No. 13-193

IN THE

Supreme Court of the United States

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

Petitioners,

v.

STEVEN DRIEHAUS, KIMBERLY ALLISON, DEGEE WILHELM, HELEN BALCOLM, TERRANCE CONROY, LYNN GRIMSHAW, JAYME SMOOT, WILLIAM VASIL, PHILIP RICHTER, OHIO ELECTIONS COMMISSION, and JON HUSTED,

Respondents.

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

BRIEF FOR PETITIONERS

CHRISTOPHER P. FINNEY
THE FINNEY LAW FIRM
4270 Ivy Pointe Blvd.
Cincinnati, OH 45245

CURT C. HARTMAN
THE LAW FIRM OF CURT C. HARTMAN
3749 Fox Point Ct.
Amelia, OH 45102

ROBERT A. DESTRO
2312 N. Powhatan St.
Arlington, VA 22205

MICHAEL A. CARVIN
Counsel of Record
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

DAVID R. LANGDON
JOSHUA B. BOLINGER
LANGDON LAW LLC
8913 Cincinnati-Dayton Rd.
West Chester, OH 45069

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 (Kimberly Allison, Degee Wilhelm, Helen Balcolm, Terrance Conroy, Lynn Grimshaw, Jayme Smoot, and William Vasil)[*] 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.

[*] These particular Commissioners have been automatically substituted for their official-capacity predecessors pursuant to Supreme Court Rule 35(3).

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OPINIONS BELOW

The Court of Appeals' opinion (Pet.App.1a) is available at 525 F. App'x 415. The District Court's opinions dismissing the two petitioners' complaints (Pet.App.21a, Pet.App.42a) can be found at 805 F. Supp. 2d 412 and 2011 WL 3296174.

JURISDICTIONAL STATEMENT

The Sixth Circuit entered judgment on May 13, 2013, and denied rehearing en banc on June 26, 2013. Pet.App.64a. Petitioners filed their petition for writ of certiorari on August 9, 2013, and review was granted on January 10, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Addendum hereto reproduces the relevant provision of the Ohio Revised Code.

STATEMENT OF THE CASE

Believe it or not, it is a criminal offense in Ohio, punishable by fines or even imprisonment, to make a knowingly or recklessly "false" statement about a candidate for political office or a ballot initiative. Petitioners are two advocacy groups that sought to challenge that law under the First Amendment. One group criticized a sitting Congressman's support for the Affordable Care Act, labeling his vote for that Act as support for taxpayer-funded abortion. That group was then haled before Ohio's elections commission, which—by a 2-1 vote along partisan lines—found "probable cause" to believe that such speech violated Ohio's false-statement law. 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 the suits, finding the constitutional 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 commission had not reached a *final* determination on whether their speech was unlawful; and (iii) the *speakers* (SBA and COAST) maintained that their statements were true, even though the elections commission had found probable cause that they violated the law. That holding flies in the face of this Court's justiciability jurisprudence and undermines the most basic First Amendment values. As a practical matter, it also effectively insulates this patently unconstitutional regime from any federal judicial review.

A. Susan B. Anthony List Criticizes Rep. Steve Driehaus, A Member Of Congress, For Supporting The Affordable Care Act.

Susan B. Anthony List ("SBA") is a national pro-life advocacy group. During the 2010 congressional elections, SBA criticized Members of Congress—including Steve Driehaus (D-OH)—who voted for the Patient Protection and Affordable Care Act ("ACA"). SBA issued a press release announcing its plan to "educat[e] voters that their representative voted for a health care bill that includes taxpayer-funded abortion." JA49-50. SBA also planned to erect large billboards in Rep. Driehaus' district, stating: "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion." Pet.App.3a; JA37 (image of billboard). And, subsequently, SBA paid for radio advertisements to the same effect, *i.e.*, that Driehaus had "voted for taxpayer funding of abortion when he cast his vote for the health care reform bill." JA73.

B. Rep. Driehaus Hales SBA Before The Ohio Elections Commission, Alleging That Its Campaign Speech Is Criminally "False."

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 Revised Code § 3517.21(B)(10), which forbids one 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 of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate." A related statutory provision proscribes such false statements in ballot issue campaigns. *See* OHIO REV. CODE § 3517.22(B)(2). *See* Pet.App.3a.

Under the Ohio scheme, "any person" may file a complaint with the OEC alleging a violation of this law. *Id.* § 3517.153(A). The OEC has the power to issue judicially enforceable subpoenas "compelling the attendance of witnesses and the production of relevant papers." *Id.* § 3517.153(B). If a complaint alleging a false statement is filed within 60 days of a primary election or 90 days of a general election, the OEC holds an "expedited hearing." *Id.* § 3517.154(A). At that hearing, a three-member panel determines if "[t]here is probable cause to believe that the failure to comply with or the violation of a law alleged in the complaint has occurred." *Id.* § 3517.156(A), (C). If so, the panel must refer the case to the full Commission. *Id.* § 3517.156(C)(2). If the Commission then finds a violation, it "shall refer the matter to the appropriate prosecutor." *Id.* § 3517.155(D)(2).

Violation of the false-statement law constitutes a first-degree misdemeanor. *Id.* § 3599.40. "Whoever violates section 3517.21 or 3517.22 of the Revised Code shall be imprisoned for not more than six months or fined not more than five thousand dollars, or both." *Id.* § 3517.992(V). And an individual who is *twice* convicted of violating Ohio's elections code "shall be disfranchised." *Id.* § 3599.39.

Driehaus' OEC complaint centered on his claim that the Affordable Care Act does not specifically appropriate federal funds for abortions, and that SBA's speech was thus false. The dispute arises primarily from two features of the ACA. *First*, the Act creates a subsidy for lower-income individuals to help pay insurance premiums, with the money sent directly from the federal treasury to the insurer. ACA §§ 1401(a), 1412(c)(2)(A), *codified at* 26 U.S.C. § 36B; 42 U.S.C. § 18082(c)(2)(A). Under the Act, the federal subsidies may be used to subsidize abortion-inclusive coverage, but insurers purportedly cannot use the specific federal subsidy dollars to pay for most abortions. ACA § 1303(b)(2), *codified at* 42 U.S.C. § 18023(b)(2). Rather, insurers must collect a "separate payment" from enrollees and keep this payment segregated from federal funds; only those segregated dollars can be used to pay for abortions. *See* ACA § 1303(b)(2), (C), *codified at* 42 U.S.C. § 18023(b)(2), (C). Driehaus contended that this segregation rule refuted the claim that the Act finances abortion via its subsidy provisions. JA30. SBA and the National Right to Life Committee, in contrast, contend that the segregation rule is a mere accounting gimmick, because money is obviously fungible; federal funds are still being used to help buy abortion-inclusive coverage. *See* JA94-96, 167.

Second, the ACA contains multiple provisions that directly appropriate federal dollars for certain health programs, such as, for example, community health centers. ACA § 10503, *codified at* 42 U.S.C. § 254b-2. These direct appropriations are not within the scope of the Hyde Amendment, which ordinarily prohibits using federal funding for most abortions, but which only applies to funds that flow through the annual appropriations bill for the Department of Health and Human Services. *See* Pub. L. No. 113-6, § 202, 127 Stat. 198, 257 (2013) ("None of the funds appropriated *by this title* shall be available to pay for an abortion, except where the life of the mother would be endangered if the fetus were carried to term, or in the case of rape ...." (emphasis added)).

With respect to that appropriation (and others like it), Driehaus pointed to an Executive Order issued after passage of the ACA that purports to extend the Hyde Amendment to community health center funds. EXEC. ORDER No. 13535, § 3, 75 Fed. Reg. 15599 (Mar. 24, 2010). But, of course, the need for an Executive Order to prohibit these funds being used for abortions confirms that the Act standing alone does allow for those taxpayer-funded grants to do so. *See* JA88. Moreover, the Hyde Amendment itself authorizes federal funds to pay for abortions at least in some cases (such as rape or to protect the life of the mother), which means that SBA's statements were factually true regardless.

C. The Ohio Elections Commission Complaint Succeeds In Suppressing SBA's Speech.

By moving quickly to stifle SBA's speech, Driehaus managed to keep the billboard from going up. Instead, "the advertising company that owned

the billboard space refused to put up the advertisement after Driehaus' counsel threatened legal action against it" under Ohio's false-statement law. Pet.App.3a. In particular, on the same day as he filed his OEC complaint, Driehaus (through his counsel) sent a letter to the advertising company that was supposed to erect SBA's billboards. JA26. The letter indicated that Driehaus would not file OEC proceedings against the company under the false-statement statute—if it refrained from posting the billboards. The company acceded to that threat and refused to post the billboards. Pet.App.3a.

D. The Commission Finds Probable Cause To Believe That SBA's Speech Was Criminal.

As a result of Driehaus' complaint, SBA was forced to divert its time and resources—in close proximity to the election—to hire legal counsel to defend itself before the OEC. Because Driehaus filed his complaint 29 days before the election, a Commission panel held an expedited probable-cause hearing on it. The panel 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. Dkt. 25-5, at 29. Driehaus then pursued voluminous discovery requests to SBA and third parties. Pet.App.4a. Among other things, Driehaus noticed depositions of three SBA officials and subpoenaed officials of other organizations that, like SBA, understand the ACA as including taxpayer-funded abortion. JA55-58. Driehaus also sought stunningly broad production of documents—including, for instance, communications with ally organizations, political party committees, and Members of Congress and their staff. JA67-71.

