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 AMERICAN BOOKSELLERS ASSOCIATION, AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF AMERICAN PUBLISHERS, INC., COMIC BOOK LEGAL DEFENSE FUND, FREEDOM TO READ FOUNDATION, GREAT LAKES INDEPENDENT BOOKSELLERS ASSOCIATION, MOUNTAIN & PLAINS INDEPENDENT BOOKSELLERS ASSOCIATION, PACIFIC NORTHWEST BOOKSELLERS ASSOCIATION, SOUTHERN INDEPENDENT BOOKSELLERS ALLIANCE, ANNIE BLOOM'S BOOKS, CHANGING HANDS BOOKSTORE, INC., HARVARD BOOK STORE, INC., PAULINA SPRINGS BOOKS, POWELL'S BOOKSTORE, INC., SCHULER BOOKS & MUSIC, TATTERED COVER, INC., THE KING'S ENGLISH, INC., WELLER BOOK WORKS, VILLAGE BOOKS, AND DARK HORSE COMICS, INC. AS *AMICI CURIÆ* IN SUPPORT OF PETITIONERS

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American Booksellers Association, American Booksellers Foundation For Free Expression, American Library Association, Association of American Publishers, Inc., Comic Book Legal Defense Fund, Freedom to Read Foundation, Inc., Great Lakes Independent Booksellers Association, Mountain & Plains Independent Booksellers Association, Pacific Northwest Booksellers Association, Southern Independent Booksellers Alliance, (collectively the "Media *Amici*"), Annie Bloom's Books, Changing Hands Bookstore, Harvard Book Store, Inc., Paulina Springs Books, Powell's Bookstore, Inc., Schuler Books & Music, Tattered Cover, Inc., The King's English, Inc., Weller Book Works, Village Books (collectively the "Bookstore *Amici*") and Dark Horse Comics, Inc. respectfully submit this brief as *amici curiæ* in support of Petitioners.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiæ*, their members, their counsel, and Media Coalition Inc. (a 40-year old trade association of which many of the Media *Amici* are members) made a monetary contribution to its preparation or submission.

The parties' written blanket consents to the filing of *amicus* briefs have been filed with the Clerk of the Court.

INTEREST OF *AMICI*

The Media *Amici's* members, the Bookstore *Amici* and Dark Horse Comics, Inc. (collectively "*Amici*") write, create, publish, produce, distribute, sell, advertise in, and manufacture books, magazines, videos, sound recordings, motion pictures, interactive games, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific, and entertaining.[2] Libraries and librarians whose interests are represented by *Amici* American Library Association ("ALA") and Freedom to Read Foundation ("FTRF") provide such materials to readers and viewers, whose First Amendment rights ALA and FTRF also defend.

Amici have a significant interest in preventing the imposition of unconstitutional governmental limitations on the content of, and access to, First Amendment-protected communicative materials, whether textual or visual.

All of the *Amici* have brought pre-enforcement actions in federal courts to assert the unconstitutionality of state and federal laws that infringe First Amendment rights.[3] Some of these

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[2] A description of each of *Amici* is attached as Appendix A.

[3] *See, e.g., Ashcroft v. ACLU,* 542 U.S. 656 (2004); *Reno v. ACLU,* 521 U.S. 844 (1997); *Virginia v. American Booksellers* *(cont'd)*

cases are discussed in detail below.

