No. 13-___

IN THE

Supreme Court of the United States

SUSAN B. ANTHONY LIST and COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,

Petitioners,

v.

STEVEN DRIEHAUS, JOHN MROCZKOWSKI, BRYAN FELMET, JAYME SMOOT, HARVEY SHAPIRO, DEGEE WILHELM, LARRY WOLPERT, PHILIP RICHTER, CHARLES CALVERT, OHIO ELECTIONS COMMISSION, and JON HUSTED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. To challenge a speech-suppressive law, must a party whose speech is arguably proscribed prove that authorities would *certainly* and *successfully* prosecute him, as the Sixth Circuit holds, or should the court presume that a credible threat of prosecution exists absent desuetude or a firm commitment by prosecutors not to enforce the law, as seven other Circuits hold?

II. Did the Sixth Circuit err by holding, in direct conflict with the Eighth Circuit, that state laws proscribing "false" political speech are not subject to pre-enforcement First Amendment review so long as the speaker maintains that its speech is true, even if others who enforce the law manifestly disagree?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs-Appellants below, are Susan B. Anthony List ("SBA") and the Coalition Opposed to Additional Spending and Taxes ("COAST"). No corporation owns 10% or more of the stock of either SBA or COAST.

Respondents, who were Defendants-Appellees below, are the Ohio Elections Commission, its Commissioners (John Mroczkowski, Bryan Felmet, Jayme Smoot, Harvey Shapiro, Degee Wilhelm, Larry Wolpert, and Charles Calvert) in their official capacities, its staff attorney (Philip Richter) in his official capacity, the Ohio Secretary of State (Jon Husted) in his official capacity, and Steven Driehaus.

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The Court of Appeals' opinion (Pet.App.1a) is available at 2013 WL 1942821. The District Court's opinions dismissing the petitioners' complaints (Pet.App.21a, Pet.App.42a) can be found at 805 F. Supp. 2d 412 and 2011 WL 3296174.

JURISDICTION

The Sixth Circuit entered judgment on May 13, 2013, and denied rehearing en banc on June 26, 2013. Pet.App.64a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Believe it or not, it is a criminal offense in Ohio to make a knowingly or recklessly "false" statement about a political candidate or ballot initiative. Petitioners are advocacy groups that sought to challenge that law under the First Amendment: One group criticized a Congressman's support for the Affordable Care Act and was haled before the state elections commission, which found probable cause to pursue charges against it. The other group wanted to repeat the same message, but refrained from doing so because of that enforcement action.

Despite these concrete injuries, the courts below dismissed both lawsuits on jurisdictional grounds, finding the First Amendment claims unripe because (i) it was not *certain* that the groups would again be subjected to enforcement action if they repeated their speech; (ii) the elections commission had not reached a *final* determination on whether their speech was unlawful; and (iii) the *groups* maintained that their statements were true. That holding, consistent with the Sixth Circuit's uniquely restrictive approach to

pre-enforcement review under the First Amendment, effectively insulates this patently unconstitutional regime from *any* federal judicial review.

1. **Susan B. Anthony List Criticizes Rep. Steve Driehaus for Supporting the Affordable Care Act.** Susan B. Anthony List ("SBA") is a national pro-life advocacy group. During the 2010 elections, SBA criticized Members of Congress—including Steven Driehaus (D-OH)—who voted for the Affordable Care Act ("ACA"). Among other things, SBA planned to erect billboards in Rep. Driehaus' district, stating: "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion." Pet.App.3a.

2. **Rep. Driehaus Hales SBA Before the Ohio Elections Commission.** After SBA's billboards were reported in the news, Driehaus filed a complaint with the Ohio Elections Commission ("OEC"), alleging that SBA's speech violated Ohio Rev. Code § 3517.21(B)(10). Pet.App.3a. That provision makes it a crime to "[p]ost, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard for whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate." A parallel provision proscribes false statements "designed to promote the adoption or defeat of any ballot proposition or issue." *Id.* § 3517.22(B)(2).

The OEC is empowered to investigate complaints under those provisions, which may be filed by "any person"; if the OEC finds a violation, it "shall refer" it to prosecutors. *Id.* §§ 3517.153-157. An individual who is twice convicted of violating the elections code "shall be disfranchised." *Id.* § 3599.39.

Driehaus alleged that the Affordable Care Act does not appropriate federal funds for abortions, and that SBA's statements were thus false. The dispute arises, *inter alia*, from the Act's creation of a subsidy for lower-income individuals to help pay insurance premiums; the money is sent directly from the federal treasury to the insurer. ACA, §§ 1401, 1412(c)(2)(A). Under the Act, federal dollars *may* be used to subsidize abortion-inclusive coverage, but insurers *cannot* use the specific federal dollars to pay for most abortions. ACA, § 1303(b)(2). Rather, the abortions must be paid for out of a separate account funded solely by enrollees. *See id.*

For some people, like Driehaus, that segregation rule was sufficient to "refute" the claim that the Act finances abortion. For others, like SBA, it was a mere accounting gimmick, with fungible federal funds still being used to buy abortion-inclusive coverage, thereby indirectly funding abortion.

3. The OEC Complaint Succeeds in Suppressing SBA's Speech. SBA's billboard "never went up because the advertising company that owned the billboard space refused to put up the advertisement after Driehaus's counsel threatened legal action against it" under the Ohio law. Pet.App.3a.

4. The Commission Finds Probable Cause. As a result of Driehaus' complaint, SBA was forced to divert its time and resources—in close proximity to the election on which it wanted to focus—to hire legal counsel to defend itself before the OEC.

An OEC panel held a hearing on Driehaus' complaint and voted 2–1, with the sole Republican dissenting, to find probable cause that SBA violated the law, and thus to allow the charges to proceed to

the full Commission. Driehaus thereafter issued voluminous discovery requests to SBA and third parties. Pet.App.4a. Ultimately, however, Driehaus lost reelection and moved to withdraw his complaint; the OEC granted the motion. Pet.App.5a.

5. SBA Sues, and Alleges Intent To Repeat Its Message. While Driehaus' complaint was pending, SBA filed a federal suit challenging the Ohio law on First Amendment grounds. Pet.App.4a-5a. The district court stayed the suit under *Younger v. Harris*, 401 U.S. 37 (1971), due to the pending state proceedings. After Driehaus' complaint was dismissed, the court lifted the stay; SBA then amended its complaint to allege that it wanted to engage in similar speech in the future, as to other candidates in Ohio, but was chilled from doing so. Pet.App.5a. Driehaus, in turn, filed a counterclaim against SBA, alleging defamation based on the abortion-funding "falsehood."