E. Coalition Opposed To Additional Spending And Taxes Refrains From Criticizing Driehaus Due To The OEC Enforcement.

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; *see also* JA162 (text of proposed COAST message). But, due to the then-ongoing action against SBA, it was afraid that doing so would expose it to enforcement actions and potential criminal penalties. Pet.App.6a.

F. SBA And COAST Challenge The Ohio Law In Federal First Amendment Lawsuits.

While Driehaus' complaint was pending before the Commission, SBA filed a federal suit challenging the constitutionality of the Ohio law. Pet.App.4a-5a. The district court stayed that suit due to the pending OEC proceedings. *Younger v. Harris*, 401 U.S. 37 (1971). Ultimately, Driehaus lost reelection and the OEC allowed him to withdraw his complaint. JA131. The court then lifted the stay, and consolidated SBA's suit with a separate suit filed by COAST.

SBA and COAST amended their complaints to allege that they wanted to engage in similar speech in the future but were chilled. Pet.App.5a; JA149, 157 (COAST allegation that it "desires to make the same or similar statements about other federal candidates who voted for ObamaCare" during future elections, but would not, due to fear "of finding itself subject to the same fate" as SBA); JA122 (SBA allegation of intent to engage in similar speech). Driehaus filed a defamation counterclaim against SBA based on the abortion-funding "falsehood."

G. The District Court Dismisses Both Suits On Jurisdictional Grounds, But Allows Driehaus' Defamation Suit To Proceed.

After consolidating the suits, the district court dismissed both. As to COAST, the court reasoned that because a "hypothetical person" would have to file a complaint against it, and the OEC would have to issue a "hypothetical finding that there is probable cause to proceed on such," COAST's injury was "far too attenuated." Pet.App.57a. COAST's "subjective chill" was not cognizable injury, either, because the threat of future prosecution was too speculative; "no complaint against COAST has been or is pending before the Commission." Pet.App.58a. Moreover, because COAST maintained that its criticisms of Driehaus were true, it supposedly "has not even alleged any intention not to comply with Ohio's false statement statute." Pet.App.56a.

The court employed similar reasoning to dismiss SBA's suit: SBA lacked standing because it had no evidence that the false-statement law "will be immediately enforced against it." Pet.App.34a. "Whether the Commission, Mr. Driehaus, or the Secretary of State may at some future point seek to enforce Ohio's false statement … statutes against [SBA] on the basis of some future statement is contingent on a number of uncertain events." Pet.App.26a n.6. Any "chill" of SBA's speech was thus not injury-in-fact. The court added that, while SBA had been subject to enforcement action, its challenge was still unripe because the Commission had not reached a final merits determination. "Without enforcement action pending at any stage, a case or controversy does not exist." Pet.App.29a.

As to Driehaus' counterclaim, the court held that SBA's statements were factually false because the ACA did not directly appropriate federal funds for the express purpose of funding abortions. *See Susan B. Anthony List v. Driehaus*, 805 F. Supp. 2d 423, 435-36 (S.D. Ohio 2011). Nonetheless, the court later granted summary judgment to SBA, holding that the statements were not defamatory under Ohio law. *Susan B. Anthony List v. Driehaus*, No. 1:10-cv-720, 2013 WL 308748, at *3 (S.D. Ohio Jan. 25, 2013).

H. The Sixth Circuit Affirms The Dismissals On Ripeness Grounds.

SBA and COAST each appealed the district court's dismissal of their suits, and the Sixth Circuit resolved both appeals in one opinion. The panel relied on prior Sixth Circuit precedent holding that neither past enforcement actions nor allegations of chill suffices to show injury-in-fact from a speech-suppressive rule; rather, a plaintiff must 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)).

Applying that standard, the panel reasoned that the OEC's finding of probable cause was *irrelevant*, because it was not a "final adjudication" of liability. Pet.App.12a. And, while anybody could file an OEC complaint and "set the wheels" of enforcement in motion, the court found it "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 so. 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 also 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. Pet.App.18a. "COAST has never been involved in a Commission proceeding and no individual has enforced or threatened to enforce the challenged laws against it." *Id.*

SUMMARY OF ARGUMENT

Two terms ago, this Court held that even false statements are protected by the First Amendment. *See United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012). "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *Id.* Indeed, laws proscribing generalized false speech cast "a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *Id.* at 2548. Even the dissenters there agreed that, at least as to "matters of public concern," laws proscribing false statements would create a "potential for abuse of power" "simply too great" for the First Amendment to tolerate. *Id.* at 2564 (Alito, J., dissenting); *see also id.* at 2555 (Breyer, J., concurring in judgment) ("in political contexts, … the risk of censorious selectivity by prosecutors is … high"). As all nine 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, and enforced by state "Ministries of Truth" like the Ohio Elections Commission. *See infra* at 55. 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.

In this case and others, however, the Sixth Circuit has misapplied justiciability principles to bar the courthouse door to those directly victimized by Ohio's suppression of core political speech. Indeed, the Sixth Circuit has created a paradigmatic Catch-22, whereby a speech-restrictive law cannot be challenged in federal court before, during, or after OEC enforcement proceedings—only once a speaker has been successfully convicted. Under its decisions, a challenge *prior* to enforcement is too "speculative," even if enforcement proceedings are pending against another speaker based on the *same* speech (COAST). *During* enforcement, *Younger* is invoked to preclude review. And even *after* the statutorily designated "truth commission" finds probable cause that a criminal law has been violated, there is purportedly still no "credible threat of prosecution," even against the *same* speaker for the *same* speech (SBA)—unless, perhaps, he falsely avers that his speech is "false." So political opponents remain free, through the OEC, to compel speakers to defend their speech in burdensome and costly proceedings in the midst of a campaign, with no meaningful judicial review.

Thus, under the decision below, federal judicial review—not only of this law, but of any open-ended, speech-suppressive statute—can only be had once a party is convicted. That is very wrong, and very much at odds with this Court's precedent.

I. As this Court has long recognized, if there exists a "credible threat" that one's speech will be penalized under a speech-suppressive law, a speaker may pursue a pre-enforcement challenge to that law. And this Court has repeatedly found a "credible threat" based on just the existence of the law and the party's intent to take action that may be perceived as violating it. At least absent an express commitment by prosecutors *not* to enforce the law, such a party has a plain basis to fear prosecution. Particularly in the First Amendment free speech context, any contrary rule—*i.e.*, requiring the speaker to suffer indignities, expenses, and penalties before he may adjudicate his constitutional rights—would result in self-censorship, degrading robust political debate.

Here, there can be little doubt that petitioners face *more* than just a "credible" threat if they repeat their criticism of ACA-supporting candidates. The OEC has already found that the criticism "probably" violates the false-statement law. And, under the Ohio regime, *any* citizen who supports the candidate under attack may file a complaint, thereby triggering the expensive, burdensome enforcement proceedings to which SBA has already been subjected once.

II. None of the contrary rationales offered by the court below can withstand even glancing scrutiny. Its rationales are fundamentally incompatible with basic First Amendment values and this Court's consistent precedent.

First, it is irrelevant that *petitioners* believe (correctly) that their statements are true. The *OEC* has declared otherwise, and it is the OEC that is designed to threaten speakers with criminal prosecution and other burdens in the crucial weeks before an election. Moreover, the fundamental reason for protecting even *false* campaign speech is to prevent *truthful* speech from being chilled through fear of burdens like those that SBA faced. It is thus particularly perverse to bar precisely those chilled, truthful speakers from obtaining judicial review; they are the ones who need and deserve it most.

Second, there is no need for a "final," "definitive" ruling by the OEC on the legality of the intended speech *before* a speaker may challenge a law that arguably proscribes it. It is the credible *threat* that creates the impending injury, but the Sixth Circuit effectively requires its *realization*. Plus, the burden of being subject to inquisitorial proceedings is *itself* injury, even if the OEC ultimately exonerates the speaker. The Sixth Circuit's regime would insulate even the most open-ended speech codes from review unless someone is brave enough to expose himself to those procedural burdens and criminal penalties.

Third, the "chill" from a speech-restricting law that arguably reaches the plaintiff's speech is hardly "subjective." When there exists a "credible threat" of prosecution for violating a speech restriction, the state has clearly imposed a palpable burden on speech, *objectively* chilling citizens from uttering the arguably proscribed speech. To be sure, when a law does *not* impose any penalties on speech, one cannot manufacture a justiciable case by self-censoring. But

that doctrine has never been applied to a law like Ohio's that, on its face, criminalizes speech.

Fourth, the OEC enforcement regime makes the threat of prosecution *more* credible, not less. Under the statute, *any* politically motivated citizen may file a costless complaint and trigger proceedings. Even in the typical case, where only politically accountable prosecutors may enforce the law, courts recognize standing: The norm is that prosecutors will faithfully execute the laws and, anyway, the First Amendment "does not leave us at the mercy of *noblesse oblige*," *United States v. Stevens*, 559 U.S. 460, 480 (2010). *A fortiori*, there is standing where, as here, the enforcement threat is multiplied because the power to commence proceedings is given to every politically motivated citizen. Relatedly, while the OEC cannot impose criminal penalties, its enforcement actions and probable-cause findings independently burden speech in many other respects, and presage criminal enforcement by prosecutors. (And there is certainly no reason to presume that prosecutors will not prosecute speech that the statutorily designated expert agency has concluded violates the law.)