Amici also have filed *amicus* briefs in this Court

Ass'n, 484 U.S. 383 (1988); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *Powell's Books, Inc. v. Kroger*, 622 F.3d 1202 (9th Cir. 2010); *American Booksellers Foundation for Free Expression v. Strickland* 601 F.3d 622 (6th Cir. 2010); *PSInet, Inc. v. Chapman*, 167 F. Supp. 2d 878 (W.D. Va. 2001), *aff'd,* 362 F.3d 227 (4th Cir. 2004); *American Booksellers Foundation for Free Expression v. Dean*, 202 F. Supp. 2d 300 (D. Vt. 2002), *aff'd,* 342 F.3d 96 (2d Cir. 2003); *ACLU v. Johnson*, 4 F. Supp. 2d 1029 (D. N.M. 1998), *aff'd,* 194 F.3d 1149 (10th Cir. 1999); *American Booksellers Ass'n v. Schiff*, 868. F. 2d 1199 (10th Cir. 1989); *American Booksellers Ass'n v. Webb*, 919 F. 2d 1493 (11th Cir. 1990); *Trans-High Corp. v. Colorado*, 13-cv-01389 *and Tattered Cover, Inc. v. Brohl*, 13-cv-01431, 2013 WL 2500836 (D. Colo. June 11, 2013); *Florence v. Shurtleff*, No. 2:05cv000485 (D. Utah May 16, 2012); *American Booksellers Foundation for Free Expression v. Sullivan*, 799 F. Supp. 2d 1078 (D. Alaska 2011); *American Booksellers Foundation for Free Expression v. Coakley*, No. 10-11165, 2010 WL 4273802 (D. Mass. Oct. 26, 2010); *Big Hat Books v. Prosecutors*, 565 F. Supp. 2d 981 (S.D. Ind. 2008); *Southeast Booksellers Ass'n v. McMaster*, 282 F. Supp. 2d 389 (D.S.C. 2003), 371 F. Supp. 2d 773 (D.S.C. 2005); 233 F.R.D. 456 (D.S.C. 2006); *Shipley, Inc. v. Long*, 454 F. Supp. 2d 819 (E.D. Ark. 2004); *ACLU v. Goddard*, (formerly *ACLU v. Napolitano*) No. CIV 00-0505 TUC-AM (D. Ariz. Apr. 23, 2004; July 22, 2004); *Athenaco v. Cox*, 335 F. Supp. 2d 773 (E.D. Mich. 2004); *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981); *Village Books v. City of Bellingham*, No. C88-1470D (W.D. Wash. Feb. 9, 1989); *American Libraries Ass'n v. Pataki,* 969 F. Supp. 160 (S.D.N.Y. 1997).

addressing First Amendment issues, including the impact of speech regulations on creators, producers, distributors, retailers, and consumers.[4]

SUMMARY OF ARGUMENT

For more than three decades, under the clear precedents of this Court, *Amici* have known that when Congress or a State enacts a statute which impinges on their First Amendment rights, they need neither suffer the chilling effect on their speech, nor violate the statute and risk criminal prosecution, but could, instead—as long as their fear of prosecution was well-founded—bring a federal pre-enforcement challenge to the statute. The *Amici* have done just that, filing 23 pre-enforcement cases[5] which resulted in decisions either holding the statutes unconstitutional, *e.g., American Booksellers*

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[4] *See, e.g.*, *United States v. Alvarez,* 132 S. Ct. 2537 (2012); *Brown v. Entm't Software Ass'n,* 131 S. Ct. 2729 (2011); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *United States v. Stevens*, 130 S. Ct. 1577 (2010); *Ashcroft v. ACLU, supra*; *Beard v. Banks*, 542 U.S. 406 (2004); *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *City of Los Angeles v. Alameda Books, Inc.*, 536 U.S. 921 (2002); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *City News and Novelty, Inc. v. City of Waukesha, 531 U.S. 278 (2001); United States v. Playboy Entm't Group, 529 U.S. 803 (2000); Denver Area Educ. Telecomms. Consortium v. F.C.C., 518 U.S. 727 (1996); United States v. X-Citement Video, Inc., 513 U.S. 64 (1994).*

[5] *See* fn. 3.

Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986), or dramatically narrowing the statutes so that they did not violate the First Amendment, *e.g., Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988), *certified questions answered,* 236 Va. 168, 372 S.E.2d 618 (Va. 1988), *vacated and remanded,* 488 U.S. 905 (1988) ("*Virginia v. American Booksellers*"). These cases have protected First Amendment rights from a broad range of threats—statutes which would have criminalized, among other things, non-obscene speech on websites and in adult-to-adult emails and other electronic communications, descriptions or depictions of violence or criminal conduct, posting non-obscene art and literature on websites, access to information about healthcare, and the physical display of non-obscene publications in bookstores and retail stores.

In some instances, these pre-enforcement cases holding statutes unconstitutional led to curative legislation—benefitting both the plaintiffs (whose First Amendment rights were protected) and the States (which were able to put a constitutional law in place), *e.g, American Booksellers Foundation for Free Expression v. Coakley*, No. 10-11165, 2010 WL 4273802 (D. Mass. Oct. 26, 2010).