6. Coalition Opposed to Additional Spending and Taxes Is Chilled and Also Files Suit. Petitioner Coalition Opposed to Additional Spending and Taxes ("COAST") agreed with SBA's criticism of Driehaus, and wanted to disseminate the following statement: "Despite denials, Driehaus did vote to fund abortions with tax dollars." Pet.App.5a. But, due to the then-ongoing action against SBA, it was afraid to do so. Pet.App.6a. Instead, while that action was still pending, it also filed a federal lawsuit challenging the Ohio law under the First Amendment. *Id.*

7. The District Court Dismisses Both Suits. After consolidating the suits, the court dismissed. As to COAST, it reasoned that any injury was "far too attenuated," and any chill of its speech was just

"subjective," because prosecution was "speculati[ve]." Pet.App.57a. "[N]o complaint against COAST has been or is pending." Pet.App.58a. Moreover, since COAST maintained that its speech was true, it "has not even alleged any intention not to comply" with the law. Pet.App.56a. Similarly, as to SBA, the court found that it had not proved that the law "will be immediately enforced against it." Pet.App.34a. As such, the undisputed "chill" of SBA's speech was not cognizable injury. Pet.App.33a. The court added that, while SBA had been subject to enforcement action, its challenge was still unripe because the OEC had not reached a final merits determination. "Without enforcement action pending at any stage, a case or controversy does not exist." Pet.App.29a.

The court also denied summary judgment on Driehaus' defamation counterclaim, holding that SBA's statements were false because the ACA did not directly appropriate federal funds for abortions. *Susan B. Anthony List v. Driehaus*, 805 F. Supp. 2d 423, 435-36 (S.D. Ohio 2011).

8. **The Sixth Circuit Affirms.** The Sixth Circuit affirmed the dismissals, relying on Circuit precedent holding that neither past enforcement of a speech-suppressive rule, nor chill arising therefrom, suffices to prove "an imminent threat of *future* prosecution." Pet.App.8a-10a (citing *Fieger v. Mich. Sup. Ct.*, 553 F.3d 955 (6th Cir. 2009); *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602 (6th Cir. 2008); *Norton v. Ashcroft*, 298 F.3d 547 (6th Cir. 2002)).

The panel thus ruled that the OEC's finding of probable cause was irrelevant, because it was not a "final adjudication" of liability. Pet.App.12a. And, although anybody could file a complaint before the

OEC and thereby "set the wheels" of enforcement in motion, it was "speculative" that any such complaint would be filed in the future. *Id.* This was because Driehaus' future candidacy was uncertain, and, although SBA had alleged an intent to make the same criticisms about other Ohio candidates who had supported the ACA, SBA could not identify a specific person who would complain if it did. Pet.App.12a-14a. Moreover, because SBA "does not say that it plans to lie or recklessly disregard the veracity of its speech," instead maintaining the truth of its position, it had not "sufficiently alleged an intention to disobey the statute." Pet.App.15a.

The panel observed that COAST's position was "somewhat different" from SBA's, but its conclusion was the same. *See* Pet.App.18a. COAST moved for rehearing en banc, which was denied. Pet.App.64a.

REASONS FOR GRANTING THE PETITION

Two terms ago, this Court held that even false statements are protected by the First Amendment. *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012). Even the dissenters agreed that laws proscribing false statements about "matters of public concern" would create a "potential for abuse of power" "simply too great" for the First Amendment to tolerate. *Id.* at 2564 (Alito, J., dissenting). As all of the Justices correctly recognized, allowing the government to serve as arbiter of political truth cannot be squared with basic free-speech principles.

Yet nearly one-third of the states still have statutes prohibiting "false" statements made during political campaigns—often, as in Ohio, with criminal sanctions attached. *See infra* n.2. These laws do exactly what *Alvarez* warned against, inserting state

bureaucrats and judges into political debates and charging them with separating truth from oft-alleged campaign "lies." Such statutes are almost certainly unconstitutional, yet they play a troubling, harassing role in every political campaign in those states.

Under the decision below, they will continue to do so. The Sixth Circuit has created a paradigmatic Catch-22, whereby a speech-restrictive law cannot be challenged before, during, or after prosecution—only once the speaker has been successfully convicted. *Younger* precludes challenges *while* enforcement is pending. Under the decision below, a challenge *prior* to enforcement is "speculative," even if enforcement proceedings are pending against another speaker based on the same speech (COAST). And even *after* a commission finds "probable cause" that a criminal statute has been violated, there is purportedly still no "credible threat of prosecution," even against the *same* speaker for the *same* speech—unless, perhaps, he concedes that his speech is "false" (SBA). But, of course, speakers threatened by these laws do not and will not admit that their statements are false; their concern is that their political opponents will contend otherwise, imposing litigation costs and political burdens as a penalty for the speech.

Thus, under the decision below, judicial review—not only of this law, but of any speech-suppressive statute—can in practice only be had once a party is actually convicted. But as this Court has long recognized, the inevitable consequence of such a regime, whereby the speaker must suffer indignities, expenses, and penalties before he may adjudicate his constitutional rights, is self-censorship, degrading robust political debate. This is particularly true and

troublesome here, because the opinion below provides a clear blueprint for coercing censorship of core political speech during electoral campaigns—when the need for uninhibited speech is at its zenith. All that political opponents need do, as they have routinely done in Ohio (*see* p.34, *infra*), is complain about controversial speech and obtain politically valuable "probable cause" findings *before* the election, and then drop the complaints *after*, once the damage has been done and the speech can no longer influence important electoral decisions. The statute is thereby shielded from any judicial review.

All of this is very wrong, and very much at odds with the precedent of this Court and other Circuits. This Court has repeatedly found a "credible threat of prosecution," entitling a speaker to pre-enforcement review, based on just the existence of the suppressive law and the party's intent to take action that arguably violates it. Absent an express commitment by prosecutors *not* to enforce the law, such a party has a plain basis to fear prosecution. The resulting "chill" of its speech is therefore not subjective or irrational, but an objective injury-in-fact that must receive federal judicial attention if freedom of speech is to have practical meaning. Seven other Courts of Appeals understand that, and so have adopted a clear presumption: A credible threat of prosecution will be found if a party's intended speech *arguably* runs afoul of a law on the books, absent desuetude or a prosecutorial commitment *not* to enforce it. This nearly uniform rule simply reflects the reality that prosecutors normally do prosecute and, in all events, that the First Amendment "does not leave us at the mercy of *noblesse oblige*." *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010).