Fifth, there is no merit to the suggestion that petitioners were not actually "chilled" by the Ohio law and the OEC enforcement effort. SBA continued to spread its message only while OEC charges were pending against it; after they were dismissed, nobody disputed that it was chilled from repetition. And COAST indisputably refrained from speaking due to fear of facing SBA's fate (or worse).

Sixth, for the same reasons that the Sixth Circuit erred in evaluating the "credible threat" inquiry, it also misapplied the prudential ripeness factors.

III. The Sixth Circuit's wrongheaded approach 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, the Sixth Circuit's restrictive rulings have 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. All that political opponents need do, as they have routinely done in Ohio, is complain about controversial speech and obtain politically valuable "probable cause" findings *before* the election, and then drop the complaints *after* the election, once the damage has been done and the speech can no longer influence electoral decisions. The statute is thereby shielded from any judicial review—and will continue to be, absent correction by this Court.

ARGUMENT

I. PETITIONERS CLEARLY FACE A "CREDIBLE THREAT OF PROSECUTION" UNDER OHIO'S CRIMINAL FALSE-STATEMENT LAW.

There is no dispute that a speaker may pursue a pre-enforcement First Amendment challenge to a speech-proscribing law if he faces a "credible threat of prosecution." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Speakers should not have to risk criminal penalties to participate in the marketplace of ideas, particularly the political marketplace. Pre-enforcement review is thus required to eliminate the prosecutorial threat that would inevitably cause all but the most courageous speakers to remain silent—which, in turn, would render freedom of speech illusory.

In view of that rationale, and as this Court's cases all confirm, the "credible threat" test is not especially demanding. It does not require a *particularized* threat or *undisputedly* unlawful speech, much less a prior *conviction*. The fact that a speech-proscribing law is on the books and has not been disavowed by authorities is enough to allow a challenge by any speaker whose intended speech arguably falls within the law's scope.

That standard is more than satisfied in this case. Petitioners' intended speech was *in fact* subjected to enforcement proceedings during the 2010 elections, and the Commission—charged with adjudicating alleged violations of the false-statement law and referring violations to prosecutors—actually declared that there was probable cause that engaging in the speech was a criminal offense. The threat faced by petitioners here is therefore well beyond "credible."

A. A "Credible Threat" Of Prosecution Exists If A Speaker's Intended Speech Is Arguably Proscribed By A Law On The Books.

This Court's justiciability jurisprudence clearly holds that pre-enforcement review is proper when a plaintiff would risk potential penalties under a law that the government has not disavowed. Particularly in the First Amendment context, any contrary rule would impose an obvious burden on basic freedoms.

1. To challenge a statute on a pre-enforcement basis, a plaintiff must "demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt*, 442 U.S. at 298. Otherwise there would be no "case or controversy" within the meaning of Article III of the Constitution. Yet one "does not have to await the

consummation of threatened injury to obtain preventive relief." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). Thus, in the context of a challenge to a criminal law, "it is not necessary that the plaintiff 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 v. Thompson*, 415 U.S. 452, 459 (1974); *see also Doe v. Bolton*, 410 U.S. 179, 188 (1973) (holding that plaintiff "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"). "[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) (emphasis omitted).

Accordingly, such a pre-enforcement challenge is justiciable if "the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt*, 442 U.S. at 298. And the standard for proving existence of a "credible threat" under *Babbitt* is not rigorous or demanding. To be sure, pre-enforcement review would not be proper if a plaintiff's supposed fear of prosecution were merely "imaginary." *Younger*, 401 U.S. at 42. But the circumstances in which this Court has found a credible threat—even in cases involving less-protected commercial or sexually explicit speech—illustrate that the prerequisites are minimal, especially when core political speech is implicated.

Babbitt itself concerned an Arizona state law prohibiting unions from inducing consumers, via "dishonest, untruthful, and deceptive publicity," to refrain from buying certain products. 442 U.S. at 301. Although the provision "ha[d] not yet been applied," this Court found a "credible threat." *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)). 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.* at 302.

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." *Id.* at 393. The plaintiffs thus had "an actual and well-founded fear that the law will be enforced against them," notwithstanding that the plaintiffs had brought their challenge before the statute even took effect. *Id.* And although it was not clear whether the statute actually applied to the plaintiffs' proposed conduct, that did not matter; it

sufficed, this Court ruled, that "if [the plaintiffs'] 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. In *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), this Court allowed "preenforcement review" of criminal provisions barring material support to terrorist groups, 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 the absence of countervailing evidence was sufficient to create a "credible threat of prosecution." *Id.*

As these decisions confirm, if a plaintiff alleges an intent to engage in conduct that *arguably* violates a statute, and the government does not *disavow* enforcement of that statute, that is enough to presume a credible threat of prosecution.

2. Faithfully applying these precedents, all Circuits to reach the issue—except the Sixth—have likewise presumed a credible threat of prosecution if a 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. *See, e.g.*, *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 16 (1st Cir. 1996) ("[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."); *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 31-32 (1st Cir. 1999) (allowing pre-

enforcement review where law, although never enforced, had not "fallen into desuetude," nor had state "disavowed" it); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003) (holding that "evidentiary bar that must be met [to show credible threat] is extremely low," requiring "long institutional history of disuse"); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000) (allowing review where, under "reasonable enough" construction of statute, plaintiff "may legitimately fear that it will face enforcement of the statute by the State"); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710-11 (4th Cir. 1999) (allowing challenge where prosecutors expressed no "intention of refraining from prosecuting"); *Commodity Trend Serv., Inc. v. CFTC*, 149 F.3d 679, 687 (7th Cir. 1998) (holding 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"); *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) ("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."); *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485-86 (8th Cir. 2006) (allowing review where plaintiffs had not "been threatened … with prosecution," because statute was not "dormant" and state had "not disavowed" it); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003) (holding that review is proper "if the plaintiff's intended speech arguably falls within the statute's reach"); *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"); *Chamber of Commerce v. FEC*, 69 F.3d 600, 603-04 (D.C. Cir. 1995) (allowing pre-enforcement suit despite lack of "any present danger of an enforcement proceeding," because one member of deadlocked agency could always change his mind).

3. While the foregoing principles apply to all constitutional rights, they have special importance in the free speech context. That is, this Court does not require those who wish to exercise their Second Amendment rights, abortion rights, or property rights, to risk suffering criminal penalties in order to obtain review either. *See District of Columbia v. Heller*, 554 U.S. 570, 575-76 (2008) (allowing pre-enforcement challenge to registration requirement for handgun); *Doe*, 410 U.S. at 188 (in abortion challenge, "physician-appellants … should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"); *Ex parte Young*, 209 U.S. 123, 145-46 (1908) (holding that company could not be required, "in order to test the validity" of statute, to run risk of "fines and penalties being imposed"). But the considerations that justify pre-enforcement review are particularly compelling in the First Amendment context.

As this Court has warned, "speakers may self-censor rather than risk the perils of trial." *Ashcroft v. ACLU*, 542 U.S. 656, 670-71 (2004). As such, "[t]here is a potential for extraordinary harm and a serious chill upon protected speech." *Id.* at 671. The chill caused by self-censorship, importantly, affects not only the putative speaker, but also the many

people who would otherwise be *listening* to that speech—and so taints, especially in the political context, the entire democratic process. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003) ("Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57 (1984) ("[W]hen there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged."); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("[F]ree expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser"); *N.Y. Times*, 376 U.S. at 279 (noting that self-censorship "dampens the vigor and limits the variety of public debate").

That is why this Court's First Amendment jurisprudence has so strongly condemned statutes that tend to "chill" protected speech by inducing fear of government penalties. *See, e.g.*, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50 (1971) (plurality op.) (invalidating statute that "would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate"); *City of Lakewood v. Plain Dealer Pub'g Co.*, 486 U.S. 750, 759 (1988) (condemning unbridled licensing schemes as causing "self-censorship by speakers in order to avoid being denied a license"); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (describing "vice" of statute as inducing speakers to "steer far wider of the unlawful zone"

due to inherent risk that "legitimate utterance will be penalized"). Of course, if the risk of "chill" is enough to invalidate a statute *on the merits*, then it is *a fortiori* sufficient to allow the speaker to seek preemptive review. *Am. Booksellers*, 484 U.S. at 393 (allowing pre-enforcement review because "alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution"). *Cf. Dombrowski*, 380 U.S. at 487 (noting that Court has allowed overbreadth challenges because, "[i]f the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation").

Thus, while it may be appropriate to require a slightly higher quantum of evidence to prove a credible threat of prosecution under laws implicating *other* constitutional rights, the threshold must be very low in First Amendment cases. *See Seegars v. Gonzales*, 396 F.3d 1248, 1252, 1253 (D.C. Cir. 2005) (noting that, while test may be more demanding for laws "not burdening expressive rights," it suffices in First Amendment cases that "the law is generally enforced"). Any other approach would, as explained, invite the very "chill" that this Court's First Amendment jurisprudence condemns.

