No. 13-193

In the Supreme Court of the United States

SUSAN B. ANTHONY LIST, et al.,
Petitioners,

v.

STEVEN DRIEHAUS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Sixth Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. JFF has made numerous appearances in this Court as *amicus curiae*, including *Citizens United v. FEC*, 558 U.S. 310 (2010) and other cases concerned with the protection of political speech.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Ohio has hand-delivered a powerful political weapon to candidates and other politically motivated individuals. Ohio Rev. Code Ann. § 3517.21(B) is easily used a club to bludgeon opponents. It expressly targets and stifles "speech uttered during a campaign for

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

political office"—exactly when the First Amendment has its "fullest and most urgent application." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

The Sixth Circuit's approach to standing enhances the cutthroat use of Ohio's statute, erecting such a high bar to standing that prospective challengers must first violate the law, admit guilt, and suffer a criminal *conviction* (Section I).[2] Even if a daring speaker assumes that risk, the statutory language thrusts unelected officials into a twilight zone where they must navigate the delicate distinctions between malicious falsehoods and political hyperbole (Section II). Finally, Ohio's statutory scheme encourages manipulation due to the ease in which anyone can file a complaint and set the wheels of criminal prosecution in motion—then dismiss it when the election is over, thus rendering the speech politically impotent. This virtually guarantees not only that speech will be chilled during critical election times, but also that future constitutional injuries will evade review (Section III).

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[2] Even if the sole threat were Driehaus' civil suit for defamation, the fear of a damage award may be as inhibiting of speech as threatened criminal prosecution. *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964).

ARGUMENT

I. THE SIXTH CIRCUIT ENCOURAGES POLITICAL OPPONENTS TO USE THE THREAT OF CRIMINAL PROSECUTION AS A CLUB. THIS BREEDS DISRESPECT FOR THE LAW.

This Court has long endorsed pre-enforcement review, a "hold your tongue and challenge now" approach. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). This procedure "promotes good public policy by breeding respect for the law" rather than demanding that speakers undergo criminal prosecution as a prerequisite to challenging questionable statutes. *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 488 (8th Cir. 2006). As the Ninth Circuit observed:

> [I]t would turn respect for the law on its head for us to conclude that ARLPAC lacks standing to challenge the provision merely because ARLPAC chose to comply with the statute and challenge its constitutionality, rather than to violate the law and await an enforcement action.

Az. Right to Life PAC v. Bayless, 320 F.3d 1002, 1007 (9th Cir. 2003). *See also Bland v. Fessler*, 88 F.3d 729, 736-37 (9th Cir. 1996) ("That one should not have to risk prosecution to challenge a statute is especially true in First Amendment cases.").

By raising the bar for standing, the Sixth Circuit effectively forecloses pre-enforcement review and invites the use of Ohio law as a club to muzzle opposing views. This approach promotes disrespect for the law by requiring an actual conviction—and in this case, it

also breeds dishonesty by requiring Petitioners to affirm their intent to make a *false* statement.

In cases where the Sixth Circuit sustained standing, the challenger had already violated the law: *Berry v. Schmitt*, 688 F.3d 290, 296 (6th Cir. 2012) (attorney Berry had standing—he had already engaged in the prohibited conduct by circulating a letter that publicly criticized a quasi-judicial state legislative ethics commission); *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 490-492 (6th Cir. 1995) (candidate paid for a billboard that was ambiguous as to whether she was an incumbent—she was found to have violated the statute, and she intended to run again). Standing unquestionably existed in these cases—but it also exists where there is a credible threat of prosecution, as there is here. The Sixth Circuit is out of step with this Court and other Circuits. Pre-enforcement review protects both First Amendment rights and respect for the law.

II. OHIO CHILLS SPEECH BY VESTING STATE OFFICIALS WITH SWEEPING POWER TO SEPARATE TRUTH FROM FALSITY IN POLITICAL DEBATE.