These cases were brought in federal courts in

nine of the Circuits—including the Sixth Circuit.[6]

The decision of the Sixth Circuit in this case,[7] threatens to close the courthouse door to such First Amendment challenges, by imposing a standing requirement under which, in effect, a speaker must show that he or she has been silenced by a threat of prosecution that was both likely and imminent. Had that standing requirement been imposed in the pre-enforcement cases brought by Media *Amici* and Bookstore *Amici*, it is doubtful that *Amici,* as plaintiffs, could have sufficiently demonstrated standing. Without pre-enforcement challenges, these unconstitutional statutes would have stayed in place—chilling speech unless and until a speaker subjected himself or herself to criminal prosecution and litigated the unconstitutionality of the statute in the criminal case.

That decision below is contrary to the decisions of this Court, which recognize that speakers who have a well-founded fear of prosecution under a statute infringing First Amendment rights must be

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[6] In *American Booksellers Foundation for Free Expression v. Strickland,* 560 F.3d 443 (6th Cir. 2009), defendants argued that plaintiffs lacked standing. The Sixth Circuit, without discussing standing, addressed the merits of the case and thus necessarily found that plaintiffs had standing.

[7] *Susan B. Anthony List v. Driehaus,* 525 Fed. Appx. 415 (6th Cir. 2013).

accorded standing to bring a pre-enforcement challenge. This Court should reverse the decision below, and reiterate the principles of standing which have long protected First Amendment rights.

ARGUMENT

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FREEDOM OF SPEECH WILL BE IMPAIRED IF SPEAKERS WHO HAVE A WELL-FOUNDED FEAR OF PROSECUTION UNDER A STATUTE WHICH VIOLATES THE FIRST AMENDMENT ARE DENIED STANDING TO BRING A PRE-ENFORCEMENT CHALLENGE

For *Amici*, the issue of standing presented in this case is intensely practical: When faced with a statute which threatens their First Amendment rights, will these *Amici* (and others so affected) be able to bring pre-enforcement challenges? Or will they need to choose between subjecting themselves to criminal prosecution, or enduring the unconstitutional statute and engaging in self-censorship?

I. To Avoid Either Having Their Speech Chilled, or Subjecting Themselves To Criminal Prosecution, *Amici* Have Brought 23 Successful Pre-Enforcement Challenges To Unconstitutional Statutes

Over the past three decades, *Amici* have brought

23 successful pre-enforcement challenges to statutes which posed a threat to their First Amendment rights.[8]

A review of a sampling of these cases demonstrates not only the critical role that pre-enforcement challenges play in ensuring that First Amendment rights are not chilled and providing an opportunity to challenge a law that impinges on the First Amendment without subjecting oneself to criminal prosecution, but also the salutary effect of such challenges. These cases give states an opportunity to narrow their statutes to render them constitutional—either through construction by the State supreme court on a certified question, construction by a federal court based on argument by counsel for the State, or by remedial legislation.

Several of the cases brought by *Amici* were challenges to expansively drafted "harmful to minors" statutes—that is, statutes which restrict minors' access to sexually-explicit, non-obscene materials to which adults are entitled to have access under the First Amendment. This Court has long held—and *Amici* do not challenge—that such

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[8] In seventeen of the cases the challenged statute or ordinance was held unconstitutional; in five, it was narrowed to constitutional dimensions; in one, the ordinance was found unconstitutional in part and the remaining portion was narrowed to constitutional dimensions.

restrictions on minors' access are constitutional. *Ginsberg v. New York,* 390 U.S. 629, 634 (1968); *Miller v. California,* 413 U.S. 15 (1973); *Reno v. ACLU,* 521 U.S. 844, 864 (1997). However, if the method used to restrict minors' access to "harmful to minors" materials also restricts, or prevents, adults' access to such materials, the statutes can impinge upon the First Amendment rights of adults. Because such statutes focus on sexually explicit materials, overbroad statutes can unconstitutionally restrict adults' access to communications about healthcare, sexual health, and family planning (including pregnancy, pre-natal care, and access to abortion), as well as access to non-obscene art and literature.