4. In short, once the government enacts a law that limits speech, there is a tangible controversy between the state and any speaker whose intended speech arguably violates that law. Federal courts therefore plainly have the Article III power to adjudicate whether that burden is facially unconstitutional before the government *exacerbates*

that injury and burden by seeking to *imprison* or *fine* the speaker. That is because threatened enforcement, not just actual conviction, cognizably burdens the citizenry's right to speak and because a justiciability rule that required conviction first would allow the state to burden speech without judicial recourse, by silencing the vast majority of speakers whose speech is deterred by the threats.

Imposing the costs and burdens of defending against government enforcement efforts as an entry barrier to participate in the marketplace of ideas thus creates a tangible speech burden *now,* not merely a hypothetical, contingent speech burden in the future. Obviously, a law requiring citizens to pay $1 before they could publicly comment on electoral issues or candidates for office would be immediately justiciable (and promptly invalidated). Since the costs of defending against government enforcement are exponentially larger than $1, and the potential further burden of imprisonment deters even those who can readily absorb such defense costs, it is quite clear that a credible threat of prosecution gives rise to an immediate First Amendment controversy.

Finally, it is important to note that such threats of prosecution infringe speech to a greater extent when the relevant statute imposes a broad or ambiguous speech restriction, rather than a precisely defined one. By definition, such ambiguous, open-ended statutes arguably reach more speech than narrow, precisely crafted prohibitions and so *deter* more speech, since the speaker's rights are unclear and subject to the broad enforcement discretion of potentially politically motivated officials. *See, e.g.*, *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (vague

statutes that "abut upon sensitive areas of basic First Amendment freedoms" are highly troubling as they cause individuals to "restric[t] their conduct to that which is unquestionably safe").

Accordingly, it is quite clear that speakers who intend to engage in speech arguably prohibited by a statute, particularly a statute imposing an open-ended restriction, have standing to challenge the law as facially unconstitutional unless prosecutors have wholly foreclosed the possibility of any enforcement.

B. Petitioners Clearly Satisfied That Standard, Given The Probable-Cause Finding Rendered As To Their Intended Speech.

There can be no serious question that, given the law described above, SBA and COAST face a credible threat of prosecution under Ohio's false-statement law if they repeat their criticism of those who voted for the Affordable Care Act (as they wish to do).

When SBA and COAST filed their suits, SBA was facing *actual* enforcement proceedings for its speech critical of Driehaus. Thus, if analyzed at the time of the complaints' filing, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992), it would be preposterous to hold that petitioners faced no threat of enforcement *even as enforcement was ongoing*.

And, of course, the OEC panel found in that proceeding that there was probable cause to believe that SBA's speech had violated the false-statement law. Pet.App.4a. So if measured at the time that the district court resumed proceedings after the dismissal of the OEC proceeding (or at any other time thereafter), that "probable cause" finding made very clear to SBA and COAST that repeating their message would likely subject them to similar

enforcement actions. And, if any doubt remained, it was resolved by the district court's own holding, in the related defamation action, that SBA's statements were factually false. *See Susan B. Anthony List*, 805 F. Supp. 2d at 435-36. As incredible as that holding was, it would inevitably be invoked by complainants in the future to show that SBA or COAST "recklessly disregarded" the "falsity" of their interpretation of the ACA, because they repeated their message even after a neutral federal court had said it was untrue.

Petitioners' evidence of a "credible threat" thus far exceeds that in *Babbitt*, *American Booksellers*, and *Humanitarian Law Project*. In none of those cases had the law previously been enforced against the *same* speech. Indeed, in *Babbitt* the law "ha[d] not yet been applied" at all, 442 U.S. at 302; in *American Booksellers*, suit was filed even "before the statute became effective," 484 U.S. at 392. Nor was there *affirmative* evidence in any of the cases that enforcement authorities would view the plaintiffs' conduct as violating the laws. In *Humanitarian Law Project*, this Court cited only the *lack* of any claim that the Government would *not* prosecute. 130 S. Ct. at 2717. Likewise, in *American Booksellers*, the State offered a narrow construction of the statute, but this Court still found a justiciable controversy because the State "has not suggested that the newly enacted law will *not* be enforced." 484 U.S. at 393 (emphasis added). And in *Babbitt* the plaintiff did not even intend to violate the law, merely alleging that, because errors are "inevitable," it would self-censor out of fear of "inadvertently" doing so. 442 U.S. at 301. By contrast, the OEC's probable-cause finding offered as clear a threat as can be imagined—absent actual conviction—of the likely outcome of

petitioners' intended speech. This past enforcement is icing on the justiciability cake.

As such, had this case arisen in any other Circuit, the court would have applied the ordinary presumption that, if a statute is not "moribund" (as the false-statement law clearly is not), and the State has not "demonstrate[d] that [it] … will not be enforced" (as Ohio clearly has not), then a credible threat exists. *N.H. Right to Life*, 99 F.3d at 15-16.

Indeed, *281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. 2011), addressed a challenge to Minnesota's materially identical false-statement law. The plaintiff was a group opposed to a school-funding ballot initiative; a school official told the media that the school district was "investigating" the group for spreading "false" information about the initiative. *Id.* at 626. The Eighth Circuit allowed the challenge, explaining that, "[t]o establish injury in fact …, 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 the law had been "infrequent[ly]" enforced, "only in extreme cases approaching desuetude" may the lack of enforcement "undermine the reasonableness of chill." *Id.* at 628.

In short, ordinary justiciability standards would clearly have allowed petitioners to challenge the Ohio statute here—not forced them to a choice between self-censorship and possible prosecution.

C. The Other Ripeness Factors Are Also Clearly Satisfied Here.

While the above addresses Article III ripeness (which here is the same as Article III standing), it is equally clear that SBA and COAST satisfy this Court's "prudential considerations" for determining whether a case is ripe for review. *Duke Power Co. v. Carolina Envt'l Study Grp., Inc.*, 438 U.S. 59, 81 (1978). Those factors require the Court to "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001).

First, petitioners' claims are undeniably fit for decision. Because SBA and COAST contend that the Ohio false-statement law is invalid on its face, "[t]he issue presented in this case is purely legal, and will not be clarified by further factual development." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985). Either the Constitution allows Ohio to criminalize "knowingly false" representations made during political campaigns, or it does not (and this Court's recent jurisprudence provides good reason to believe the latter). Resolution of that First Amendment question has nothing to do with the "truth" of the specific statements made by SBA, COAST, or anyone else.[1] And even if some factual record *were* necessary to resolve this purely legal question, the prior OEC proceedings against SBA provide a ready demonstration of how the false-

[1] Moreover, the "truth" of petitioners' statements here—though irrelevant to the constitutional issue—is *itself* a pure question of law, since its "truth" turns on interpreting the ACA.

statement law actually operates. Denying review to allow for any further factual development "would not … significantly advance [a court's] ability to deal with the legal issues presented nor aid [a court] in their resolution." *Duke Power Co.*, 438 U.S. at 82; *see also, e.g.*, *Whitman*, 531 U.S. at 479 ("The question before us here is purely one of statutory interpretation that would not 'benefit from further factual development of the issues presented.'" (citation omitted)); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) (confirming that where issue is even "predominantly legal," "resolution of [that] issue need not await [further] development").

Second, denying prompt judicial review would impose a substantial, undeniable hardship on SBA and COAST. If the Ohio statute is insulated from pre-enforcement review, petitioners must choose between engaging in core expressive activity on matters of public concern and avoiding the threat of costly, inquisitorial OEC proceedings and even criminal prosecution. That directly contradicts this Court's longstanding refusal to place plaintiffs "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what [they] believe[] to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel*, 415 U.S. at 462.

Conversely, Ohio suffers no hardship in defending the Act's constitutionality before delving into a contested OEC proceeding about the "truth" of petitioners' statements and their "actual malice." To the contrary, it is in the State's interest to promptly know whether its regime is facially unconstitutional,

so it can save resources in implementing the invalid regime (if it loses on the merits) or remove the cloud over the law (if it prevails).

In short, because the courts "will be in no better position later than [they] are now" to consider SBA and COAST's claims, *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 145 (1974), there is simply no reason—let alone a good one—for allowing this material hardship on speech to persist. This case is plainly ripe for judicial review.

II. THE SIXTH CIRCUIT'S ARGUMENTS TO THE CONTRARY ARE FUNDAMENTALLY AT WAR WITH BASIC FIRST AMENDMENT VALUES.

In the decision below, the Sixth Circuit offered an assortment of reasons for why pre-enforcement review should not be allowed. Those reasons, which the Sixth Circuit has also invoked in other cases, fundamentally misunderstand the injuries caused by speech-suppressive laws. They result in a regime under which a plaintiff must *admit* that his speech would violate the law, and prove that he would *almost certainly* be *successfully* convicted, in order to bring a constitutional challenge to that law. That is plainly untenable. 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 are both unnecessary for justiciability and irreconcilable with basic free speech principles. It is, rather, the threat of facing enforcement proceedings and potential criminal penalties that chills speech and constitutes Article III injury.