The contrary opinion below is, however, in line with the Sixth Circuit's uniquely restrictive approach to justiciability in pre-enforcement First Amendment cases. Here, of course, the court found advocacy groups' challenges nonjusticiable despite a probable-cause finding issued by a state commission about the *same speech* that the groups indisputably intended to engage in. In other cases, the Sixth Circuit has dismissed challenges where parties quite reasonably feared prosecution under speech-restrictive laws that were never disavowed, and had previously been enforced, even against the same speakers. The Sixth Circuit does not just fail to presume a credible threat of prosecution (as other Circuits do), but imposes insurmountable obstacles to proving one—effectively requiring *particularized* and *certain* threats of *successful* prosecution, and, absent such certainties, dismissing chill as merely "subjective."

In addition to departing from its sister Circuits on the more general "credible threat of prosecution" standard, the decision below squarely contradicts the Eighth Circuit's resolution of a virtually identical challenge to a virtually identical law in 2011. Reversing a district court, the Eighth Circuit allowed a speaker to challenge Minnesota's false-statement law: The statute was not in "disuse" and the state had not promised not to enforce it, and that was—per the usual presumption adopted by the Eighth and most Circuits—sufficient for standing and ripeness. Moreover, despite maintaining the truth of its statements, the plaintiff had a reasonable fear of prosecution, according to the Eighth Circuit, given that past complaints had been filed against it. The decision below, by contrast, held exactly the opposite on indistinguishable facts.

In short, the Sixth Circuit's approach to pre-enforcement challenges—in general and in this context—cannot be squared with the decisions of other Circuits or basic First Amendment principles. Yet it has profoundly impaired constitutional rights, shutting down numerous challenges to all manner of speech codes and chilling an unknowable quantity of speech. In this case, application of the Sixth Circuit's restrictive rulings has assured perpetuation of a blatantly unlawful regime under which bureaucrats are the supreme fact-checkers for every political campaign—a regime that has, predictably, been routinely abused and will continue to be, absent this Court's intervention.

I. THE SIXTH CIRCUIT HAS IRRECONCILABLY DEPARTED FROM SEVEN OTHER CIRCUITS BY ERECTING SUBSTANTIAL HURDLES TO REVIEW OF SPEECH-SUPPRESSIVE LAWS.

The Sixth Circuit's standard for whether a "credible threat of prosecution" exists, such that a pre-enforcement challenge may be mounted, is starkly different from that in seven other Circuits. The latter quite naturally presume such a threat if the plaintiff's intended speech arguably runs afoul of a speech prohibition, with that presumption subject to rebuttal only if the law has fallen into disuse or the government has made a firm commitment not to enforce it. But the Sixth Circuit, in case after case, has forbidden challenges, even *after* prior enforcement, unless the government took *specific* action to concretely threaten the *particular* plaintiff with *future* prosecution and the plaintiff admits that the speech violates the law.

More particularly, the Sixth Circuit's refusal to allow a pre-enforcement challenge to Ohio's false-statement statute rejects at every turn the position taken by the Eighth Circuit, which allowed the same challenge to be pursued against Minnesota's nearly identical statute. The decision below will prevent *any* court from reaching the merits of the Ohio law's constitutionality, other than after a final conviction.

A. Seven Circuits Ordinarily Presume That a Credible Threat of Prosecution Exists If the Intended Speech Is Arguably Proscribed, But the Sixth Circuit Demands Much More.

Standing and ripeness in a First Amendment challenge is satisfied if the speaker faces a "credible threat of prosecution." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). The speaker need not "undergo a criminal prosecution" before seeking relief. *Doe v. Bolton*, 410 U.S. 179, 188 (1973). But the Sixth Circuit, although paying lip service to the "credible threat" principle, applies a standard for satisfying it that sharply departs from its sister Circuits. Indeed, that court has effectively converted the standard into one of "*particularized* and *certain* threat of *successful* prosecution."

The Sixth Circuit's test cannot be satisfied even if a party has been subjected to prior enforcement proceedings for the same speech. This is purportedly because only a formal finding that specific speech is unlawful "establishes an imminent enforcement threat," while a previous finding of "probable cause" to so believe merely threatens the speaker with costly and intrusive "proceedings that may—or may not—find an infraction." Pet.App.11a. This test is irreconcilable with that used in seven other Circuits.

1. The First Circuit offered a clear rule for when a "credible threat of prosecution" exists in *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996). The plaintiff there wanted to make expenditures "arguably prohibited" by a campaign finance statute. *Id.* at 18. The court held that where a "non-moribund" law arguably proscribes speech, "courts will assume a credible threat of prosecution in the absence of compelling contrary evidence" like disavowal by state authorities. *Id.* at 15. "[A] pre-enforcement facial challenge to a statute's constitutionality is entirely appropriate unless the state can convincingly demonstrate that the statute is moribund or that it simply will not be enforced." *Id.* at 16.

The First Circuit subsequently reaffirmed that rule. In *Rhode Island Association of Realtors, Inc. v. Whitehouse*, 199 F. 3d 26, 31 (1st Cir. 1999), emphasizing the need to be "sensitive to the danger of self-censorship," the court noted that the statute, albeit never enforced, had not "fallen into desuetude," nor had the state "disavowed" it. *Id.* at 31-32. Rather, nonenforcement simply showed that the prohibition had "proven to be an effective [speech] deterrent." *Id.* In *Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir. 2003), the court similarly permitted a pre-enforcement challenge to a criminal libel law. In determining "whether a First Amendment plaintiff faces a credible threat of prosecution, the evidentiary bar that must be met is extremely low. … A finding of no credible threat of prosecution under a criminal statute requires a long institutional history of disuse." *Id.* at 57.

