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

Respondents.

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

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION SUPPORTING PETITIONERS

SHANNON LEE GOESSLING
Counsel of Record
KIMBERLY STEWART HERMANN
SOUTHEASTERN LEGAL FOUNDATION
2255 Sewell Mill Road, Suite 320
Marietta, Georgia 30062
(770) 977-2131
shannon@southeasternlegal.org

Counsel for Amicus Curiae

February 28, 2014

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court.

SLF has an abiding interest in the protection of the freedoms set forth in the First Amendment – namely the freedom of speech. From a public interest perspective, SLF asserts that this Court's jurisprudence regarding pre-enforcement challenges of speech-suppressive laws requires courts to hear such challenges – especially when the law suppresses free discussion and debate on public issues which are vital to America's civil and political institutions. SLF is profoundly committed to the protection of American legal heritage, including the freedom of speech, a vital component to its system of laws.

[1] Pursuant to this Court's Rule 37.6, SLF hereby represents that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of *amicus curiae* briefs by filing letters evidencing their consent with the Clerk of Court.

SUMMARY OF ARGUMENT

The freedom to publicly speak on political issues, especially those arising during elections, is critical to a functioning democracy. The First Amendment has "its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Thus, it is imperative that if the government attempts to suppress political speech, Americans have the ability to protect their freedom of speech by challenging the constitutionality of such laws.

This Court has consistently held that a plaintiff does not need to expose himself to arrest or prosecution before challenging the constitutionality of a speech-suppressive law. To do otherwise, would turn respect for the law on its head and force law-abiding Americans into self-censorship. Ignoring this Court's jurisprudence, the Sixth Circuit has refused to hear pre-enforcement challenges to the constitutionality of laws suppressing political speech unless the challengers first incriminate themselves or are convicted of violating the law. The Sixth Circuit's approach abridges the freedom of speech and suppresses open discussion of governmental affairs and debate on public issues, both of which are vital to America's civil and political institutions.

To ensure the government does not violate the Constitution through forced self-censorship, and to prevent it from robbing Americans of their freedom to fully participate in the political process, this Court

should reverse the Sixth Circuit's decision and reaffirm its well-settled precedent regarding standing to bring pre-enforcement challenges.

ARGUMENT

I. The Sixth Circuit's refusal to hear pre-enforcement challenges to the constitutionality of speech-suppressive laws forces self-censorship and chills speech.

This Court has consistently recognized that constitutional challenges based on the First Amendment present unique standing considerations. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988); *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 299-302 (1979); *see also Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (permitting a pre-enforcement First Amendment challenge, recognizing the "sensitive nature of constitutionally protected expression"). As Justice Brandeis explained in his famous *Whitney v. California* concurrence, "[i]t is therefore always open to Americans to challenge a law abridging free speech and assembly. . . ." 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Nowhere is this more true than when a law criminalizes speech and a person must choose between either committing a crime or self-censorship. If that person violates a speech-suppressive law by partaking in the criminalized speech and is convicted, he indisputably has standing to challenge the law's

constitutionality.[2] While some may characterize that person as brave and fearless, presumably, a majority of Americans are unwilling to face potential incarceration to express their views.

Recognizing this Catch-22, the Court has held that a plaintiff does not need to first expose himself to arrest or prosecution to raise a First Amendment challenge. *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (first holding that a plaintiff "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"); *see Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (finding that while the plaintiff had not been arrested for violating the contested law, he had standing to challenge the law because he claimed that it deterred his constitutional

[2] The basic inquiry made to determine whether a party has alleged a case or controversy within the meaning of Article III of the Constitution, "is whether the conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Babbitt*, 442 U.S. at 297-98 (internal quotations omitted). Thus, where a party is arrested, prosecuted or convicted, the dispute and injury is definite and concrete. *See generally, e.g., United States v. Alvarez*, 132 S. Ct. 2537 (2012) (justiciable First Amendment challenge where plaintiff was charged with violating the Stolen Valor Act); *Mills v. Alabama*, 384 U.S. 214 (1966) (justiciable First Amendment challenge to a state law criminalizing certain campaign speech where plaintiff was charged with violating law); *Garrison v. Louisiana*, 379 U.S. 64 (1964) (justiciable First Amendment challenge to a criminal defamation law where plaintiff was tried and convicted).

rights). Instead, a person may hold his tongue and challenge the statute now, for the harm of self-censorship is a harm that can be realized even without an actual prosecution. *See Am. Booksellers Ass'n*, 484 U.S. at 392-93 (finding that plaintiffs had standing to challenge the constitutionality of a criminal statute prohibiting the display of sexually explicit materials even though they had neither been charged nor convicted of the crime).

Without explanation, and contrary to seven other circuit courts,[3] the Sixth Circuit's approach to standing ignores this Court's well-settled precedent and refuses to hear suits that challenge the constitutionality of speech-suppressive criminal laws unless the plaintiff has been convicted. *See Susan B. Anthony List v. Driehaus*, 525 Fed. Appx. 415 (6th Cir. 2013). Requiring a potential challenger to violate the law and even incriminate himself to presumably be convicted so that he can mount a constitutional challenge turns respect for the law on its head. *See Arizona Right to Life PAC v. Bayless*, 320 F.3d 1002, 1007 (9th Cir. 2003) (finding standing in a pre-enforcement challenge and explaining that to preclude the challenge violates public policy and penalizes plaintiff for its "commendable respect for the rule of law"). The result of the Sixth Circuit's approach is to rob Americans of any *lawful* ability to challenge

[3] *See* Pet'r Br. at 19-21.

the constitutionality of speech-suppressive laws and force them into self-censorship.

