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

REPLY BRIEF

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INTRODUCTION

The parties agree that a concrete "case" or "controversy" within the meaning of Article III arises when a plaintiff faces a "credible threat" of being penalized for constitutionally protected speech. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). The issue before this Court is whether petitioners have satisfied that test.

They plainly have. Existence of a credible threat requires predicting how two actors will behave in the future—the *speaker* and the *state*. As to the former, petitioners alleged that they want to engage in the *same* speech in future elections as SBA had during the 2010 campaign, not necessarily regarding Rep. Driehaus but regarding many other Ohio candidates who had supported the ACA and its abortion funding. At least at the pleading stage, that more than suffices, particularly because federal elections recur every two years and petitioners are advocacy groups whose mission is to pursue these critiques. As to the state, the Commission in 2010 found probable cause that SBA's statements were criminal—a view from which it has never retreated, even in this litigation.

The Commission seeks to deny the self-evident threat that petitioners face by stringing together a series of implausible hypotheticals under which petitioners might avoid further enforcement or final conviction. With respect to OEC enforcement, *maybe* the Ohio Secretary of State will ignore his statutory duty to report suspected violations (though he has never disavowed that role), and *maybe* nobody in the entire State of Ohio will file a complaint with the Commission (notwithstanding the latter's probable-cause finding and the immense benefits of unleashing

"truth police" on an adversary). With respect to final OEC adjudication, *maybe* the Commission will reverse its "preliminary" view that describing the ACA as taxpayer-funded abortion is a crime in Ohio (though it has given no such indication, even in the face of this litigation). With respect to criminal prosecution, *maybe* a prosecutor will in his discretion decline to pursue charges (even though they have been referred by the agency designated to adjudicate election-law violations). And *maybe*, after petitioners incur the burdens—financial, political, reputational—of being dragged through this intrusive process in the middle of a campaign, a state court will hold, several years later, that the Commission erred (though most complainants abandon the process after the election).

In short, even *after* a speaker has been subjected to prior enforcement that found a probable violation, the Commission contends that there is no "credible threat" unless the speaker eliminates every conceivable hypothetical under which state actors ignore their own laws. But Article III does not require, and the First Amendment cannot tolerate, such a Sisyphean burden on speakers.

The Commission's contrary view is at war with this Court's consistent admonition that the law does not force speakers to a Hobson's Choice of either engaging in core political speech and risking prosecution, or engaging in "self-censorship" that profoundly diminishes free political debate. Rather, a credible *threat* suffices, because that threat visits the cognizable harm required by Article III and because the only alternative is to force citizens to seriously jeopardize their freedom in order to obtain adjudication of their constitutional rights. Indeed,

the Commission's rule would result here in denying *any* pre-enforcement challenge to an unconstitutional restriction on core political speech.

ARGUMENT

I. PETITIONERS SUFFICIENTLY ALLEGED AN INTENT TO ENGAGE IN SPEECH ARGUABLY PROSCRIBED BY THE STATUTE.

Petitioners alleged that they will repeat "the same or similar statements" as those found to probably violate Ohio law, "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." JA149 (COAST); *see also* JA122 (SBA intent to engage in "substantially similar activity"). Raising an argument that not even the Sixth Circuit invoked, the Commission says that these allegations are not sufficiently "concrete" or "imminent." It also defends the Sixth Circuit's rule that petitioners' suit is precluded because petitioners do not agree that their intended speech is false. Those objections fail.

A. The Commission argues that no dispute can be justiciable unless petitioners identified in their complaints the "particular candidate" they planned to criticize and the "precise language" they planned to use. (Opp.34.) There is no such arbitrary rule.

First, this case was dismissed on the pleadings, at which point "general factual allegations of injury … may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). That alone distinguishes all of

the cases the Commission cites, including *Lujan* (a summary judgment case) and *Golden v. Zwickler*, 394 U.S. 103, 107 (1969), and *Renne v. Geary*, 501 U.S. 312 (1991) (both of which reached final judgments). As *Lujan* explained, the need for "specific facts" to prove standing arises only at "successive stages of the litigation." 504 U.S. at 561.

Contrary to the Commission's claim (Opp.35), this Court did not overrule *Lujan* when it held in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), that the facts pleaded in a complaint must be "plausible" to present a viable claim. The plausibility rule does not mean that "detailed factual allegations" are necessary. *Id.* at 678. All it means is that the court need not accept "legal conclusions" as true and may use its "common sense" to determine whether well-pleaded facts show a plausible claim to relief. *Id.* at 678-79.

Here, "common sense" confirms the inherent plausibility of petitioners' assertion that they will repeat similar statements in the future. Petitioners are *advocacy groups*; their mission is to educate voters about issues like the ACA's taxpayer funding for abortion. (SBA's specific focus is abortion.) So it is obvious that they would continue to repeat that message. *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1002 (9th Cir. 2010) (because plaintiff is "politically active organization that has been heavily involved in public debates about pro-life issues," there is a "reasonable expectation that [it] will face … enforcement … again").

The Commission emphasizes that Driehaus is no longer a candidate for political office. (Opp.33.) But Driehaus is hardly the only candidate to vote for the ACA. Indeed, SBA's original "false statement" also

criticized *another* Member of Congress from Ohio, Marcy Kaptur. JA52. Rep. Kaptur ran for reelection in 2012 and is running once again in 2014. Senator Sherrod Brown, another ACA supporter, was also on the ballot in Ohio in 2012—as was the President.