A. The *Speaker's* Position On Whether His Speech Violates The Law Is Irrelevant.

The Sixth Circuit held that petitioners could not "establis[h] ripeness" because they would "not say that [they] pla[n] to lie or recklessly disregard the veracity of [their] speech." Pet.App.15a. Admitting guilt is a prerequisite that the Sixth Circuit has also imposed in other pre-enforcement First Amendment challenges. *Fieger*, 553 F.3d at 965 (plaintiffs did not allege unlawful intent "to make vulgar, crude, or personally abusive remarks"); *Norton*, 298 F.3d at 554 (noting that "plaintiffs have professed an intention to comply with the" statute).

1. Subjective inquiry into whether the *speaker* believes his intended speech would violate the law, however, simply has nothing to do with the credible-threat test. The relevant question, under that test, is whether the speaker reasonably fears enforcement of the law against him, and that obviously turns on what *enforcement authorities* think. Courts thus routinely look to what enforcement authorities have said on the question whether the intended speech violates the law—but never (at least outside the Sixth Circuit) to what the *speaker* may think about that. *See, e.g.*, *Am. Booksellers*, 484 U.S. at 393 (citing State's lack of disavowal of prosecution); *Humanitarian Law Project*, 130 S. Ct. at 2717 (same); *Lopez v. Candaele*, 630 F.3d 775, 786-90 (9th Cir. 2010) (dismissing where "[n]o [school] official" suggested that sexual harassment policy would apply to intended speech); *PETA v. Rasmussen*, 298 F.3d 1198, 1203 (10th Cir. 2002) (dismissing where defendants agreed they had "misinterpreted" law as proscribing the conduct at issue); *Am. Library Ass'n*

v. Barr, 956 F.2d 1178, 1192-93 (D.C. Cir. 1992) (question is "how likely it is that the government will attempt to" enforce statute against plaintiffs).

As the Eighth Circuit thus explained in *281 Care*, since determining truth "often proves difficult" in "the political-speech arena," plaintiffs' "reasonable worry that state officials … will interpret [their] actions as violating the [false-statement] statute" was enough, even though they (like petitioners here) did not allege an intent to lie. 638 F.3d at 629-30.

Here, the Commission *already found* that petitioners' speech is probably criminal, providing "strong evidence" of a "credible threat," *Lopez*, 630 F.3d at 786-87, and making petitioners' fears even more reasonable than those of the speakers in *281 Care Committee*. Indeed, a complainant in a future OEC action would surely invoke the prior probable-cause finding to prove that SBA *knowingly* lied, by repeating its message notwithstanding that finding. Because petitioners' belief in the truth of their own speech does not remotely reduce the chance that a complainant would pursue enforcement, or the chance that the OEC would again find probable cause, or the chance that a prosecutor would file charges, it makes no sense for the ripeness inquiry to consider that belief—much less to turn on it.

2. Indeed, it would be ironically perverse to exclude from the courthouse only those speakers who believe that they are engaging in *truthful* speech. The reason why laws like Ohio's are constitutionally deficient is precisely because of their chilling effect *on truthful speech*. *See Alvarez*, 132 S. Ct. at 2548 (plurality op.) ("The mere potential for the exercise of that power [to prohibit false speech] casts a chill"

that the "First Amendment cannot permit."); *id.* at 2553 (Breyer, J.) (proscribing false speech "can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart"); *id.* at 2564 (Alito, J.) (agreeing that, in the political context, "any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech"). Thus, the Sixth Circuit's approach excludes as plaintiffs the precise speakers that the First Amendment is supposed to protect. Petitioners' objective, reasonable fear of enforcement and the ensuing self-censorship of their own truthful speech makes them the *ideal* plaintiffs to vindicate the constitutional values at stake.

Moreover, the decision below also shields from review precisely the laws that are most offensive to the Constitution. The more vague, open-ended, or discretionary the speech-proscribing law, the more difficult it is to determine whether intended speech violates the law—and therefore the more difficult for a plaintiff to aver that it does. But as noted, those laws are also the *most* constitutionally problematic. Their malleable nature vests the enforcer with broad discretion to both interpret the statutory scope and choose the citizens to be prosecuted. Such unfettered discretion is always subject to potential abuse, especially in the electoral context. Relatedly, it chills more speech than a bright-line prohibition because speakers at the margins will be deterred from arguably crossing the ill-defined line. *See Baggett*, 377 U.S. at 372 (vague statutes that "abut upon sensitive areas of basic First Amendment freedoms" are troubling as they cause individuals to "restric[t] their conduct to that which is unquestionably safe");

Lakewood, 486 U.S. at 757 ("[T]he mere existence of the licensor's unfettered discretion … intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."); *Schirmer v. Nagode*, 621 F.3d 581, 586-87 (7th Cir. 2010) ("[U]ncertainty is particularly problematic in the realm of free speech, given the danger that vital protected speech will be chilled.").

For example, *Playboy*'s publisher would not believe that the magazine violates a law barring "offensive depictions of women" and *The New Republic*'s publisher would not think it violated a law prohibiting "unsubstantiated criticism" of public officials. Yet, although such laws are plainly unconstitutional precisely because they impose amorphous, overbroad speech restrictions, the Sixth Circuit's perverse test would immunize them from challenge until after the magazines were prosecuted.

In other words, the Sixth Circuit's "admission of guilt" prerequisite is exactly backwards. On its view, *truthful* speakers who are chilled by *vague* statutes of *uncertain* scope would be precluded from bringing pre-enforcement challenges, even though those are the speakers for whom, and the statutes for which, such anticipatory review is the *most* critical.

Here, the Ohio law proscribes "false" political speech, with liability thus turning on the impossibly open-ended concept of political "truth." Candidates routinely accuse one another of "lying," but—as this case illustrates so well—these are invariably debates over characterization or context, not black-or-white facts. Thus, as this case again so vividly illustrates, the potential for politically motivated abuse is great. *See also infra* Part III.

3. As if that were not bad enough, the Sixth Circuit's insistence on a preemptive and untrue *confession* of criminal intent *itself* greatly chills speech. Announcing oneself to be a liar is generally not an advisable way to gain credibility in politics. Indeed, the Sixth Circuit's demand for preemptive confession would grant the subject of the criticism at issue a complete response: "My opponent has already *admitted* in federal court that his attacks are false!" Given the political context of the false-statement statute, the Sixth Circuit's rule—you may get into court if you admit that you are a liar—only *exacerbates* the law's chilling effect.

Perhaps even worse, requiring a preemptive *admission* of knowing falsity as a prerequisite to opening the federal courthouse doors effectively coerces plaintiffs to confess to a crime. Since such a confession would, as a practical matter, effectively compel a prosecutor to charge the admitted violator, the stakes for *pre-enforcement* review would be all but indistinguishable from raising the Constitution as a *defense* to a prosecution—*i.e.*, the plaintiff will either prevail on the challenge or risk imprisonment. This is, of course, precisely the dilemma sought to be avoided by pre-enforcement review. Even if such coerced self-incrimination is permissible under the Fifth Amendment, it cannot possibly be reasonably imposed as a threshold standing requirement.[2]

---

[2] While a speaker who has not already uttered the "false" speech could avoid prison, these disputes inevitably occur after the speech has been uttered at least once, when the political opponent threatens the speaker or media outlet involved. And if a challenge were filed *before* such a dispute, the Sixth Circuit would find the threat of prosecution speculative. *Infra* Part II.B.

4. The Sixth Circuit worried that, without a confession of criminal intent, petitioners' fear would amount to fear "of a false prosecution." Pet.App.15a. Maybe so, in that petitioners believe their speech is truthful. But that does not mean that their fear is not *credible*; it clearly is, given the OEC's past finding. And the chilling effects caused by the risks of "false" prosecutions, "false" convictions, and "false" liability awards have long been sufficient even to *invalidate* laws under the First Amendment. *See, e.g.*, *Speiser*, 357 U.S. at 526 (citing "possibility of mistaken factfinding"); *Baggett*, 377 U.S. at 374 ("Even if it can be said that a conviction … would not be sustained, the possibility of a prosecution cannot be gainsaid."); *N.Y. Times*, 376 U.S. at 279 (citing chill "even though [criticism] is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court"). Such risks are thus *a fortiori* sufficient for *standing*.

B. No "Final Determination" That The Intended Speech Is Illegal Is Needed In Order To Create A Credible Threat Of Prosecution.

The Sixth Circuit held that the past enforcement of the false-statement law against SBA was not evidence supporting any fear of future enforcement, but merely a "prior injury," "not enough to establish prospective harm." Pet.App.9a. To create a credible threat of future prosecution, the court reasoned, the OEC would have to have "*found* that [SBA] *violated* [the] law." Pet.App.10a (emphases added); *see also* Pet.App.11a (noting that probable-cause finding "is neither a 'definitive statement of position,' nor a 'definitive ruling or regulation'" (quoting *FTC v. Standard Oil of Cal.*, 449 U.S. 232, 241-42 (1980))).

In other words, the Sixth Circuit requires the speaker to prove to a *near-certainty* that he would be *successfully* prosecuted. That, in practice, means that a speaker may pursue a "*pre*-enforcement" challenge only *post*-enforcement, because authorities do not issue preemptive "definitive" statements about whether conduct is unlawful. Again, this is a rule that the Sixth Circuit has applied repeatedly. *E.g.*, *Fieger*, 553 F.3d at 967 (attorney must "present evidence" that "Michigan Supreme Court would … impose … sanctions" under "civility" rule); *Morrison*, 521 F.3d at 610 ("The record is silent as to whether the school district … would have punished Morrison for protected speech in violation of its policy."). *Cf. Briggs v. Ohio Elections Comm'n*, 61 F.3d 487 (6th Cir. 1995) (allowing challenge only *after* OEC found speaker guilty under false-statement law).