The Sixth Circuit's approach to standing, coupled with Ohio's statutory language, is a deadly mix. Petitioners and Driehaus both claim to speak the truth about his vote for the Affordable Care Act. The public is entitled to hear both. But Driehaus has the upper hand, because he can wield the statutory weapon—using the massive resources of the Ohio Election Commission ("OEC")—as a club to silence Petitioners' interpretation. Justice Breyer's recent observation summarizes the danger:

> [T]he threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart.

United States v. Alvarez, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring). In the Sixth Circuit, the "chill" has hardened into a freeze by requiring an actual criminal conviction just to challenge the statute.

Legal liability for speech varies according to context. False statements are not always protected. Laws against perjury protect the integrity of the legal system and ensure that judgments are founded on truth. *Id.* at 2546. Defamation of a public official requires knowledge that a statement is false or reckless disregard for the truth (*New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964))—a standard replicated by Ohio and other states in the election context. Although that standard helps prevent "the chilling of truthful speech on matters of public concern" (*Alvarez*, 132 S. Ct. at 2463 (Alito, J., dissenting)), it is difficult to apply in a timely manner while an election is pending. In the heat of public debate, core political speech needs "breathing space" to survive. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Moreover, the Ohio statute is not a "harmless, empty shadow" the state has declined to enforce over several decades. *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (no standing where there was an 80-year-old "tacit agreement" by the state not to prosecute violations of a statute prohibiting contraceptive devices). It is a constitutionally questionable regulation

that Driehaus actually used to punish Petitioners for their commentary on the implications of his vote.

A. The Ohio Statute Is A Content-Based Regulation.

Ohio Rev. Code Ann. § 3517.21(B) is a classic content-based regulation comparable to other challenged laws in the election context. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 197 (1992) (statute prohibiting political speech within 100 feet of polling place on election day was content-based because it only regulated speech relating to political campaigns and could not be applied without reference to content). In Ohio's statutory scheme, subsection (9) applies to "the voting record of a candidate or public official." Subsection (10) covers false statements concerning a candidate. These provisions cannot be applied without reference to content.

"'[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted)." *Alvarez*, 132 S. Ct. at 2543. The government—not the speaker—bears the burden of proving constitutionality. *Id*., citing *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004). Even where the government does not favor one side of a political controversy, the First Amendment is hostile to content-based regulations. *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980).

As a content-based regulation, Ohio's statute is fraught with constitutional flaws—but in the Sixth Circuit, its chances of review are slim.

B. The Ohio Statute Raises Thorny Issues Of Interpretation In The Heat Of Political Debate.

The need for review is especially critical in light of the broad powers of the Ohio Elections Commission. OEC must undertake the formidable task of interpretation to determine what is true and what is false. The statute presupposes that the state possesses an independent right to separate truth from falsity in political debate—a questionable proposition at best. *Meyer v. Grant*, 486 U.S. 414, 419-420 (1988) ("[E]very person must be his own watchman for truth, because the forefathers did not trust any government to separate the truth from the false for us."). OEC's decisions can potentially sway elections by stifling open debate. The Ohio statute covers statements that are demonstrably true or false ("Candidate X voted for [or against] the Affordable Care Act") as well as conclusions drawn from a candidate's vote—as in this case. Does the Affordable Care Act indirectly provide federal funds for abortion by subsidizing abortion-inclusive coverage for lower-income persons (as Petitioners contend)—or does it not, because abortions must be funded out of a separate account (as Driehaus argues)? Pet. Op. Br. 4-5. Reasonable minds could disagree, but the Sixth Circuit's approach "compel[s] the speaker to hedge and trim." *Thomas v. Collins*, 323 U.S. 516, 535 (1945). The facts here highlight this Court's warning that "[t]he interpretive process itself would create an inevitable, pervasive, and serious risk

of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable." *Citizens United v. FEC*, 558 U.S. at 327. Such a task raises the specter of "temporary political majorities ...exercis[ing] their power by determining for everyone what is true and false, as well as what is right and wrong." Stephen G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 Fla. St. U. L. Rev. 1, 3 (2008). As the Washington Supreme Court observed, "any statute permitting censorship by a group of unelected government officials is inherently unconstitutional." *Rickert v. Pub. Disclosure Comm'n,* 161 Wn.2d 843, 854, 168 P.3d 826, 831 (Wash. 2007). In Ohio, the Elections Commission is composed of seven unelected persons—three appointed by the Governor from each major political party upon recommendation by the Democratic and Republican caucuses of the General Assembly, and the seventh an independent person (not affiliated with either party) appointed by the six partisan members.[3]