Other Circuits followed. The Seventh Circuit, citing the First, held that "a threat of prosecution is credible when a plaintiff's intended conduct runs afoul of a criminal statute and the Government fails to indicate affirmatively that it will *not* enforce the statute." *Commodity Trend Serv., Inc. v. CFTC*, 149 F.3d 679, 687 (7th Cir. 1998). As Judge Posner elaborated, "[a] plaintiff who mounts a pre-enforcement challenge to a statute that he claims violates his freedom of speech need not show that the authorities have threatened to prosecute him; the threat is latent in the existence of the statute." *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (citations omitted). If the statute "arguably covers" intended speech, "and so may deter constitutionally protected expression …, there is standing." *Id.*

The Fourth Circuit, too, adopted the same rule. As Judge Wilkinson explained, the First Circuit's presumption "is particularly appropriate when the presence of a statute tends to chill the exercise of First Amendment rights." *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999). "A non-moribund statute that 'facially restricts expressive activity by the class to which the plaintiff belongs' presents such a credible threat, and a case or controversy thus exists in the absence of compelling evidence to the contrary." *Id.* No such evidence existed there because prosecutors expressed no "intention of refraining from prosecuting those who appear to violate the plain language of the statute." *Id.* at 710-11.

The Eighth and Ninth Circuits are in accord. In *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481 (8th Cir. 2006), the plaintiffs "ha[d]

neither violated the Minnesota Statutes nor been threatened by Appellees with prosecution," yet the court found a credible threat. *Id.* at 485. Citing *New Hampshire Right to Life* and *Majors*, it observed that the statute in question was not "dormant" and that the state had "not disavowed an intent to enforce" it. *Id.* at 485-86. And the Ninth Circuit held, in *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003), that, "if the plaintiff's intended speech arguably falls within the statute's reach," then the speaker may "suffe[r] the constitutionally recognized injury of self-censorship" and bring suit. *Id.* at 1095; *see also Az. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1006-07 (9th Cir. 2003) (finding credible threat where "Arizona has not suggested that the legislation will not be enforced … nor has [it] fallen into desuetude").

The Second Circuit has gone even further, finding standing even when enforcement authorities affirmatively argued that the speech was *not* prohibited. In *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000), for example, the State argued that it "has no intention of suing VRLC," invoking an alternative reading of the statute under which the speech was permitted. *Id.* at 383. But so long as there was a "reasonable enough" construction under which the plaintiff's speech was proscribed, it "may legitimately fear that it will face enforcement of the statute by the State brandishing" it. *Id.* Notwithstanding the State's present intention not to enforce, "there is nothing that prevents the State from changing its mind." *Id.*; *see also Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003).

While the D.C. Circuit has adopted a demanding test for showing a credible threat of prosecution under a law "not burdening expressive rights," it agrees that, in First Amendment cases, it suffices that "plaintiffs' intended behavior is covered by the statute and the law is generally enforced." *Seegars v. Gonzales*, 396 F.3d 1248, 1252, 1253 (D.C. Cir. 2005). Thus, in *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995), the court allowed a pre-enforcement suit even though it was clear that the plaintiffs were "not faced with any present danger of an enforcement proceeding" because the agency was deadlocked. *Id.* at 603. As Judge Silberman reasoned, a credible threat still existed because "[n]othing … prevent[ed] the Commission from enforcing its rule at any time with, perhaps, another change of mind [of a Commissioner]." *Id.* at 603-04.

In sum, the First, Second, Fourth, Seventh, Eighth, Ninth, and D.C. Circuits all agree that, in the First Amendment context, a pre-enforcement challenge is proper so long as (i) the plaintiff's speech is at least arguably proscribed by the law; and (ii) the law has neither fallen into desuetude nor been bindingly disavowed by prosecutors. This is, as the First Circuit declared, an "extremely low" threshold. *Mangual*, 317 F.3d at 57.

2. Against all that, the Sixth Circuit stands alone. Rather than rely on the commonsense notion that there is a "credible threat of prosecution" when one's speech arguably violates a statute, the Sixth Circuit requires speakers to prove a *particularized*, virtually *certain* threat of *successful* prosecution, thus effectively restricting challenges to after the speaker has been found guilty.

In the Sixth Circuit, citizens cannot bring pre-enforcement challenges even if precisely the same speech has been found by an enforcement agency to probably violate the law; even if it is undisputed that the speaker intends to say the precise words that triggered a prior or pending enforcement; and even if it is undisputed that those proceedings chilled speech. Only a prior *conclusive finding* that the speech violates the law—or perhaps the speaker's admission that it does so—suffices. Since virtually no speaker will voluntarily drain his speech of all persuasive force (and admit a criminal infraction) by averring that the speech is a lie, the only way to challenge speech restrictions in the Sixth Circuit is *after* subjecting oneself to costly administrative hearings and successful prosecution—precisely the result that this Court's precedents reject.

Far from being an outlier, this case is only the latest in a series of free-speech challenges that the Sixth Circuit has thrust aside on justiciability grounds, employing a remarkably demanding test that goes far beyond a credible threat of prosecution. In any other Circuit, these challenges would have reached the merits.

a. In this case, when SBA and COAST filed their suits, SBA was facing actual enforcement proceedings. In those proceedings, the OEC panel found probable cause that SBA violated a criminal law. These proceedings made very clear to SBA and COAST that repeating that message would credibly subject them to prosecution. Driehaus' complaint was dismissed only once he withdrew it post-election.

None of that satisfied the Sixth Circuit. The previous enforcement against SBA was, according to

the court, not evidence supporting a fear of future enforcement, but merely a "prior injury," "not enough to establish prospective harm." Pet.App.9a. Even the probable-cause finding did not show a credible threat of prosecution, because the OEC "never *found* that [SBA] *violated* [the] law." Pet.App.10a (emphases added). To bring a pre-enforcement challenge, apparently you must first be convicted.

Moreover, the threat of prosecution is particularly likely under the Ohio law because enforcement can be triggered by a complaint from *anyone*—not just a single agency or prosecutor. Incredibly, according to the Sixth Circuit, the fact that a multitude of politically-motivated persons could trigger enforcement made it *more* difficult to establish this threat. Pet.App.12a. Plus, it was "far from certain" that the prior complainant, Driehaus, would run again. Pet.App.14a. Of course, as SBA pointed out and nobody disputed, it intended to launch the same criticism over the ACA against *other* candidates for office in Ohio who had supported the Act, and any citizen who supported those candidates could file a complaint. Pet.App.12a (quoting SBA's statement at oral argument that any "citizen in Ohio who supports Obama" could file a complaint). But absent an identifiable complainant, the court found that mere "conjecture." *Id.*

Finally, the Sixth Circuit found SBA could not "establish[] ripeness" because it would "not say that it plans to lie or recklessly disregard the veracity of its speech" in violation of the law. Pet.App.15a. But, of course, the OEC's prior finding of "probable cause"—and the district court holding, in the defamation action, that SBA's statements were

false—made prosecution for false political speech extremely credible. The Sixth Circuit's insistence on a preemptive (and untrue) *confession* to violating a criminal statute therefore does nothing to ensure ripeness, and itself greatly chills speech.