And if the statutory language defining such materials is broader than permitted under *Miller/Ginsberg*, the statutes can impinge upon the First Amendment rights of minors.[9]

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[9] As this Court held in *Brown v. Entertainment Merchants Ass'n,* 131 S. Ct. 2729, 2735-36 (2011), " '[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.' *Erznoznik v. Jacksonville,* 422 U.S. 205, 212–13 (1975) (citation omitted). No doubt a State possesses legitimate power to protect children from harm, *Ginsberg, supra*, at 640–641; *Prince v. Massachusetts,* 321 U.S. 158, 165 (1944), but that does not include a free-floating power to restrict the ideas to which children may be exposed. 'Speech that is neither obscene as to youths nor subject to some other legitimate proscription *(cont'd)*

Issues as to the constitutional breadth of "harmful to minors" statutes have arisen both in the bricks-and-mortar world, and, more recently, in the expansion of those statutes to online communications.

In *Virginia v. American Booksellers*, several of Media *Amici,* joined by booksellers and magazine distributors, brought a pre-enforcement First Amendment challenge to a Virginia "harmful to minors" statute (there denominated "harmful to juveniles") which made it unlawful for any person "to knowingly display for commercial purposes in a manner whereby juveniles may examine and peruse" certain visual or written sexual or sadomasochistic material that is harmful to juveniles. 484 U.S. at 383. *Amici* challenged both the "display" restrictions and the scope of the material that came within the statute's breadth.

This Court held that plaintiffs had standing to bring these pre-enforcement challenges, noting:

> [T]he alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution.

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cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.' *Erznoznik, supra,* at 213–214."

484 U.S. at 392. This Court certified two questions to the Supreme Court of Virginia, which narrowly construed the statute to render it constitutional, holding that a book cannot be deemed harmful to juveniles "if it has serious value for a legitimate minority of juveniles, and in this context, a legitimate minority may consist of older, normal (not deviant) adolescents," and holding that there was a *scienter* element in the statute, so that, in order to be convicted of violating the statute, a bookseller must have "knowingly afforded juveniles an opportunity to peruse harmful materials in his store or, being aware of facts sufficient to put a reasonable person on notice that such opportunity existed, took no reasonable steps to prevent the perusal of such materials by juveniles." *Virginia v. American Booksellers Ass'n*, 372 S.E.2d 618, 624-25 (Va. 1988).

Thus, because a pre-enforcement challenge could be made, the chilling effect was avoided, the booksellers were able to challenge the constitutionality of the statute without risking criminal prosecution, and Virginia was able to narrow the statute so that it would not be constitutionally infirm.[10]

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[10] Similarly, in *American Booksellers Foundation for Free Expression v. Strickland,* 560 F.3d 443, 447 (6th Cir. 2009), the Sixth Circuit certified a question to the Ohio Supreme Court relating to the scope of the State's "harmful to minors" statute, as applied to Internet communications. The Ohio Supreme *(cont'd)*

In *American Booksellers Foundation for Free Expression v. Coakley*, several of *Amici* and other parties (including an online photographic not-for-profit organization and a licensed marriage and family therapist), as plaintiffs, brought a pre-enforcement challenge to a Massachusetts statute which, in expanding a "harmful to minors" statute to electronic communications, used such sweeping language that brought within its scope a wide range of non-obscene communications among adults. The district court issued a preliminary injunction against the statute, holding that the law was overly broad because it "proscribe[s] a substantial amount of constitutionally protected speech" when judged "in relation to the statute's plainly legitimate sweep." 2010 WL 4273802, at *4, quoting from *Virginia v. Hicks,* 539 U.S. 113, 118–19 (2003).

The Massachusetts legislature promptly amended the statute to cure the constitutional defect

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Court issued an opinion stating that the statute applied only to personally directed electronic communications and that it did not apply to generally accessible communications. *American Booksellers Foundation for Free Expression v. Cordray,* 922 N.E.2d 192, 195 (Ohio 2010). The Sixth Circuit held that the statute, as thus limited by a definitive decision of the State's highest court, was constitutional. *American Booksellers Foundation for Free Expression v. Strickland,* 601 F.3d 622 (6th Cir. 2010). The chilling effect was thus eliminated, as was the risk that a prosecutor would take a broader view of the statute.

by, among other things, adding a provision that:

> A person who disseminates an electronic communication or possesses an electronic communication with the intent to disseminate it shall not be found to have violated this section unless he specifically intends to direct the communication to a person he knows or believes to be a minor.

Mass. St. 2011, c. 9, § 19 (eff. April 11, 2011) (codified as Mass. Gen. Laws, Ch. 272 § 28). Days later, the preliminary injunction was vacated on consent, and the action was dismissed.