This case underscores the need for judicial sensitivity to the danger of self-censorship when First Amendment values are at stake. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988); *Meese v. Keene*, 481 U.S. 465, 473 (1987). Courts should grant review in cases where plaintiffs intend to engage in conduct that "could reasonably be interpreted as making false statements with reckless disregard for the truth of those statements" because they have good cause to fear prosecution. *281 Care Comm. v. Arneson*,

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[3] See http://elc.ohio.gov/History.stm (last visited 02/17/14).

638 F.3d 621, 628 (8th Cir. 2011). *See also Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (plaintiffs have standing to challenge a statute that "arguably covers" their constitutionally protected speech, because "most people are frightened of violating criminal statutes"); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 58 (1st Cir. 2003) (allowing pre-enforcement challenge to statute where plaintiff wanted to publish articles that would "exacerbat[e his] exposure to a criminal libel prosecution"). Here, the interpretive process is particularly treacherous because Ohio, like several other states, has patterned its statute after the standard for defamation actions involving public officials—knowledge of falsity or reckless disregard for the truth. Ohio Rev. Code Ann. § 3517.21(B)(10). The original context of that standard was applied primarily to journalists and other potential communicators of defamatory material. In this context it opens the door for political maneuvering.

C. In The Political Speech Arena—As In Defamation Actions Against Public Officials—It Is Difficult To Distinguish Deliberate Or Recklessly False Statements From Mere Political Rhetoric.

Ohio's election law borrows the "actual malice" standard crafted by this Court for defamation actions by public figures. *New York Times Co. v. Sullivan*, 376 U.S. 254. That standard can be excruciating to apply even in its original context:

> The difficulty of making this distinction [deciding whether a statement was made with "reckless disregard for the truth"] is reflected in

> cases dealing with defamation against public officials. Courts and scholars constantly struggle to draw a line between knowingly or recklessly false statements and uses of rhetoric, exaggeration, and ideologically-derived facts.

281 Care Comm. v. Arneson, 638 F.3d at 630 n. 1.

The "actual malice" standard was crafted so as to preserve America's "profound national commitment" to "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co. v. Sullivan*, 376 U.S. at 271. In particular, "[i]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages." *Id*. at 281, quoting *Coleman v. MacLennan*, 78 Kan. 711, 724, 98 P. 281, 286 (1908).

This Court protects political rhetoric, eschewing a rigid approach that might be appropriate in other contexts. *Greenbelt Coop Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (it was "no more than rhetorical hyperbole" to allege blackmail by a city council member); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974) ("traitor" was used "in a loose, figurative sense," not as a representation of fact). Campaign speech is "[o]ften characterized as hyperbole and overstatement" and "tends toward exaggeration, to vilification…and even to false statement." *281 Care Comm. v. Arneson*, 638 F.3d at 630 n. 1, citing Terri R. Day, "*Nasty as They Wanna be Politics:" Clean Campaigning and the First Amendment*, 35 Ohio N.U. L. Rev. 647, 652 (2009). Election time debates may include "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.*

v. Sullivan, 376 U.S. at 271. Even a false statement may contribute to the debate, producing a sharper impression of truth by its collision with error. *Id*.