In any of the other Circuits, the district court would have been reversed. The false-statement law is not "moribund" and, not only had the state not "demonstrate[d] that [it] … will not be enforced," it was actively enforcing it. *N.H. Right to Life*, 99 F.3d at 15-16. The threat to SBA and COAST was certainly "latent in the existence of the statute," especially in light of past enforcement. *Majors*, 317 F.3d at 721. These groups were being "forced to modify their speech" to comply with the statute, and so were suffering injury. *St. Paul*, 439 F.3d at 487. In other Courts of Appeals, a credible threat of prosecution would have been presumed, *especially* given past enforcement proceedings. Obviously, none of the other Circuits would have cared that the Commission had not *already* found the petitioners guilty; in a *pre*-enforcement challenge, one does not demand a *prior* conviction.

Nor would the other Circuits have been bothered by petitioners' maintenance of their innocence: Whatever the speaker may think, a credible threat exists so long as the intended speech is "arguably" proscribed. *See N.H. Right to Life*, 99 F.3d at 18 ("arguably prohibited"); *Majors*, 317 F.3d at 721 ("arguably covers"); *California Pro-Life Council,* 328 F.3d at 1095 ("arguably falls within the statute's reach"). Indeed, some Circuits recognize standing even if the state *denies* that the intended speech is proscribed, because the state may change its mind.

E.g., *Vt. Right to Life*, 221 F.3d at 383. One need not go that far here, where the OEC and district court had already effectively deemed SBA's speech false.

b. The Sixth Circuit's decision below is, however, par for the course in that court. The prior cases that the panel cited reflect the same hostile attitude toward First Amendment challenges.

In *Fieger*, an attorney with a "significant history of criticizing Michigan's judges" was reprimanded under disciplinary rules for "vulgar comments" about judges on his radio show. 553 F.3d at 957, 968. He brought a facial challenge to the rules, but the Sixth Circuit found no standing because Fieger was not "currently being threatened with discipline," *id.* at 973, and had articulated only a "generalized, subjective 'chilling' of speech," *id.* at 965. Past sanction does not prove future injury, said the court, citing *Los Angeles v. Lyons*, 461 U.S. 95 (1983), a Fourth Amendment case that raised no concerns of chill. Moreover, Fieger did not allege that his speech would, in his view, be so "vulgar, crude, or personally abusive" as to violate the rules, only that fear of such a determination was causing him to self-censor. 553 F.3d at 967, 970. Judge Merritt dissented:

> [Fieger] has alleged that he intends to continue being an outspoken critic of the Michigan judiciary. If history is any guide, much of that future criticism could very plausibly be described as "discourteous," putting him in realistic danger of prosecution. The fact that disciplinary action has "only" been brought against him twice does not undermine standing in this context, as the majority contends; it buttresses it.

Id. at 978 (Merritt, J., dissenting).

Fieger, in turn, relied on the earlier decision in *Morrison*, involving a school board with a "policy prohibiting students from making stigmatizing or insulting comments regarding another student's sexual orientation." 521 F.3d at 605. A Christian student who wanted "to tell others when their conduct does not comport with his understanding of Christian morality" sued, after refraining for a year from expressing those views. *See id.* Again, the court dismissed, because "whether [Morrison] would have been so punished [for violating the policy], we can only speculate." *Id.* at 610. The record was "silent" on "whether the school district threatened to punish or would have punished Morrison." *Id.* In the absence of a concrete threat, the court rejected the pre-enforcement challenge: Such a suit requires "some specific action on the part of the defendant," not just existence of a suppressive policy. *Id.* at 609.

The *Morrison* dissent warned that the opinion "unnecessarily muddles established doctrine … [and] may occlude the doctrine that a threat which chills a plaintiff's speech constitutes an injury-in-fact." *Id.* at 619 (Moore, J., dissenting).

Morrison emphasized that "[c]haracterizing chill as insufficient to establish standing is not original to this panel." *Id.* at 609 (majority op.). True enough. Yet another example of the Sixth Circuit's hostility is *Norton*, which the decision below also cited. *Norton* involved a challenge to the Freedom of Access to Clinic Entrances Act by two anti-abortion activists, who had been "handing out leaflets and speaking with individuals in cars stopped in the [abortion] Clinic driveway." 298 F.3d at 551. One of the two

was called to a meeting "with law enforcement," at which she was advised "that she was … impeding access to the Clinic," and that a pattern of such conduct "could be considered a violation of the [Act]." *Id.* Following this meeting and a follow-up letter, both protestors ceased their activities "because [they] feared arrest." *Id.* Yet again, the Sixth Circuit found a challenge unripe. Notwithstanding the warning by federal officers, the court said it "cannot conclude that plaintiffs have sufficiently demonstrated that the alleged harm will ever come to pass." *Id.* at 554. This was especially so given that they "professed an intention to comply with the Act," disputing the federal agents' suggestion that their protests might violate it. *Id.* If the protestors wanted to avoid the "uncertainty" about the law, the court suggested they "heed the government's advice and simply move their counseling activities across the street." *Id.* at 555.

c. The few cases in which the Sixth Circuit *has* allowed First Amendment challenges to proceed only confirm the backward nature of that Circuit's regime—under which prior adjudication of guilt is a prerequisite to suit.

In *Briggs v. Ohio Elections Commission*, 61 F.3d 487 (6th Cir. 1995), a candidate was found guilty of falsely suggesting that she was the incumbent; the OEC declined "to impose a fine or refer the matter for prosecution," but warned that her violation could be held against her in the future. *Id.* at 490. The Sixth Circuit held that the OEC's "promise to consider Briggs's violation, if subsequent complaints come before it, poses a cognizable threat of injury." *Id.* at 492. Similarly, in *Berry v. Schmitt*, 688 F.3d 290 (6th Cir. 2012), the court allowed an attorney to

bring a First Amendment challenge to Kentucky's Rules of Professional Conduct—*after* the Kentucky Bar Association investigated his speech, found that it did violate the Rules, and "issued a warning letter" that advised compliance. *Id.* at 295-97.