Less than nine months elapsed from the filing of the complaint to the Massachusetts legislature's enactment of a curative amendment. The pre-enforcement challenge not only eliminated the chilling effect of an unconstitutional statute, but resulted in the enactment of an amended statute which would withstand constitutional scrutiny if challenged by a criminal defendant who, with specific intent, used electronic communications to disseminate "harmful to minors" materials to a person he knew or believed to be a minor.

Trans-High Corp. v. Colorado, No. 13-cv-01389 *and Tattered Cover, Inc. v. Brohl,* No. 13-cv-01431, 2013 WL 2500836 (D. Colo. June 11, 2013) did not involve a "harmful to minors" statute. In those cases, several of *Amici* and other parties brought a pre-enforcement challenge to a Colorado penal statute which would have restricted the display and sale of magazines focused on marijuana at the same time that Colorado legalized the sale of marijuana for non-medical use. The statute was so broad and so vague that it would have made it a crime to display

copies of magazines such as *State Legislatures* and *Governing* which gave substantial coverage to the Colorado referendum and statute decriminalizing marijuana.

After the complaints were filed, the State of Colorado readily conceded that the provisions of the statute restricting the display and sale of magazines violated the First Amendment. A permanent injunction was entered, on consent, less than two weeks after the action was filed.

In *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, an Indianapolis ordinance, while not criminal by its terms, attempted by threat of civil sanction, fines and damages to punish the production, sale or distribution of materials that depicted or constituted the "sexually explicit subordination of woman" (defined to include women depicted or described in scenarios of degradation, positions of servility or submission).Under the statute, a complaint could be brought by any "woman acting against the subordination of women" and could result in the issuance of a cease and desist order against further sale, distribution or performance. The form of ordinance (characterized as an anti-pornography civil rights ordinance) was highly promoted and publicized, having been drafted by a well-known law professor and a leading feminist activist and writer.

Several of *Amici* and other parties, including an association of college stores, a distributor of motion picture videos, and a distributor of books and magazines, were concerned about the breadth and vagueness of the scope of the ordinance, which appeared to cover much art and literature, both

classic and modern. They brought a pre-enforcement challenge. The district court found that plaintiffs had standing and held the ordinance unconstitutional, as did the Seventh Circuit. This Court affirmed. *American Booksellers Ass'n v. Hudnut,* 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd* 771 F.2d 323 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986). In addition to alleviating the threat to plaintiffs' First Amendment rights without forcing them to risk fines and penalties, the highly visible, successful, pre-enforcement challenge discouraged attempts to pass laws similar to the ordinance in other States and municipalities, thus conserving judicial resources.

In *Big Hat Books v. Prosecutors*, 565 F. Supp. 2d 981 (S.D. Ind. 2008), several of *Amici* and other parties, including individual bookstores and the Indianapolis Museum of Art, brought a pre-enforcement challenge to an Indiana statute requiring registration with a $250 filing fee by all persons (individuals and businesses) who sell any "harmful to minors" materials. Since such materials cannot be sold to minors, the statute was directed at those who sold such materials to adults, who are entitled under the First Amendment to purchase them. The district court held that the registration mandate failed strict scrutiny and that the fee was content-based. The statute was thus unconstitutional under the First Amendment.

In *Southeast Booksellers Ass'n v. McMaster,* 371 F. Supp. 2d 773 (D.S.C. 2005), several of *Amici* and other parties (including an art center) brought a pre-enforcement challenge against a South Carolina statute expanding that state's "harmful to minors" statute to electronic communications, such that it

restricted non-obscene protected communications among adults. The district court held the legislation unconstitutional, noting that:

> this action mirrors a wealth of cases challenging, on First Amendment grounds, state and federal statutes which resemble the Act. Federal courts have unanimously concluded that these acts are unconstitutional.

371 F. Supp. at 781 (citations omitted).

In the case of a highly publicized proposed statute as in *Hudnut, supra*, a judicial finding of unconstitutionality may stifle further attempts of passage. On the other hand, in many cases it is irrelevant. The failure of legislators to consider constitutionality can often be explained by political expedience. The "blame" for striking a politically popular bill can be passed to the judiciary.[11] The resulting proliferation of unconstitutional legislation in the various States further highlights the importance of pre-enforcement challenges in the protection of First Amendment rights.