The "actual malice" standard was fashioned to limit liability—but Ohio's statutory scheme, especially when combined with the Sixth Circuit's high bar for standing, "expands liability in a different, far greater realm of discourse and expression," thereby "invert[ing] the rationale for the exception.... A rule designed to tolerate certain speech ought not blossom to become a rationale for a rule restricting it." *Alvarez*, 132 S. Ct. at 2545. When applied to campaign speech, the "actual malice" standard is precarious because "neither factual error nor defamatory content removes the constitutional shield from criticism of official conduct." *New York Times Co. v. Sullivan*, 376 U.S. at 273. Petitioners criticized Driehaus simply by expressing conclusions about the implications of his affirmative vote on the Affordable Care Act. In *New York Times*, this Court observed that the Sedition Act of 1798—making it a crime to publish false or malicious statements against federal officials—was "vigorously condemned as unconstitutional" and has been presumed invalid by the Justices "because of the restraint it imposed upon criticism of government and public officials." *Id*. at 273-274, 276.

Moreover, even in a public official's defamation action this Court refuses to place the burden of proving truth on the speaker:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads

> to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.

Id. at 279. As in cases involving political debate, there is grave danger of chilling protected expression—including truthful speech. "[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Id*. at 279.

Constitutional protection for criticism of public officials is "appropriately analogous to the protection accorded a public official when *he* is sued for libel by a private citizen." *Id*. at 262. This avoids the "unjustified preference" that would otherwise accrue to public officials because of the immunity they enjoy in the exercised of their official duties. *Id*. at 282, citing *Barr v. Matteo*, 360 U.S. 564, 575 (1959).

D. This Court's Ruling Has Broad Implications For Litigants In Other States.

Ohio's statute is constitutionally questionable. Although that is not the issue before this Court, a ruling in Petitioners' favor will keep the court doors open for litigants whose First Amendment rights have been chilled by similar state election laws. A ruling against Petitioner would slam the door in their faces and perpetrate constitutionally suspicious practices—leaving injuries to free expression without a remedy.

Several states have election laws with language requiring knowledge or reckless disregard for the truth—identical or similar to Ohio's standard: Colo. Rev. Stat. § 1-13-109; Fla. Stat. Ann. § 104.271(2); Minn. Stat. § 211B.06; Mont. Code Ann. § 13-37-131 (failure to verify public voting record is evidence of reckless disregard); N.C. Gen. Stat. § 163-274(a)(8); N.D. Cent. Code § 16.1-10-04; Or. Rev. Stat. Ann. § 260.532; Rev. Code Wash. § 42.17A.335. Some states require actual knowledge that a statement is false: Alaska Stat. § 15.56.014; Mass. Gen. Laws ch. 56 § 42; Tenn. Code Ann. § 2-19-142; Utah Code Ann. § 20A-11-1103; W. Va. Code § 3-8-11; Wisc. Stat. § 12.05. A few states have more specific requirements: Iowa Code § 39A.4(c)(3) (false statements about qualifications or party affiliations); Mich. Comp. Laws § 168.931(3) (false statements lacking signatures); Miss. Code Ann. § 23-15-875 (false statements regarding a candidate's private life); Va. Code Ann. § 24.2-1005.1 (certain false statements to voters to impede the exercise of their right to vote). Three states have repealed statutes found to be unconstitutional: Me. Rev. Stat. Ann. tit. 21-A, § 1014-A (repealed 2009); N.Y. Elec. Law § 472(a) (repealed 2009); Nev. Rev. Stat. § 294A.345 (repealed 2005).

State court cases demonstrate the need for judicial review. A simple negligence standard will not pass constitutional muster. *District One Republican Comm'n v. District One Democrat Comm'n*, 466 N.W.2d 820 (N.D. 1991); *Snortland v. Crawford*, 306 N.W.2d 614 (N.D. 1981) (negligent false statements are not actionable). The Louisiana Supreme Court acknowledged the state's interest in fair elections, but found the standard in La. Rev. Stat. Ann. § 18:1463(c)