Below, the court distinguished *Briggs* and *Berry* precisely because they involved prior findings of guilt. Pet.App.11a-12a (noting that, in *Briggs*, OEC "actually found a violation" and, in *Berry*, "the bar association was unequivocal that his conduct violated the rule"). Only such *final determinations* create a sufficient injury in the Sixth Circuit. The bizarre consequence of this regime is that one must have been *previously adjudicated* in violation *before* one may challenge a speech-restrictive law—undermining the entire purpose of *pre-enforcement* review. And only in extremely unusual cases where authorities impose no sanctions (like in *Briggs* and *Berry*) may the law be challenged without actually *suffering* penalties.

* * *

In at least seven Circuits, a threat of prosecution is presumed if a law (i) arguably proscribes intended speech and (ii) there is no history of disuse or non-enforcement. But the Sixth Circuit demands a particularized threat of future enforcement (to show that prosecution is *certain*), as well as a prior finding or concession that the speech is unlawful (to show that prosecution would *succeed*). Consequently, it has tossed out challenge after challenge that would easily satisfy other courts. Intervention is necessary to ensure that the First Amendment has equal force in the Sixth Circuit as in the rest of the country.

B. On Nearly Identical Facts, the Eighth Circuit Allowed a Pre-Enforcement Challenge to a Law Prohibiting False Statements.

Moving from the broader legal question to a more particular scenario, the decision below conflicts with a recent decision of the Eighth Circuit on nearly identical facts. There is now a square split on the viability of pre-enforcement challenges to state laws that prohibit false political speech.

In *281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. 2011), the Eighth Circuit addressed a challenge to Minnesota's false-statement law, which (like Ohio's) forbids dissemination of knowingly or recklessly false statements in campaigns. Under the Minnesota law, like the Ohio law, any person may file a complaint alleging violation of the provision; county attorneys may choose to bring criminal charges after administrative proceedings end. *See id.* at 625. The plaintiff in *281 Care Committee* was an organization opposed to a school-funding ballot initiative; a school official told the media that the school district was "investigating" the organization for spreading "false" information about the initiative. *Id.* at 626. The group was thereafter "chilled from … vigorously participating in the debate surrounding school-funding ballot initiatives in Minnesota." *Id.*

Although the district court there (as here) dismissed as nonjusticiable, the Eighth Circuit reversed. It explained—in accord with the majority rule—that, "[t]o establish injury in fact for a First Amendment challenge …, a plaintiff need not have been actually prosecuted or threatened with prosecution." *Id.* at 627. "Rather, the plaintiff needs only to establish that he would like to engage in

arguably protected speech, but that he is chilled from doing so by the existence of the statute." *Id.* Although Minnesota's law had been "infrequent[ly]" enforced, "only in extreme cases approaching desuetude" may lack of enforcement of a statute "undermine the reasonableness of chill." *Id.* at 628.

Nor was the Eighth Circuit bothered that the plaintiffs had "not alleged that they wish to knowingly make false statements." *Id.* The point was that they "*have* alleged that they wish to engage in conduct that could reasonably be interpreted as making false statements"; that was "enough to establish that [their] decision to chill their speech was objectively reasonable." *Id.* Determining political "truth" leaves considerable "room for mistake and genuine disagreement," and thus for allegations of wrongdoing by "political opponents who are free to file complaints under the statute." *Id.* at 630. Further, that the plaintiffs' speech had triggered enforcement proceedings in the past—even though "no complaints … ever reached the criminal stage and no criminal prosecution was ever threatened"—confirmed the "reasonableness of the alleged chill." *Id.* Even dismissed complaints impose costs, in time and "attorney fees." *Id.*

Addressing ripeness, the Eighth Circuit reasoned that "the issue presented requires no further factual development, is largely a legal question, and chills allegedly protected First Amendment expression." *Id.* at 631. It was therefore ripe. *See id.*

On each of these issues, the decision below directly diverged from *281 Care Committee*. Contrary to the Eighth Circuit, the Sixth held that SBA and COAST *did* need to show that they were

"actually prosecuted or threatened with prosecution," and that their "chill" alone was not cognizable injury. 638 F.3d at 627. Contrary to the Eighth Circuit, the Sixth held that fear of a "false prosecution" was categorically unreasonable, even though SBA had already been subject to enforcement proceedings for the same speech—and even though the Commission had found probable cause and the district court had found the speech false. And, contrary to the Eighth Circuit, the Sixth found that "factual development"—*i.e.*, concrete application of the law—was necessary, such that a pre-enforcement challenge to a false-statement law would, in practice, *never* be ripe.

* * *

Conflict between the Sixth and Eighth Circuits over whether any speaker may challenge a speech-restrictive law common to at least 16 states warrants the Court's attention. That this division reflects a deeper dispute over justiciability of pre-enforcement challenges to any speech restriction only makes certiorari even more warranted.

II. THE SIXTH CIRCUIT'S APPROACH IS FUNDAMENTALLY INCONSISTENT WITH FIRST AMENDMENT JURISPRUDENCE.

As should already be obvious, the Sixth Circuit is very much on the wrong side of this lopsided conflict. This Court's First Amendment jurisprudence clearly holds that pre-enforcement review is proper when a speaker refrains from speaking based on a restrictive law that the government has not disavowed; any contrary rule would impose an obvious, direct burden on constitutional freedoms.

A. When a Statute Is Reasonably Construed To Prohibit a Plaintiff's Intended Speech, the Statute Itself Causes "Chill" Injury.

This Court has never required a plaintiff to show certainty, or a particularized threat, that *he* would be prosecuted; or that authorities *already* found his speech unlawful; or that he *agreed* that his speech was proscribed. To the contrary, First Amendment jurisprudence confirms that those showings—now imposed by the Sixth Circuit as prerequisites to pre-enforcement challenge—are both unnecessary for justiciability and irreconcilable with free speech.

The leading case is *Babbitt*, 442 U.S. 289, where a union challenged an Arizona law that prohibited unions from inducing consumers, via "dishonest, untruthful, and deceptive publicity," to refrain from buying certain products. *Id.* at 301. This Court found a "credible threat of prosecution." *Id.* at 298. The plaintiff "actively engaged in consumer publicity campaigns in the past" and "alleged … an intention to continue to engage in boycott activities." *Id.* at 301. "Although [it] d[id] not plan to propagate untruths," the union could still pursue its challenge, because "erroneous statement is inevitable" and so the union would be forced to "curtail [its] consumer appeals" due to fear of prosecution for "inaccuracies inadvertently uttered." *Id.* (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 271 (1964)).