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[11] *See* Michael Bamberger, Reckless Legislation: How Legislators Ignore the Constitution (Rutgers Univ. Press 2000), at 7-8.

II. *Amici* Were Able To Bring These Pre-Enforcement Challenges Because This Court Has Consistently Recognized That a Plaintiff Who Has a Well-Founded Fear of Prosecution Based on an Intent to Engage in Activity Arguably Protected by the First Amendment Has Standing

Amici were able to bring these pre-enforcement challenges because this Court has recognized that, when First Amendment rights are at issue, evaluating whether there is the "actual or threatened injury" sufficient to establish standing[12] entails consideration of two potential injuries.

First, there is the injury which attends the threat of enforcement. As the Court has repeatedly

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[12] Standing is a "threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin* 422 U.S. 490, 498 (1975). To clear that hurdle, a party who invokes a federal court's authority must show that (1) he or she personally has suffered some actual or threatened injury as a result of the challenged conduct; (2) the injury can fairly be traced to that conduct; and (3) the injury likely will be redressed by a favorable decision from the court. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). In cases involving pre-enforcement challenges based on First Amendment claims, the issue is the first of these requirements—actual or threatened injury. The latter two requirements—tracing an injury to the unconstitutional statute, and the effectiveness of redress by the court—are easily satisfied.

explained, it is not necessary that a person expose himself to arrest or prosecution under a statute in order to challenge that statute in a federal court. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Epperson v. Arkansas*, 393 U.S. 97 (1968). A credible threat of present or future prosecution itself works an injury that is sufficient to confer standing, even if there is no history of past enforcement. *Doe v. Bolton*, 410 U.S. 179, 188 (1973).

The second type of injury is peculiar to the First Amendment context. In such cases, an actual injury exists when the plaintiff is chilled from exercising its right to free expression or forgoes expression in order to avoid enforcement consequences. *Meese v. Keene*, 481 U.S. 465, 473 (1987). The publicity caused by a criminal charge, even if ultimately proven to be baseless, is harmful to the reputation of a person or business. In such situations the mere existence of the allegedly unconstitutional statute forces the speaker toward self-censorship. *Virginia v. American Booksellers*, 484 U.S. at 393.

The Court, in *Virginia v. American Booksellers*, recognized the unique danger from the mere existence of unconstitutional speech-suppressive statutes on the books:

> We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them.

Ibid. This has been the test for standing in First Amendment challenges ever since, during which time *Amici* have successfully sustained pre-enforcement challenges in federal district courts in nine of the Circuits. *Amici*'s standing, as plaintiffs, has been regularly upheld on the basis that they had an actual and well-founded fear of prosecution.

There are also prudential reasons in favor of the *Virginia v. American Booksellers* test for standing in First Amendment challenges. The mere existence of such an unconstitutional statute on the books, even prior to enforcement, results in restriction of protected speech. As this Court held in *Virginia v. American Booksellers,*

> [T]he alleged danger of this statute is, in large measure, one of self-censorship; a harm than can be realized even without an actual prosecution.

484 U.S. at 393. That holding recognizes—as does the language of the First Amendment, "Congress shall *make no law* … abridging the freedom of speech …" (emphasis added)—that when a speech-suppressive law is enacted, the injury is sustained by the *making* of the law, and not only if and when it is later enforced.

The decision of the Sixth Circuit in this case applies a different standard—a standard which undermines the First Amendment. The Sixth Circuit held that Susan B. Anthony List lacked standing because it had not shown that it was "*likely* that the Commission *will threaten* SBA List with prosecution *anytime soon*." 525 Fed. Appx. at 420 (emphasis added). But under *Virginia v. American Booksellers,* it is not necessary for a speaker to show that

prosecution is *likely* or *imminent.* It is, instead, sufficient to show that, "The State has not suggested that the … law will not be enforced." 484 U.S. at 393.

And the Sixth Circuit dealt with the chilling effect dismissively, noting that SBA List had continued to engage in the speech at issue, and has proclaimed "We will simply not be intimidated into silence." 525 Fed. Appx. at 423. But standing is based on the "danger … of self-censorship," *Virginia v. American Booksellers,* 484 U.S. at 393, inherent in a statute which punishes speech, not on a subjective determination of whether, or to what extent, a particular speaker is willing to engage in the speech and risk prosecution with the statute in place.