("knows or reasonably expected to know") unconstitutional. *State v. Burgess*, 543 So. 2d 1332, 1335-1336 (La. 1989). The Court also found the terms "scurrilous" and "irresponsible adverse comment" to be overly broad, encompassing both true and false speech about candidates. *Id*. at 1335. In Washington, a sharply divided state supreme court ruled that Rev. Code Wash. § 42.17.530(1)(a) was facially unconstitutional because it lacked a requirement that prohibited statements be actually defamatory (harmful to a candidate's reputation) rather than merely false. *Rickert v. Pub. Disclosure Comm'n,* 161 Wn.2d at 852, 168 P.3d at 830 (political brochure stated that opposing candidate had voted to close a facility for the developmentally challenged).

Some state courts have thoughtfully upheld free speech rights when confronted with challenges:

- *State ex rel. Hampel v. Mitten*, 227 Wis. 598, 609, 278 N.W. 431, 436 (Wis. 1938) (Statements of opinion regarding opposing candidate's moral character were not actionable under Corrupt Practices Act.)

- *State ex rel. Skibinski v. Tadych*, 31 Wis. 2d 189, 194, 142 N.W.2d 838, 841 (Wis. 1966) (Statements that candidate was "laughing stock of county" and wasted taxpayer money were "conclusions, comment, and opinion"—not statements of fact.)

- *Thornton v. Johnson*, 253 Or. 342, 363, 453 P.2d 178, 188 (1969) ("Whether or not the Attorney General had the authority to represent the

School District [as he represented in a press release] is open to dispute.")

- *Mosee v. Clark*, 253 Or. 83, 86-87, 453 P.2d 176, 177 (1969) ("[R]eturn a proven leader" might have implied that the former county sheriff was an incumbent county officer—which he was not—but also might have meant that he had worked in county government and been a governmental leader—which was true.)

- *Sumner v. Bennett*, 45 Ore. App. 275, 280-281, 608 P.2d 566, 569 (1980) (Characterization of candidate's voting record was a matter of opinion—not false within the meaning of Or. Rev. Stat. Ann. § 260.532 and thus not actionable.)

- *State v. 119 Vote No! Committee*, 135 Wn.2d 618, 632, 957 P.2d 691, 699 (Wash. 1998) (Court held unconstitutional a statute that broadly prohibited all false political statements of material facts made in political advertisements.)

These and other state cases highlight the challenge courts face when applying the actual malice standard—and the need to give speakers the benefit of the doubt when more than one interpretation is possible. *Citizens United v. FEC,* 558 U.S. at 327; *see, e.g., Committee of One Thousand to Re-Elect State Senator Walt Brown v. Eivers*, 296 Ore. 195, 202, 674 P.2d 1159, 1163 (1983) (reasonable inference that proposed legislation would have established a statewide property tax) ("[S]tatements are not 'false'...if any reasonable inference can be drawn from the evidence that the statement is factually correct or that

the statement is merely an expression of opinion.") Even the Sixth Circuit acknowledges that statements subject to differing interpretations are not false. *Briggs v. Ohio Elections Comm'n*, 61 F.3d at 494 (politician's billboard ambiguous as to whether she was an incumbent).

III. THE SIXTH CIRCUIT'S POSITION ON STANDING VIRTUALLY GUARANTEES THAT CONSTITUTIONALLY FLAWED STATUTES WILL EVADE REVIEW.

"Like forecasted hurricanes, approaching elections invariably give rise not only to gusts of wind but also to feverish preparations. And, just as the prudent fisherman does not trust in chance to save his boat from the gathering storm, the sage political activist does not rely on an unenlightened electorate to save her candidate from the vicissitudes of the ballot box." *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 10 (1st Cir. 1996). Elections are like hurricanes in another way—quickly gone, yet sometimes leaving destruction spread across the now-sunny landscape. Another storm will come and the same damage will recur unless adequate repairs are undertaken.