1. The obvious defect in the Sixth Circuit's analysis is that a "credible threat" of prosecution may clearly exist even absent a "definitive statement of position" by the enforcement authorities as to the illegality of the intended speech. Pet.App.11a. To be "credible," a threat need not be "definitive." Even if application of the statute to the plaintiff is *uncertain*, that *uncertainty* can cause speakers to self-censor. "[U]ncertainty is particularly problematic in the realm of free speech, given the danger that vital protected speech will be chilled." *Schirmer*, 621 F.3d at 587. Indeed, there is always *some* uncertainty, because prosecutors do not pursue *all* violations. Just as that discretion does not bar suit—the First Amendment "does not leave us at the mercy of *noblesse oblige*," *Stevens*, 559 U.S. at 480—doubts over whether authorities would view conduct as prohibited do not defeat standing either.

More important, the only practical way to obtain the "definitive statement of position" the Sixth Circuit demands would be to engage in the conduct and see what happens. If the speaker is convicted, then he has proved the point—but can no longer seek "pre-enforcement" review to foreclose a prosecution. It is thus not a *credible threat* that the Sixth Circuit requires, but its *realization*. Yet this runs headlong into this Court's long-established rule that one need not "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; *see also Dombrowski*, 380 U.S. at 487 (review need not await one "hardy enough to risk criminal prosecution").

This is why this Court has never required any "definitive" statement by prosecutors that they will prosecute, relying instead on the *absence* of *disavowing* prosecution. *Compare Am. Booksellers*, 484 U.S. at 393 (citing non-disavowal), *with Morrison*, 521 F.3d at 610 (dismissing where "record is silent" on whether school would pursue charges). And this is why the other Circuits allow review so long as intended speech is "arguably" proscribed, not "definitively" so. *N.H. Right to Life*, 99 F.3d at 18 ("arguably prohibited"); *Majors*, 317 F.3d at 721 ("arguably covers"); *Cal. Pro-Life Council,* 328 F.3d at 1095 ("arguably falls within the statute's reach").

2. The case that the Sixth Circuit cited for the "definitive statement of position" standard, *FTC v. Standard Oil*, concerned an agency's issuance of an administrative complaint and addressed whether it constituted "final agency action" subject to review in federal court under the Administrative Procedure

Act prior to the termination of the administrative adjudication. 449 U.S. at 233. But neither the APA's nor *Standard Oil*'s discussion of what constitutes "final agency action" says anything about whether a pre-enforcement First Amendment suit is appropriate because, again, such challenges are permissibly commenced based on "credible *threats* of *prosecution*," not "*final decisions*."

More specifically, *Standard Oil* explained that immediate review *would* be appropriate if the agency action had a "direct and immediate effect" on the plaintiff's primary conduct, *e.g.*, by inducing it to change its behavior to avoid potential sanctions. *See id.* at 239, 242 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). But the agency complaint only challenged *past* conduct, and thus had no "legal or practical effect, except to impose … the burden of responding to the charges." *Id.* at 242.

Standard Oil has no relevance here. Not only did it not present a First Amendment challenge to a speech-suppressive law, but it did not challenge *any* conduct-prohibiting rule or regulation. Nor was it an attempt to obtain "pre-enforcement" review; rather, it was an effort to bypass administrative review of purely *past* conduct. It thus presented none of the considerations that have motivated this Court's pre-enforcement justiciability jurisprudence. In APA cases that *do* present those considerations, *i.e.*, where agency action "requires an immediate and significant change in the plaintiffs' conduct … with serious penalties attached to noncompliance," *Abbott Labs*, 387 U.S. at 153, pre-enforcement review is permissible; plaintiffs need not expose themselves to such penalties in order to obtain judicial relief.

3. 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. Quite obviously, though, past enforcement of a law that remains on the books *is* an extraordinarily good predictor of future enforcement for similar speech. This bears no similarity to *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), where a police officer's use of a chokehold against the plaintiff in one random encounter did not suggest that future such encounters were likely for that particular plaintiff. *See id.* at 105-06.

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 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 test—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* were able to prove that future prosecution was virtually certain, thereby directly authorizing the abusive tactic of initiating politically motivated proceedings during electoral campaigns and dropping them after. *See infra* Part III.

C. When A Law Proscribes Speech, The "Chill" That Results Is Not Merely "Subjective."

The Sixth Circuit's error appears to stem in part from confusion over the notion of "subjective chill." To warrant pre-enforcement review, the court said, speech must be "more than *subjectively* chilled." Pet.App.11a (quoting *Berry v. Schmitt*, 688 F.3d 290, 297 (6th Cir. 2012)) (emphasis added). And in other cases, the Sixth Circuit has similarly dismissed challenges by describing chill as merely "subjective." *E.g.*, *Morrison*, 521 F.3d at 609 (requiring evidence "to substantiate an otherwise-subjective allegation of chill"); *Fieger*, 553 F.3d at 965 (requiring plaintiff "to articulate something more than … subjective 'chilling' of speech").

The critical point about "subjective chill" is that this Court has used that phrase only to describe supposed chill caused by state action *that does not directly proscribe or penalize speech*. In other words, the "chill" that concerns the Court is that caused by a credible threat of facing penalties or burdens under a law facially regulating speech. By contrast, where

someone's speech is *indisputably lawful*, but he is nonetheless subjectively self-censoring as a response to state action that does not actually penalize or threaten his speech, pre-enforcement review of that state action is not proper. Chill is thus "subjective" if the supposedly chilling law provides no authority for any adverse state action targeting the type of speech at issue. That doctrine is simply inapposite in this case, a traditional First Amendment challenge to a law that, directly and on its face, prohibits speech on pain of substantial criminal penalties.

The "subjective chill" doctrine originated in *Laird v. Tatum*, 408 U.S. 1 (1972). The plaintiff in that case alleged "that the exercise of his First Amendment rights [wa]s being chilled by the mere existence … of a governmental investigative and data-gathering activity." *Id.* at 10. As the Court explained, its prior cases addressing "chilled" speech involved "governmental power [that] was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging." *Id.* at 11. The Court thus distinguished cases in which the state was penalizing speech by restricting membership in the State Bar, *Baird v. State Bar of Az.*, 401 U.S. 1 (1971); discharging public employees, *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); or imposing heightened obligations on the receipt of propaganda materials through the mail, *Lamont v. Postmaster General*, 381 U.S. 301 (1965). However marginal some of those burdens on speech may have been, each of the plaintiffs was "in danger of sustaining a direct injury as the result of" the challenged state action. *Laird*, 408 U.S. at 12-13 (quoting *Ex parte*

Levitt, 302 U.S. 633, 634 (1937)). By contrast, the plaintiffs in *Laird* faced no legal repercussions from the challenged state data-gathering activities; the "chill" they alleged stemmed only from "speculative apprehensiveness that the Army may at some future date misuse the information in some way." *Id.* at 13. That sort of "chill," the Court ruled, is merely a "subjective" response to state action that does not create "specific present objective harm or a threat of specific future harm." *Id.* at 13-14.

Subsequent cases have invoked the "subjective" chill language only in analogous circumstances, *i.e.*, where the plaintiff was not even arguably subject to any direct restrictions or burdens on his speech. Thus, in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), this Court held that plaintiffs challenging a surveillance program did not establish standing based merely on "their fear of surveillance." *Id.* at 1152. Any chill was only subjective, because—as in *Laird*—it "resulted from a governmental policy that does not regulate, constrain, or compel any action on their part." *Id.* at 1153. *Accord United Presbyterian Church in the USA v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (Scalia, J.) (invoking *Laird* to bar challenge to executive surveillance order that "issues no commands or prohibitions").

By contrast, in *Meese v. Keene*, 481 U.S. 465 (1987), where the plaintiff showed that his exhibition of films that the government labeled "propaganda" would "substantially harm his chances for reelection" and "adversely affect his reputation," this Court found that he had "demonstrated more than a 'subjective chill.'" *Id.* at 473-74. The critical difference was that the plaintiff in *Meese*, had he

proceeded with the speech, faced a tangible threat of concrete harm. That impending injury sufficed for standing, even though he self-censored to avoid it.

In this case, the "chill" suffered by petitioners is obviously not "subjective." Ohio's law "regulate[s]" and "constrain[s]" their speech, *Clapper*, 133 S. Ct. at 1153, and they face a "threat of specific future harm," *Laird*, 408 U.S. at 13-14—*viz.*, enforcement burdens and potential criminal penalties—if they violate it. *Babbitt* and *American Booksellers* govern here, not *Laird* and *Clapper*.