Nothing in this Court's decisions supports the Sixth Circuit's view that standing to bring a pre-enforcement challenge to a law which violates the First Amendment is limited to persons who can show that they have been silenced by the likely threat of imminent prosecution.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be **reversed.**

Dated: February 28, 2014

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APPENDIX A
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AMICI CURIÆ

The following *amici curiæ* join this brief:

The Media *Amici*

American Booksellers Association, founded in 1900, is a trade organization devoted to meeting the needs of its core members - independently owned bookstores with storefront locations nationwide - through education, information dissemination, business products and services, and advocacy. ABA represents more than 1,700 bookstores operating in 2,000 locations throughout the country. ABA exists to protect and promote the interests of independent retail book businesses, as well as to protect the First Amendment rights of every American.

American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

American Library Association ("ALA"), established in 1876, is a nonprofit professional organization of more than 67,000 librarians, library trustees, and other friends of libraries dedicated to providing and improving library services and promoting the public interest in a free and open information society.

Association of American Publishers, Inc. ("AAP") is the national association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover, paperback, and electronic books in every field, scholarly and professional journals, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. AAP represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Comic Book Legal Defense Fund ("CBLDF") is a non-profit corporation dedicated to defending the First Amendment Rights of the comic book industry. CBLDF, which has its principal place of business in New York, New York, represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians, and readers located throughout the country and the world.

Freedom to Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

The Great Lakes Independent Booksellers Association is a trade association representing and promoting the independent booksellers located in Illinois, Indiana, Michigan and Ohio. It was formed in 1989 in response to censorship legislation proposed in Michigan.

The Mountain & Plains Independent Booksellers Association is a trade association supporting independent booksellers in Arizona, Colorado, Kansas, Montana, Nebraska, Nevada, New Mexico, Oklahoma, South Dakota, Texas, Utah and Wyoming.

The Pacific Northwest Booksellers Association is a trade association representing the interests of literacy, free speech and independent bookselling in Alaska, Idaho, Montana, Oregon and Washington.

The Southern Independent Booksellers Alliance is a trade association that empowers, promotes and celebrates independent booksellers in Alabama, Arkansas, Florida, Georgia, Kentucky Louisiana, Mississippi, North Carolina, South Carolina, Tennessee and Virginia.

The Bookstore *Amici.*

Each of the Bookstore *Amici* and their owners believes in the exercise and protection of rights under the First Amendment.

Bluejay, Inc. d/b/a/ Paulina Springs Books is a corporation organized under the laws of the State of Oregon, which operates bookstores in Sisters and Redmond, OR, as well as having an online retail presence.

Changing Hands Bookstore, Inc. is a corporation organized under the laws of the State of Arizona, which operates a bookstore in Tempe, AZ, as well as having an online retail presence.

Harvard Book Store, Inc. is a corporation organized under the laws of the Commonwealth of Massachusetts, which operates a bookstore in Cambridge, MA, as well as having an online retail presence.

Historic Fairhaven Retail Associates is a corporation organized under the laws of the State of Washington, operating a bookstore under the name Village Books in Bellingham, WA, as well as having an online retail presence.

Old Multnomah Book Store Ltd. is a corporation organized under the laws of the State of Oregon, which operates a bookstore under the name Annie Bloom's Books in Portland, OR, as well as having an online retail presence.

Powell's Bookstore, Inc. is a corporation organized under the laws of the State of Oregon, which operates bookstores under the name Powell's Books in Portland, OR, as well as having an online retail presence.

Sam Wellers Books is a corporation organized under the laws of the State of Utah, which operates a bookstore under the name Weller Book Works in Salt Lake City, UT.

Schuler Books, Inc. is a corporation organized under the laws of the State of Michigan, which operates bookstores under the name Schuler Books & Music in Grand Rapids and Lansing, MI.

Tattered Cover, Inc. is a corporation organized under the laws of the State of Colorado, which operates bookstores in Denver and Highlands Ranch, CO, as well as having an online retail presence.

The King's English, Inc. is a corporation organized under the laws of the State of Utah, which operates a bookstore under the name King's English Bookshop in Salt Lake City, UT, as well as having an online retail presence.

Dark Horse Comics, Inc., a corporation organized under the laws of Oregon, is the third-largest comics publisher in the United States. Dark Horse and its owners believe in the exercise and protection of rights under the First Amendment.