Ohio has crafted an easy way to silence a political opponent and then dismiss the complaint after the election is over – when allegedly it is moot and immune to further review. Pet. 34-35; Reply 5. The "hurricane" has come and gone. Speakers have been silenced, and winning candidates have taken office. But under long-standing precedent, the controversy remains alive and well. Damage has been done and it will happen again,

evading review indefinitely if the court dismisses the current case.

Article III standing must exist at all stages of review. *Steffel v. Thompson*, 415 U.S. 452, 460 n. 10 (1974). Mootness is derived from the same prudential considerations as standing and ripeness, although it revolves around ongoing events. *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 34 (1st Cir. 1999). It has been defined as "'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).' H. P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L. J. 1363, 1384 (1973)." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980). A case becomes moot when the issues presented are no longer live or the parties lack a "legally cognizable interest in the outcome." *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979), quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969). There are two requirements: (1) "no reasonable expectation...that the alleged violation will recur"; and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis,* 440 U.S. at 631 (class action alleging racial discrimination in hiring was moot because there was no longer a shortage of firefighters and minorities had been hired).

The party asserting mootness bears the burden of persuading the court. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc*., 528 U.S. 167, 189 (2000) (reversing decision holding that petitioners' citizen suit for civil penalties under Clean Water Act was moot

when respondent came into compliance). "The burden is a heavy one." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). The test is stringent—voluntary cessation of allegedly illegal conduct is insufficient. *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). It must be "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id*. at 203.

Here, the required clarity is lacking. This case—like many other election cases—fits squarely within a well-recognized exception to the mootness doctrine. Ordinarily an appeal must be dismissed if, pending review, conditions change that render it impossible for the court to grant the plaintiff effectual relief. *Southern Pacific Terminal Co. v. Interstate Commerce Com*., 219 U.S. 498, 514 (1911). But this Court has long recognized an exception where "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982), quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); *see Southern Pacific Terminal Co. v. Interstate Commerce Com*., 219 U.S. at 514 (public interests at issue in ICC orders should not be defeated by short orders that expire pending review).

Election-related cases are the epitome of this exception. There is rarely enough time to resolve even a timely filed challenge before the election is held. In these cases, the "capable of repetition, yet evading review" doctrine is appropriate for both "as applied" challenges and facial attacks. *Storer v. Brown*, 415

U.S. 724, 737 n.8 (1974). Numerous cases testify to the application of this doctrine in the world of elections and political speech:

- *Dunn v. Blumstein*, 405 U.S. 330, 333 n. 2 (1972) (A challenge to Tennessee's residency requirement for voting was not moot even though Blumstein was now eligible to vote—it applied to others and would be capable of repetition yet evading review.)

- *Storer v. Brown*, 415 U.S. at 737 n.8 (Issues regarding independent candidates' access to ballot were not moot even though the 1972 election was over, because the California statutes would be applied in future elections).

- *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 774 (1978) (Although the 1976 referendum had been held and proposed constitutional amendment defeated, the case was not moot. The time between legislative authorization and submission to the voters was too short for complete judicial review. The 1976 election was the fourth time a proposed graduated income tax amendment was submitted to the Massachusetts voters, and appellants intended to continue opposing it.)

- *Democratic Party v. Wisconsin*, 450 U.S. 107, 115 n.13 (1981) (This challenge to state requirement that delegates vote according to results of open primaries was not moot because the Wisconsin Supreme Court's order would remain and control future elections. Even if it

had only controlled the 1980 election, it would be capable of repetition yet evading review.)

- *Meyer v. Grant*, 486 U.S. at 417 n. 2 (Prohibition on paid circulators violated the rights of persons circulating initiative petition for signatures. Although the November 1984 election had passed, Colorado granted initiative proponents only six months to gather the necessary signatures—not enough time to obtain review and act on the ruling. The initiative had not been enacted and appellees continued to advocate its adoption.)

- *Norman v. Reed*, 502 U.S. 279, 288 (1992) (Challenge to prohibition on new political party using its party name on the 1990 ballot was not moot because it was likely that the same parties would "generate a similar, future controversy subject to identical time constraints.")