D. The Structure Of The OEC Regime Makes The Threat Of Enforcement Proceedings *More* Credible, Not Less Credible.

The Sixth Circuit also claimed that petitioners could not show a credible threat of prosecution due to certain features "peculiar to the [OEC's] statutory powers." Pet.App.12a. *First*, the OEC itself "cannot initiate proceedings, but instead must wait for someone to bring a complaint." *Id.* The court asked: "Who is likely to bring a complaint to set the wheels of the Commission in motion?" *Id.* Not Driehaus, it said, because he may not run for elective office again. Pet.App.14a. And while the statute allows "any" other citizen to file a complaint, OHIO REV. CODE § 3517.153(A), the Sixth Circuit found that notion overly speculative. Pet.App.12a. *Second*, the court noted that the OEC may, at most, "refer the matter to a prosecutor," but cannot directly impose criminal or other penalties for violation of the statute. Pet.App.4a. The Commission has contended that this feature forecloses review as well, because even if the OEC found a violation, prosecution would not inevitably result. (BIO 26, 31.)

1. Outside the OEC context, usually only a small group of prosecutors may bring charges. And whether they will do so is *always* "speculative" to some extent, given that only the prosecutors know for sure how they will exercise their discretion. But, because the only way to know for sure is through self-exposure to sanctions, the law presumes that the threat of prosecution is "credible" and allows pre-enforcement review, at least absent clear evidence that prosecutors will *not* pursue charges. *See, e.g.*, *Am. Booksellers*, 484 U.S. at 393; *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004) (only "assurances from prosecutors that they do not intend to bring charges" defeat standing). Thus, justiciability law clearly does not bar review based on doubt over whether a prosecutor would enforce the law. *See Doe*, 410 U.S. at 208 (Burger, C.J., concurring) ("[N]o one in these circumstances should be placed in a posture of dependence on … prosecutorial discretion."); *Baggett*, 377 U.S. at 373 ("Well-intentioned prosecutors … do not neutralize the vice of a vague law."). *But see Fieger*, 553 F.3d at 967 (requiring proof that enforcing court "would, in its discretion, impose such sanctions" for violating civility code).

Here, as noted, the triggering of enforcement proceedings is not limited to government officials who are ethically obliged to eschew frivolous or biased enforcement, but can be done by a multitude of politically-motivated individuals. If anything, this makes it *easier* to establish a credible threat of enforcement action. Instead of just one or several prosecutors, *millions* of people may file complaints. They have every incentive to do so—and, unlike prosecutors, who face constraints of scarce resources and electoral accountability—no reason *not* to. In a

hard-fought political campaign, every marginal effort to diminish an opponent might make the difference between victory and a narrow loss. Hence 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). By broadly allowing all citizens to serve as private attorneys-general to enforce its false statement-law, Ohio makes the enforcement threat in a particular case all the more credible. To be sure, exactly *who* would file a complaint in any given case is necessarily speculative, but that *someone* would do so is extremely likely—and the latter is what establishes a credible threat.

The Sixth Circuit focused on whether *Driehaus* was likely to bring another complaint to the OEC. Pet.App.14a. But petitioners indisputably intend to launch the same criticism against *other* candidates for office in Ohio who had supported the ACA and who continue to run in elections, for Congress and other elective offices. JA149 ("COAST desires to make the same or similar statements about other federal candidates who voted for ObamaCare, as well as about candidates in local or state elections who either voted to support or voiced support of ObamaCare."); JA122 ("SBA List intends to engage in substantially similar activity in the future."). Any citizen who supported those candidates could file a complaint (and would have motive to do so). *See* Pet.App.12a (quoting SBA's statement at oral argument that any "citizen in Ohio who supports Obama" could file a complaint). Driehaus' particular circumstances are thus simply beside the point.

2. Nor does the two-stage enforcement scheme contemplated by the Ohio law somehow undermine the credibility of the threat faced by petitioners. To the contrary, Ohio's regime allows speakers to be not only criminally prosecuted, but also initially penalized through costly, burdensome enforcement actions by the OEC. This hardly creates *less* of an injury but, rather, imposes an *additional* one.

First, while an OEC enforcement proceeding is not an ordinary "prosecution," it is the first—and a necessary—step to traditional criminal prosecution. Prosecutors cannot charge violations of the false-statement law absent an OEC referral. OHIO REV. CODE § 3517.21(C). A "credible threat" of an OEC enforcement action thus necessarily gives rise to a "credible threat" of a subsequent prosecution, at least absent "assurances from prosecutors that they do not intend to bring charges." *D.L.S.*, 374 F.3d at 975. There have been no assurances or disavowals here, and there is simply no reason to believe prosecutors will not do their jobs when the expert agency—the OEC—has told them there has been a violation of the false-statement law (which, by statute, the OEC *must* do, OHIO REV. CODE § 3517.155(D)(2)).

Second, even if it were clear that prosecutors would *not* follow up on any OEC referral, or even if the Ohio statute did *not* allow criminal penalties to ever be imposed, the OEC's enforcement proceeding *itself* constitutes an impending injury sufficient for standing. To warrant pre-enforcement review of a law that burdens speech, "[t]he threatened state action need not necessarily be a prosecution." *Lopez*, 630 F.3d at 786. To the contrary, as noted in *Laird*, this Court has allowed challenges to laws restricting

bar membership, threatening discharge from public employment, and burdening receipt of certain mail. *See* 408 U.S. at 12-13 (citing *Baird*, 401 U.S. 1; *Keyishian*, 385 U.S. 589; and *Lamont*, 381 U.S. 301). And even the threat of an *unsuccessful* prosecution suffices for pre-enforcement review, in view of the burdens imposed on speakers by such proceedings. *Dombrowski*, 380 U.S. at 487 ("The chilling effect … may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."); *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."). This further proves that criminal penalties need not be likely for a ripe controversy to exist.

The financial, political, and disclosure burdens imposed by the OEC proceeding are, plainly, equally sufficient to constitute injury sufficient to warrant pre-enforcement judicial review. Being compelled to participate in the OEC process—to defend the truth of one's political speech before a panel of government bureaucrats—would present an independent burden on speech, even if the applicable criminal penalties were counterfactually taken off the table. *See FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 468 n.5 (2007) ("[L]itigation constitutes a severe burden on political speech."). Not only does defending such an action cost money, distract time and attention from pending campaigns, and impose heavy political costs, but the Commission has the power to issue subpoenas, order discovery, and seek contempt to enforce its orders. OHIO REV. CODE § 3517.153(B); OHIO ADMIN. CODE § 3517-1-11(B)(3). Indeed, Driehaus invoked such discovery to demand highly

confidential campaign communications among SBA, like-minded advocacy groups, and even Members of Congress, thus imposing a further chilling effect on core political speech and lobbying. JA183-95. And such discovery will *always* be sought, to determine the speaker's "knowledge" that the statement was "false." But as this Court has recognized, "compelled disclosure" by "groups engaged in advocacy" can impose "a restraint on freedom of association." *NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *see also Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam) (agreeing that "compelled disclosure, in itself, can seriously infringe on privacy of association … guaranteed by the First Amendment"). Since compelled disclosure of confidential campaign communications can, in some circumstances, *itself* violate the Constitution, *see John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2817-21 (2010), to threaten it surely constitutes an impending burden on speech sufficient to trigger the right to pre-enforcement review.

Finally, a finding by the OEC that one's speech is knowingly false (or "probably" so) imposes injury on the speaker even if prosecutors would, for whatever reason, decline to file criminal charges. For the state to publicly brand someone a "liar" is no small thing, especially in the electoral context. To a candidate, the stigma associated with that finding is a tangible harm that could mean the difference between victory or defeat. If being labeled a "propagand[ist']" by the state suffices for standing because it could "harm" the speaker's "chances for reelection," *Meese*, 481 U.S. at 473-74, then surely the same is true of being labeled a knowing liar. This is yet another reason why petitioners here have standing without regard to the likelihood of *criminal* prosecution.

E. The Suggestion That Petitioners Were Not in Fact Chilled Is Neither True Nor Relevant.

In discounting the threat that any speech would be chilled, the Sixth Circuit found that SBA was not actually "chilled" because it supposedly continued to express its message freely after Driehaus filed his OEC complaint. Pet.App.17a.

First, that is simply untrue. SBA did not self-censor while enforcement proceedings were *pending*, because it was already on the hook for its speech and repeating the same message would not subject it to any *more* prosecution. That is why it continued to run radio advertisements during the campaign. JA73. After the OEC dismissed the case, however, SBA did fear that repeating its message would expose it to additional costs and burdens, and so alleged. JA121-22. Those allegations are undisputed (and obvious, since many other candidates supporting the ACA ran in 2012 and will run in 2014). Moreover, there is no dispute that *COAST* was chilled by the Commission's probable-cause finding about its intended speech. JA148. The Sixth Circuit simply held that its chill was "speculative" because it had never been subjected to enforcement proceedings. Pet.App.18a; *see also* Pet.App.57a.

In any event, the law does not require that a speaker actually cease speaking in order to secure pre-enforcement review. A credible threat may exist whether or not the speaker chooses to run that risk on occasion. Free speech is burdened by such threats regardless of whether the speaker accepts those burdens because of a fervent desire to get his message out. As then-Judge Scalia explained in *United Presbyterian*, "some who have successfully

challenged governmental action on 'chilling effect' grounds have themselves demonstrably *not* suffered the harm of any chill, since they went ahead and violated the governmental proscription anyway." 738 F.2d at 1378-79. Standing analysis turns on the existence of the burden, not on whether the speaker acquiesces to, or defies, the unconstitutional threat.

