponent, either knowing the information to be false or with a reckless disregard of whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person.

The Court found that the rule restricted two different kinds of speech: 1) speech conveying false information; and 2) speech conveying true information that nonetheless would deceive or mislead a reasonable person.

Similar to the federal district court ruling in *Susan B. Anthony List*, the Ohio Supreme Court applied strict scrutiny to the rule. While the state had a compelling interest, the Court concluded that the restriction in Rule 4.3 “is not narrowly tailored to meet its purpose, because it overreaches to speech that is true but that would be deceiving or misleading to a reasonable person.” *O'Toole*, at ¶ 21. Because the rule regulated true but misleading speech, the Court found that it was not narrowly tailored and struck it as unconstitutional.

However, the Ohio Supreme Court upheld the portion of Rule 4.3 that prohibits making false statements. “The portion of Jud.Cond.R. 4.3(A) that limits a judicial candidate’s false speech made during a specific time period (the campaign), conveyed by specific means (ads, sample ballots, etc.), disseminated with a specific mental state (knowingly or with reckless disregard) and with a specific mental state as to the information’s accuracy (with knowledge of its falsity or with reckless disregard as to its truth or falsity) is constitutional.” *O'Toole*, at ¶41.

Relying on a series of decisions related specifically to speech in judicial elections, the *O'Toole* decision departs from the decision just announced in *Susan B. Anthony List* in one significant regard. The federal court struck down the Ohio law prohibition against false statements found in R.C. 3517.21 (“a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not”) in its entirety. Focusing on the legislatively created process to enforce R.C. 3517.21, the federal court concluded that the burden of defending against a complaint was also imposed on truthful speakers, thus was not narrowly tailored and had a chilling effect on campaign speech.

In contrast, the Ohio Supreme Court upheld the prohibition against making false campaign statements in judicial races found in

Rule 4.3 (“either knowing the information to be false or with a reckless disregard of whether or not it was false”), and only severed the ban on true but misleading speech. Noting the additional compelling state interests of promoting and maintaining an independent judiciary and ensuring public confidence in the independence, impartiality, integrity and competence of judges, the Ohio Supreme Court declined to extend its ruling to include campaign speech that was knowingly false.

Authors