- *Federal Election Comm'n v. Wis. Right to Life, Inc. (WRTL)*, 551 U.S. 449, 462 (2007) (Even though WRTL would not run exactly the same three advertisement, it could not reasonably obtain review before the 2004 election was over.)

- *Davis v. FEC*, 554 U.S. 724, 735 (2008) (Davis' case, concerning a candidate's right to spend his own money, could not be resolved before the 2006 election concluded.)

- *Mangual v. Rotger-Sabat*, 317 F.3d at 61 (News reporter intended to continue writing about government corruption and identified persons who might threaten him with prosecution.)

- *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d at 18: ("N-PAC's resolve that it will continue to make expenditures which are arguably prohibited by RSA 664:5, V leads to a reasonable expectancy that N-PAC will again find itself in the same quandary involving the same statutory scheme.")

- *Majors v. Abell*, 317 F.3d at 722 (Candidate plaintiff has no duty to run in every election to keep lawsuit alive.)

In some instances, the facts can be carefully distinguished and a case actually is (or may be) moot. In *Steffel*, Petitioner's handbilling activities were directed against the Vietnam War and United States' foreign policy in Southeast Asia, but recent developments required that the District Court consider, on remand, whether there was a continuing live controversy. *Steffel v. Thompson*, 415 U.S. at 459-460. In *Golden v. Zwickler*, 394 U.S. 103 (1969), the sole target of anonymous election campaign literature was a Congressman who had retired to be a New York Supreme Court Justice and there was no prospect that he would run for office again. But here, even if Driehaus will never run again, he is not the "sole target" of Petitioner's speech.

Petitioner is an ideological advocacy group devoted to electing candidates and promoting policies to abolish abortion. (See http://www.sba-list.org/about-sba-list/our-mission.) When such a group seeks injunctive and declaratory relief, it is typically concerned about recurring issues in future elections. *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d at 17-18 (prayer for declaratory relief "affects expenditures that

N-PAC may choose to make in *future* elections"). Several years ago, the Ninth Circuit adjudicated a pro-life group's challenge to Washington State's Public Disclosure Law, holding that "[t]he passage of Initiative 1000 in 2008 [did] not alter the justiciability of Human Life's constitutional challenge." *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1001-1002 (9th Cir. 2010). The Court observed that:

> Human Life is a politically active organization that has been heavily involved in public debates about pro-life issues in the past and intends to undertake future communications like those it wished to make in conjunction with the Initiative 1000 vote. This is sufficient to establish a reasonable expectation that Human Life will face the prospect of enforcement of the Disclosure Law again.

Human Life of Wash., Inc. v. Brumsickle, 624 F.3d at 1002. This Court, similarly, rejected a mootness argument where a pro-life advocacy corporation "credibly claimed that it planned on running 'materially similar' future targeted broadcast ads mentioning a candidate within the blackout period and there is no reason to believe that the FEC will 'refrain from prosecuting violations' of BCRA" (citations omitted)." *WRTL*, 551 U.S. at 463. Similar circuit cases have also fallen within the "capable of repetition yet evading review" exception: *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 779 (9th Cir. 2006) (AKRTL intended to engage in an ideological telemarketing campaign when challenged provisions of Alaska law remained in place—after the relevant ballot initiative vote); *Cal. Pro-Life Council, Inc. v. Getman*

(CPLC-I), 328 F.3d 1088, 1095 n. 4 (9th Cir. 2003) (advocacy group planned to continue distribution of voter guides in spite of challenged disclosure requirements); *Reich v. Local 396, Int'l Bhd. of Teamsters*, 97 F.3d 1269, 1272 n.5 (9th Cir. 1996) (challenge to withholding information from a candidate after the candidate's opportunity to be elected had passed).

"[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United v. FEC*, 558 U.S. at 340. Ohio's chilling statutory scheme suppresses core political speech, but in the Sixth Circuit those laws are now virtually immune from challenge.

CONCLUSION

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

Respectfully submitted,

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