Moreover, although the provision "ha[d] not yet been applied," the Court recognized that "when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not 'first expose himself to actual arrest or prosecution to be entitled to

challenge the statute.'" *Id.* at 302 (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). Critically, to show reasonable fear of prosecution, it sufficed that "the State has not disavowed any intention of invoking the criminal penalty provision" and so the union was "not without some reason in fearing prosecution for violation of the ban." *Id.*

The Court reaffirmed *Babbitt* in *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383 (1988), involving a state law restricting display of sexually explicit materials. This Court was "not troubled by the pre-enforcement nature of this suit": the State had "not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise"; the plaintiffs thus had "an actual and well-founded fear that the law will be enforced against them." *Id.* at 393. It did not matter that the law only *arguably* applied to them; it sufficed that, "if their interpretation of the statute is correct, [they] will have to take significant and costly compliance measures or risk criminal prosecution." *Id.* at 392.

More recent decisions are to the same effect. For example, in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), "preenforcement review" was proper because "[t]he Government has not argued to this Court that plaintiffs will not be prosecuted if they do what they say they wish to do." *Id.* at 2717. Citing *Babbitt*, the Court found that absence of countervailing evidence to be sufficient to create a "credible threat of prosecution." *Id.*

Babbitt, *American Booksellers*, and *Holder* show that (i) the government's non-disavowal of an intent to enforce is enough to presume a credible threat of prosecution; and (ii) a plaintiff need not allege that

he intends to violate the law, only that he intends to engage in action that *enforcement authorities* could think violates the law. Yet, as shown, the Sixth Circuit holds just the opposite on both points.

B. The Sixth Circuit's Reasons for Finding Suits Like This One Unripe Reflect Gross Naiveté About the Evils of Speech Suppression.

In the decision below, as in its other decisions, the Sixth Circuit gave a number of reasons for why pre-enforcement review should not be allowed. Those reasons fundamentally misunderstand the injuries caused by speech-suppressive laws.

1. The Sixth Circuit repeatedly identifies the absence of any pending enforcement proceedings as a basis for denying review. *E.g.*, Pet.App.17a ("No complaint or Commission action is pending against SBA …."); *Fieger*, 553 F.3d at 973 ("[T]his case does not arise in the midst of a criminal prosecution or disciplinary proceeding."). But the reason why this Court has never required a plaintiff to "first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights," *Steffel*, 415 U.S. at 459, is because such a rule would directly infringe constitutional freedoms. Allowing the statute to stand until someone "hardy enough to risk criminal prosecution" is permitted to challenge it would, in the interim, prevent everyone else from exercising their rights, *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965); *see also Am. Booksellers*, 484 U.S. at 393 ("[T]he alleged danger … is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."). Indeed, that is

indisputably what happened to COAST in this case.[1] (Moreover, once a proceeding is pending, *Younger* precludes preemptive relief.)

2. Below, the Sixth Circuit also discounted the prior "probable-cause" proceedings against SBA, on the theory that "past" actions have no significance for justiciability. Pet.App.10a. Obviously, though, past enforcement of a law that remains on the books—unlike, say, past use of a particular police practice during a random interaction, as in *Lyons*—*is* an extraordinarily good predictor of future enforcement for similar speech. More important, the Sixth Circuit's bizarre regime creates the worst of all worlds for core political speech: enforcement proceedings to chill such speech during campaigns, cessation of such burdensome enforcement once the election-related speech is valueless, and repetition of the speech-deterring enforcement during the next election cycle, without any judicial review in the interim. Such a regime of enforcement that evades review is clearly impermissible; it is well-established, even outside the speech context, that an agency's cessation of enforcement proceedings does not eliminate jurisdiction to challenge them. *See United*

[1] The Sixth Circuit found that SBA, unlike COAST, was not "chilled" because it continued to express its message after Driehaus filed his complaint. Pet.App.17a. But obviously SBA was not chilled while enforcement proceedings were *pending*; it was already on the hook and *repeating* its already-challenged speech would not subject it to any more prosecution. After the OEC dismissed the proceeding, however, SBA did fear that repeating its message would expose it to additional costs and burdens, and so alleged. Those allegations are undisputed (and obvious, since many other candidates supporting the ACA ran in 2012).

States v. W.T. Grant Co., 345 U.S. 629, 632 (1953) ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case," because otherwise defendant would be "free to return to his old ways."). To the contrary, it shifts the burden to the "party asserting mootness" to show that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968)). Yet instead of requiring the OEC to meet that standard—which it plainly could not—the Sixth Circuit held that the voluntary cessation of the OEC proceedings shielded the *entire statute* from judicial review unless *petitioners* proved that future prosecution was virtually certain, thereby directly authorizing and encouraging the abusive tactic of initiating politically motivated proceedings during campaigns and dropping them after. *See infra* p.34.

3. The Sixth Circuit also routinely says that it is "speculative" that a speech-suppressive law will be enforced. Here, it wondered precisely who would file a complaint against SBA or COAST. Pet.App.12a ("Who is likely to bring a complaint to set the wheels of the Commission in motion?"). In other cases, it found it "speculat[ive]" that a school would enforce its speech code, *Morrison*, 521 F.3d at 610 ("The record is silent as to whether the school district … would have punished Morrison …."); "speculative" that the Michigan Supreme Court would, "in its discretion, impose [ ] sanctions" for violation of its rules, *Fieger*, 553 F.3d at 967; and "speculat[ive]" that activists would be charged with crimes that

agents warned they might be committing, *Norton*, 298 F.3d at 554. Of course, it is *always* somewhat "speculative" that a prosecutor will bring charges; only the prosecutor knows for sure. But prosecution is at least credible and, more important, *resolving* the speculation requires self-exposure to sanctions, chilling speech. "Speculative" enforcement thus cuts *in favor* of allowing pre-enforcement review. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006) (en banc) ("We cannot ignore such harms just because there has been no need for the iron fist to slip its velvet glove.").