II. The Sixth Circuit's refusal to hear Petitioners' pre-enforcement challenge to Ohio's statutes proscribing certain political speech effectively bans political speech and muzzles the very agencies our Founding Fathers thoughtfully and deliberately selected to keep our society free.

Unique standing considerations associated with the First Amendment are even more critical when, such as here, the criminal law that a party seeks to challenge suppresses political speech. The Sixth Circuit's refusal to hear Petitioners' pre-enforcement challenge to Ohio's statutes proscribing certain political speech directly contradicts the very agencies our Founding Fathers thoughtfully and deliberately selected to keep our society free. Self-censorship results from the Sixth Circuit's dismissal, chilling the very things that the civil and political institutions in our society depend on – free debate and free exchange of ideas – and, from a practical perspective, banning political speech.

Since 1724, freedom of speech has famously been referred to as the "great Bulwark of liberty[.]" 1 John Trenchard & William Gordon, Cato's Letters: Essays on Liberty, Civil and Religious 99 (1724), reprinted in Jeffrey A. Smith, Printers and Press Freedom: The Ideology of Early American Journalism 25 (Oxford University Press 1988). Upon ratification, the First

Amendment "was understood as a response to the repression of speech and press that had existed in England." *Citizens United v. FEC*, 558 U.S. 310, 353 (2010). Through the First Amendment, our Founding Fathers sought to ensure complete freedom for "discussing the propriety of public measures and political opinions." Benjamin Franklin's 1789 newspaper essay, reprinted in Smith, at 11. "Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law, the argument of force in its worst form." *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).

As this Court has acknowledged, "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) (quoting *Mills*, 384 U.S at 218-19). This free discussion necessarily "includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). Of these, the Court has observed that "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co.*, 401 U.S. at 272.

"In a republic where the people are sovereign, the ability of the citizenry to make informed choices

among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). In finding a state law regulating the content of permissible speech during a judicial campaign unconstitutional, this Court explained that "[d]ebate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges." *Republican Party v. White*, 536 U.S. 765 (2002). In *Citizens United*, the Court took this a step further and reaffirmed the principle that "[p]olitical speech is indispensable to decisionmaking in democracy." 558 U.S. at 349 (internal quotations omitted).

By refusing to follow this Court's well-settled precedent and hear Petitioners' constitutional challenge to a law criminalizing certain speech, the Sixth Circuit censors political speech. Its approach to standing quashes "an essential mechanism to democracy" and robs Americans of their right to "inquire, to hear, to speak, and to use information to reach consensus" which this Court has found to be a "precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339-40.

III. To prevent forced self-censorship and ensure Americans can partake in open political discourse, this Court should reverse the Sixth Circuit's dismissal and reaffirm its settled precedent regarding justiciability standards applicable to pre-enforcement challenges of laws that effectively censor political speech.

Since it first articulated modern-day justiciability standards for pre-enforcement challenges in *Doe*, this Court has never required a party to be convicted before challenging the constitutionality of a criminal law. The Court has re-affirmed these standards time and time again, especially with respect to First Amendment challenges. *See, e.g., Am. Booksellers Ass'n*, 484 U.S. at 392-93; *Babbitt*, 442 U.S. at 299-302; *Dombrowski*, 380 U.S. at 486. "First Amendment standards, . . . must give the benefit of doubt to protecting rather than stifling speech." *Citizens United*, 558 U.S. at 327 (internal quotations omitted).

Circuit courts have applied these well-settled standards to pre-enforcement challenges of laws that seek to censor political speech and have consistently found such challenges justiciable. *See, e.g., St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481 (8th Cir. 2006) (permitting pre-enforcement challenge of a campaign finance law even though plaintiffs did not violate law); *Arizona Right to Life PAC*, 320 F.3d at 1006-07 (permitting pre-enforcement review of a law limiting the time, place and manner of

distribution of political literature even though plaintiffs did not violate law); *Majors v. Abell*, 317 F.3d 719 (7th Cir. 2003) (permitting pre-enforcement challenge of criminal law regulating the content of election speech even though plaintiffs were never charged, let alone convicted of the crime); *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000) (permitting pre-enforcement challenge of civil campaign finance laws justiciable even though no suit brought against plaintiffs). These courts recognize that to find otherwise would be to force self-censorship of political speech – rejecting exactly what the Sixth Circuit has done here.

The Sixth Circuit's decision should not be allowed to stand. Here, the threat of prosecution with no right to challenge prior to conviction is tantamount to forced censorship of citizens who wish to participate in political discourse. "Political speech must prevail against laws that would suppress it, whether by design or inadvertence," *Citizens*, 558 U.S. at 340. The Sixth Circuit's treatment of standing scares citizens, who would otherwise partake in political debate, into self-censorship. This Court's reversal of the Sixth Circuit and its re-affirmance of settled precedent regarding pre-enforcement challenges is imperative to protecting political speech and ensures that Americans will continue to be free to partake in the democratic process.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests that this Court reverse the decision below.

Respectfully submitted,

SHANNON LEE GOESSLING
Counsel of Record
KIMBERLY STEWART HERMANN
SOUTHEASTERN LEGAL FOUNDATION
2255 Sewell Mill Road, Suite 320
Marietta, Georgia 30062
(770) 977-2131
shannon@southeasternlegal.org

Counsel for Amicus Curiae

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