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Obamacare Ad Lands at the Supreme Court

A billboard opposing the health care law touched off a potentially major First Amendment case.

By Sam Baker

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The Supreme Court is set to hear arguments Tuesday over the First Amendment and false campaign attacks—and it all started with an anti-Obamacare billboard.

The billboard never went up, and the candidate it would have attacked lost anyway. But the election-year spat has mushroomed into an argument about freedom of speech that could have serious long-term implications.

A ruling is expected in June, just in time for midterm elections that have already seen a flood of anti-Obamacare ads—including several that may not be entirely accurate.

The justices will hear oral arguments Tuesday morning in a case that pits former Rep. Steve Driehaus, a Democrat from Ohio, against the Susan B. Anthony List, a prominent advocacy group that opposes abortion rights.

It all started in 2010, after Driehaus voted for the Affordable Care Act. Shortly before the 2010 elections, SBA List set out to buy a billboard in Driehaus's district that said, "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion."

Driehaus—who campaigned as a "pro-life" candidate—took exception, convinced the billboard company not to accept SBA List's ad, and filed a complaint with Ohio's election commission,

saying the billboard violated a ban on false statements in political advertising. State law prohibits campaign materials that "make a false statement concerning the voting record of a candidate or public official."

Now the issue is much bigger than one billboard. It's become a fight about whether Ohio—and the 15 states that have similar laws—even have the right to regulate campaign ads in the first place, or to pass judgment on what is or isn't a "false" attack.

Technically, the questions before the justices on Tuesday are narrower issues of legal standing. But the case could easily be pulled toward broader First Amendment issues, and a slew of outside briefs are aiming to push the Court in that direction.

Citizens United—the biggest winner yet in the Roberts Court's rulings about political speech—filed a brief arguing that the Court simply had to strike down Ohio's election law as a violation of the First Amendment.

"Ohio has no jurisdiction to police the marketplace of ideas," Citizens United wrote.

Lower courts dismissed SBA List's challenges on procedural grounds.

Because Driehaus convinced the billboard owner not to run SBA List's ad, the Ohio election commission never ruled on its truthfulness. So in challenging Ohio's law, SBA List had to argue that it was chilling future speech—that the organization would like to run another ad in the future, and the Ohio law might be enforced against that ad.

A federal appeals court said that kind of hypothetical simply wasn't good enough.

"Allowing such a case to proceed would require us to guess about the content and veracity of SBA List's as-yet unarticulated statement, the chance an as-yet unidentified candidate against whom it is directed will file a Commission complaint, and the odds that the Commission will conclude the statement violates Ohio law," the 6th Circuit Court of Appeals said in a decision dismissing SBA List's claims.

Driehaus's brief before the Supreme Court hews to largely the same arguments, arguing that SBA List's challenge isn't "ripe" because the organization can't show that it has been injured by the Ohio election law.

SBA List also said in court that its future ads would be true, which would theoretically mean that the false-statements law wouldn't interfere with them.

But that's the catch: SBA List believes its billboard against Driehaus was truthful. So while the Supreme Court is only asking for arguments about ripeness and standing to sue, some briefs say it's all but impossible to decide those questions without also asking whether state election commissions should have the power to block certain political speech.

"Two Pinocchios out of five is OK, but three is illegal?" the libertarian Cato Institute wrote in a brief filed with conservative humorist P.J. O'Rourke.

Cato's somewhat unusual brief is full of patently false statements ("President Obama was born in Kenya") and invokes "truthiness"—Stephen Colbert's term for statements that feel true, even if they're not—to explicitly defend the role of misinformation and exaggeration in campaigns.

"When a red-meat Republican hears 'Obama is a socialist,' or a bleeding-heart Democrat hears, 'Romney wants to throw old women out in the street,' he is feeling a truth much more than thinking one," the brief says. "No government agency can change this fact, and any attempt to do so will stifle important political speech."