4. Finally, the Sixth Circuit has held it against plaintiffs that they did not concede that their speech would be unlawful. *See* Pet.App.15a ("[SBA] does not say that it plans to lie …."); *Fieger*, 553 F.3d at 965 (plaintiffs did not allege intent "to make vulgar, crude, or personally abusive remarks"); *Norton*, 298 F.3d at 554 (noting statute's specific-intent element and that "plaintiffs have professed an intention to comply with the Act"). But pre-enforcement First Amendment review is meant to free speakers from chill; what matters is obviously not *their* view of their speech's legality, but whether they *reasonably fear* enforcement by authorities or complainants, which turns on what those people think. *See 281 Care Comm.*, 638 F.3d at 628. And, even if a prosecution is unlikely to succeed, "[t]he chilling effect … may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski*, 380 U.S. at 487; *accord Mangual*, 317 F.3d at 59 ("The plaintiff's credible fear of being haled into court on a criminal charge is enough for the purposes of standing, even if it were not likely that the reporter would be convicted.").

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The bottom line of this Court's First Amendment jurisprudence is that if a law objectively chills speech, it causes injury and can be challenged right away. The Sixth Circuit's contrary approach entirely misses that fundamental point.

III. THE SIXTH CIRCUIT'S APPROACH PROFOUNDLY IMPAIRS FREE SPEECH IN ITS MOST IMPORTANT CONTEXTS.

This case is worthy of this Court's attention because the effect of the Sixth Circuit's approach is to prevent even meritorious challenges to laws that suppress speech, resulting in self-censorship, chill, and degradation of political discourse—the very evils that the First Amendment is designed to combat. As the *SBA-Fieger-Morrison-Norton* pattern illustrates, the effects of the Sixth Circuit's uniquely restrictive approach can be felt in many different contexts; this is a recurring issue of broad significance.

Moreover, the specific context of the decision below creates a special need to reverse the Sixth Circuit's perverse approach. Ohio's false-statement law is far from moribund; the OEC "handles about 20 to 80 false statement complaints per year." *Ohio Elections Commission Gets First Twitter Complaint*, THE NEWS-HERALD (Oct. 29, 2011). The OEC has been asked to determine the "truth" or "falsity" of everything from whether a congresswoman's receipt of donations from a Turkish PAC constituted "blood money" given the Armenian genocide, *State Hears Schmidt Genocide Case*, CINCINNATI ENQUIRER, 2009 WLNR 16019649 (Aug. 14, 2009), to whether a school board "turned control of the district over to the union," Ray Crumbley, *Hearing Set on Complaint*

That School Levy Foes Violated Law, COLUMBUS DISPATCH, 1992 WLNR 4914401 (May 16, 1992), to whether a city council member had "a habit of telling voters one thing, then doing another," *Election Complaint Filed*, CLEVELAND PLAIN DEALER, 1997 WLNR 6374883 (Nov. 12, 1997), to whether a state senator had supported higher taxes by voting to put a proposed tax increase on the ballot, *Ethics Commission Says Bueher Made False Statements*, AP ALERT (Oct. 19, 2007). And at least 15 other states have analogous statutes.[2]

Yet such laws, after *Alvarez*, are almost certainly unconstitutional. *All* the Justices there agreed that laws restricting false political statements would be subject to strict scrutiny. *Alvarez*, 132 S. Ct. at 2548 (plurality); *id.* at 2552 (Breyer, J., concurring in judgment); *id.* at 2564 (Alito, J., dissenting). Even the Solicitor General conceded that laws like Ohio's "are going to have a lot harder time getting through the Court's 'breathing space' analysis." Tr. of Oral Argument 18, *Alvarez*, 132 S. Ct. 2537 (No. 11-210).

Despite that broad consensus, the Sixth Circuit's holdings assure the indefinite perpetuation of this censorious regime. Judicial review is precluded by *Younger while* enforcement proceedings are pending. And the Sixth Circuit's approach makes it impossible

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[2] *See* Alaska Stat. § 15.56.014; Colo. Rev. Stat. § 1-13-109; Fla. Stat. Ann. § 104.271(2); La. Rev. Stat. Ann. § 18:1463; Mass. Gen. Laws ch. 56, § 42; Mich. Comp. Laws § 168.931; Minn. Stat. § 211B.06; Mont. Code Ann. § 13-37-131; N.C. Gen. Stat. § 163-274(a)(8); N.D. Cent. Code § 16.1-10-04; Or. Rev. Stat. Ann. § 260.532(1); Tenn. Code Ann. § 2-19-142; Utah Code Ann. § 20A-11-1103; Wisc. Stat. § 12.05; W. Va. Code § 3-8-11.

to sue *earlier* (because prosecution is "speculative") or *later* (because past enforcement proves nothing). *See also Krikorian v. Ohio Elections Comm'n*, No. 10-CV-103, 2010 WL 41167556 (S.D. Ohio Oct. 19, 2010) (dismissing challenge after OEC issued reprimand). Thus, the *only* way to obtain federal review would be to subject oneself to prosecution and appeal to Ohio courts, hoping that this Court would grant certiorari.

Not only does that regime ensure that untold volumes of political speech will be chilled—in the context where "the constitutional guarantee has its fullest and most urgent application," *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)—but it fails to account for the abuse that has predictably become the norm. As in this case, complainants often drop their complaints once the election is over and the political damage done. *E.g.*, *Candidates for Judge's Seat Drop Complaints*, COLUMBUS DISPATCH, 2004 WLNR 21190313 (May 14, 2004); Jim Woods, *Complaint, Suit Over Election Ad Dropped*, COLUMBUS DISPATCH, 2001 WLNR 11914358 (Mar. 2, 2001); Michele Fuetsch, *Mayor Drops Complaint Against Council President*, CLEVELAND PLAIN DEALER, 1998 WLNR 7134266 (July 31, 1998). That leaves no remedy for the speaker's political injury, litigation costs, and distraction:

> The initial hearing alone can require the accused party to spend time and money preparing a defense. And savvy politicians know to make such complaints just before an election, so that the target of the complaint suffers bad publicity in the final days of the campaign, when it is too late for the complaint to be upheld or dismissed.

Speech Police, COLUMBUS DISPATCH, 2012 WLNR 5833464 (Mar. 19, 2012).

Absent this Court's review, there is no solution to the Catch-22 created by the Sixth Circuit's approach, and no way to shut down—or even obtain judicial review on the merits of—the unconstitutional regime under which every election in battleground Ohio and at least 15 other states is now conducted.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 2013