This is particularly true because threatened prosecution can stifle speech regardless of whether the plaintiff is cowed into submission. Ohio's law applies not just to the political entity or candidate making a statement or paying for an advertisement, but to *anyone* who "[p]ost[s], publish[es], circulate[s], distribute[s], or otherwise disseminate[s]" the "false" statement. OHIO REV. CODE § 3517.21(B)(10). This encompasses media outlets, radio stations, billboard companies, and any others whom speakers might enlist or hire to distribute their message. And once the target of the criticism puts such a third-party on notice that he believes the statement to be false, that third-party is within the OEC's crosshairs and so could be "chilled" even if the speaker is not.

Here, for example, SBA was concretely harmed by the false-statement law even apart from the credible threat that *it* would face enforcement action: The billboard company with which it had contracted refused to post the disputed billboards as a direct consequence of Driehaus' threatened litigation under the Ohio law. JA26-27. The notion that SBA was unharmed by the statute is thus *doubly* wrong.

F. The Sixth Circuit's Warped "Credible Threat" Analysis Tainted Its Evaluation Of The Other Ripeness Factors.

The Sixth Circuit's misapprehension of the "credible threat" standard also infected its handling of the prudential ripeness considerations, resulting in a similarly flawed analysis. Specifically, the court held that SBA's case was not fit for review because "[t]he Commission has not found that SBA List violated the false-statement law" and "no prosecutor has taken any action upon any Commission referral." Pet.App.16a. And the court went on to conclude that SBA would not suffer hardship in the absence of review because it "has not demonstrated an objective fear of future enforcement." Pet.App.17a.

Of course, these conclusions are nothing more than a repackaging of the court's insistence that a speaker can show a "credible threat" of prosecution only by proving that a successful prosecution is virtually guaranteed. As explained, however, that is mistaken and misguided. *See supra* Part II.B. Had the panel taken this Court's "credible threat" cases seriously, the only conclusion that it could have drawn is that the case is entirely fit for review (both because SBA had already had a complaint filed against it for the speech in question *and* because petitioners' facial challenge raises a purely legal question), and that the denial of review imposes a substantial hardship on petitioners (in light of their well-established objective fear of prosecution for engaging in similar speech in the future).

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

The effect of the Sixth Circuit's approach to pre-enforcement First Amendment challenges 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.

Ohio's false-statement law is far from moribund; as noted, the OEC "handles about 20 to 80 false statement complaints per year." THE NEWS-HERALD, *supra*. 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 councilor 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, *State Elections Panel Chides Latta Campaign*, THE BLADE, 2007 WLNR 21915569 (Nov. 6, 2007). These examples, while ludicrous, paint an accurate picture of the types of claims that, in Ohio, are subject to OEC litigation, given the inherent malleability of "truth" in political advertising.

Indeed, the range of political claims that could be subjected to litigation under the Ohio law is virtually endless, underscoring the serious First Amendment concerns about the regime. A veritable industry of journalists purports to "fact check" claims by political candidates. In the 2012 Ohio Senate race, just for example, these sites concluded that (i) it was "false" for Republican candidate Josh Mandel to describe Senator Sherrod Brown as having cast the "deciding" vote for the Affordable Care Act, because although every vote was critical, his was not the *last* vote to be cast, *see* http://goo.gl/nm7RNX; (ii) it was "false" for Senator Brown to say that Mandel "would have voted 'no'" on the bailout for the auto industry, *see* http://goo.gl/z6geJU; and (iii) Mandel earned a "pants-on-fire" rating for criticizing Brown as "sid[ing] with Washington bureaucrats and fringe extremists in the attacks on our natural resources," *see* http://goo.gl/yh0vL0. Under the Ohio law, the targets of such routine political criticism could file OEC complaints against their critics and quite possibly obtain probable-cause findings. Also, of course, the speakers could file their own complaints after being "falsely" labeled "liars." And this endless cycle of point/counter-point on public policy is, apparently, to be adjudicated by bureaucrats and/or criminal courts in the heat of a time-sensitive election campaign. In our democracy, however, such debates are supposed to be "resolved" by voters. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that … freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.").

Nor is this concern limited to Ohio. At least 15 other states have analogous statutes. 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.

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 U.S. Solicitor General conceded that laws like Ohio's, generally proscribing false campaign speech, "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). And Ohio's own Attorney General has filed an *amicus* brief attacking the law's constitutionality. *See* Amicus Br. of Ohio Atty. Gen. at 19-20, *COAST Candidates PAC v. Ohio Elections Comm'n*, No. 1:11-cv-775 (S.D. Ohio Feb. 10, 2012) (agreeing that "Ohio's generalized prohibitions on 'false statements' made in the course of a political campaign burden core, truthful speech protected by the First Amendment" and noting that the OEC "machinery has been used extensively by private actors to gain political advantage in circumstances where malicious falsity cannot ultimately be established").

Despite that broad consensus, the Sixth Circuit's holdings assure the indefinite perpetuation of this censorious regime. The court applies *Younger* to preclude review *while* enforcement proceedings are pending (as in this case). JA108 (finding SBA's allegation of chill "an insufficient basis to overcome *Younger* abstention"). And the Sixth Circuit's approach makes it impossible to sue *earlier* (since prosecution is "speculative") or *later* (since past enforcement proves nothing). *See Krikorian v. Ohio Elections Comm'n*, No. 10-CV-103, 2010 WL 4117556 (S.D. Ohio Oct. 19, 2010) (dismissing challenge even after OEC issued reprimand). So, if pre-enforcement review is not available, 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 from a final, affirmed conviction.

Not only does that regime ensure that untold volumes of political speech will be silenced—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. The Commission concedes on its website that campaigns "use the Commission as a part of their activities." *Ohio Elections Commission: History*, http://elc.ohio.gov/History.stm. Indeed, as in this case, complainants often drop their complaints once the election is over and the political damage has been 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 injuries suffered by the speaker:

> 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).

Being dragged before state officials or subjected to criminal prosecution are obviously burdens standing alone and, combined with the risk of criminal penalties, will greatly deter most speakers. The Sixth Circuit's approach thus guarantees that truthful speech will be substantially deterred. Indeed, the Commission affirmatively promotes this chill, boasting on its website that "campaigns and their consultants will continue to hone their messages in an attempt to work carefully around the Commission." *Ohio Elections Commission: History*, http://elc.ohio.gov/History.stm.

The Catch-22 created by the Sixth Circuit's approach essentially immunizes from judicial review Ohio's unconstitutional regime, under which every election in that battleground state (and at least 15 other states) is now conducted.

CONCLUSION

For the reasons stated above, this Court should reverse the decision below.

Respectfully submitted,

CHRISTOPHER P. FINNEY
THE FINNEY LAW FIRM
4270 Ivy Pointe Blvd.
Cincinnati, OH 45245

CURT C. HARTMAN
THE LAW FIRM OF CURT C. HARTMAN
3749 Fox Point Ct.
Amelia, OH 45102

ROBERT A. DESTRO
2312 N. Powhatan St.
Arlington, VA 22205

MICHAEL A. CARVIN
Counsel of Record
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

DAVID R. LANGDON
JOSHUA B. BOLINGER
LANGDON LAW LLC
8913 Cincinnati-Dayton Rd.
West Chester, OH 45069

FEBRUARY 2014

STATUTORY ADDENDUM

Ohio Revised Code

Title 35. ELECTIONS

Chapter 3517. CAMPAIGNS; POLITICAL PARTIES

Section 3517.21(B). Infiltration of campaign - false statements in campaign materials - election of candidate

(B) No person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following:

(1) Use the title of an office not currently held by a candidate in a manner that implies that the candidate does currently hold that office or use the term "re-elect" when the candidate has never been elected at a primary, general, or special election to the office for which he or she is a candidate;

(2) Make a false statement concerning the formal schooling or training completed or attempted by a candidate; a degree, diploma, certificate, scholarship, grant, award, prize, or honor received, earned, or held by a candidate; or the period of time during which a candidate attended any school, college, community technical school, or institution;

(3) Make a false statement concerning the professional, occupational, or vocational licenses held by a candidate, or concerning any position the candidate held for which the candidate received a salary or wages;

(4) Make a false statement that a candidate or public official has been indicted or convicted of a theft offense, extortion, or other crime involving financial corruption or moral turpitude;

(5) Make a statement that a candidate has been indicted for any crime or has been the subject of a finding by the Ohio elections commission without disclosing the outcome of any legal proceedings resulting from the indictment or finding;

(6) Make a false statement that a candidate or official has a record of treatment or confinement for mental disorder;

(7) Make a false statement that a candidate or official has been subjected to military discipline for criminal misconduct or dishonorably discharged from the armed services;

(8) Falsely identify the source of a statement, issue statements under the name of another person without authorization, or falsely state the endorsement of or opposition to a candidate by a person or publication;

(9) Make a false statement concerning the voting record of a candidate or public official;

(10) Post, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate.

As used in this section, "voting record" means the recorded "yes" or "no" vote on a bill, ordinance, resolution, motion, amendment, or confirmation.

(C) Before a prosecution may commence under this section, a complaint shall be filed with the Ohio elections commission under section 3517.153 of the Revised Code. After the complaint is filed, the commission shall proceed in accordance with sections 3517.154 to 3517.157 of the Revised Code.

Effective Date: 08-24-1995