Whether *Driehaus* runs for Congress again is therefore irrelevant. Petitioners do not care about *Driehaus*; they care about *the ACA's abortion funding*, which remains politically salient. Petitioners' allegation that they want to repeat the speech about others is therefore plainly plausible. This contrasts starkly with *Golden*, where the pamphlet at issue addressed particular remarks by a particular Congressman. 394 U.S. at 105 n.2. The Court concluded that the plaintiff's "*sole concern* was literature relating to the Congressman and his record." *Id.* at 109 (emphasis added). No such conclusion can be drawn here.[1]

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[1] The Commission also cites *Renne*, but the Court there identified a host of justiciability defects not present here. *First*, the challenged provision prohibited party endorsements in non-partisan elections, but the plaintiffs were *voters*, not parties or even candidates. 501 U.S. at 319-20. *Second*, the only means of enforcing the prohibition was deleting the party endorsements from candidates' statements in official voter guides. *Id.* at 322. But there was no evidence that a candidate wanted to include such an endorsement in his statement. *Id.* at 321. *Third*, a distinct statute, not challenged, anyway restricted mention of partisan activities in candidate statements. *Id.* at 319. *Fourth*, the Court "doubt[ed]" that the plaintiffs had properly pleaded a facial challenge. *Id.* at 323. But "[i]f such a challenge had been brought by a political party … , and if the complaint had alleged that these organizations wanted to endorse, support, or oppose a candidate for nonpartisan office but were inhibited from doing so because of the constitutional provision, the case would unquestionably be ripe." *Id.* at 325 (Stevens, J., concurring).

Nor is there any relevant doubt over the "precise language" that petitioners intend to use. (Opp.36.) First, it is extraordinarily precise: COAST alleged an intent to make "the same or similar statements" as SBA had. JA149. Second, while "precise language" might sometimes matter, *Renne*, 501 U.S. at 322, it did not matter to the Commission—which in finding probable cause did not distinguish between any of SBA's various statements linking the ACA to abortion funding. JA49-50, 37, 73. Petitioners thus face a credible threat *regardless* of "precisely" how they formulate their ACA message.

Indistinguishable precedent plainly establishes the sufficiency of these allegations. In *Babbitt*, the unions did not specify language they would use to criticize a specific company, but it nonetheless sufficed that they alleged intent "to engage in boycott activities," including "consumer publicity" campaigns covered by the law prohibiting "dishonest, untruthful and deceptive publicity." 442 U.S. at 301. Even though the unions did not allege intent to "propagate" the proscribed "untruths," its suit "plainly pose[d] an actual case or controversy," as "erroneous statement is inevitable in free debate." *Id.*

Similarly, in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), the plaintiff's past advertisement criticized two Senators, but it did not allege an intent to refer to those specific candidates or any other particular candidates by name in future advertisements, much less during the law's "blackout period." It sufficed that the organization said it "planned on running 'materially similar'" ads in the future. *Id.* at 463. As the Court explained, it is impractical "in the context of election cases" to

demand greater "specificity." *Id.* In short, "[h]istory repeats itself, but not at the level of specificity demanded by the [Commission.]" *Id.*[2]

The Commission observes that the plaintiffs in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), identified the entities they sought to assist, and in *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383 (1988), identified the books they believed "might" be covered by the challenged law. (Opp. 53.) But in neither case did the Court mention those facts in its discussion of justiciability, so they could hardly have been critical.

B. The Commission also argues that petitioners' allegations of intent to repeat SBA's speech are not *imminent*. (Opp.17, 34.) But this is nothing like the allegation in *Lujan* that the plaintiffs intended "some day" to visit endangered species' habitats, 504 U.S. at 564—petitioners here had already been injured by the Ohio law and would be injured again at the next, regularly scheduled election. While an election *six years* off may be "too remote temporally," *McConnell v. FEC*, 540 U.S. 93, 226 (2003), in this case the next election was less than two years away.

Since, as this case vividly illustrates, it takes at least two years to resolve election speech cases, any rule deeming two years "premature" would inevitably ensure that adjudication cannot timely occur before the next election. *WRTL*, 551 U.S. at 462 (rejecting FEC position that "2-year window between elections

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[2] *Wisconsin Right to Life* addressed mootness rather than ripeness, but both doctrines require the plaintiff to prove that the injury will recur, *see City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983), and so its principles apply equally here.

provides ample time … to litigate"). Why establish unrealistic ripeness rules only to create avoidable mootness issues that, in turn, trigger the "capable of repetition yet evading review" exception?

C. The Commission also defends the Sixth Circuit's holding that petitioners' claims are barred because they believe their speech is true. (Opp.39, 48.) But the Commission never explains *why* this "preemptive confession" is needed for justiciability or responds to petitioners' points on why it is irrelevant. As explained, the credible-threat test looks to how the *speaker* will act and how the *state* will react. The speakers have *alleged* how they plan to act, and their subjective views about the legality of their speech are irrelevant to predicting how the *state* will respond.

If plaintiffs must "confess" to get into court, that would as a practical matter foreclose pre-enforcement challenges to the false-statement law, even though its constitutional flaw is precisely that it "present[s] a grave and unacceptable danger of suppressing truthful speech." *United States v. Alvarez*, 132 S. Ct. 2537, 2564 (2012) (Alito, J., dissenting). Indeed, this rule would block challenges to the most vague and open-ended laws—*i.e.*, the most constitutionally troubling ones. (Petrs.Br.32-34.) This is why *Babbitt* conclusively held that, even in the commercial-speech context where the state *may* proscribe "false" speech, a plaintiff may challenge such a ban even when it specifically *disavows* any intent to "propagate untruths." 442 U.S. at 301; *see also Holder*, 130 S. Ct. at 2717 (plaintiffs urged Court to hold that statute did *not* encompass their intended speech, thereby resolving case "without reaching any issues of constitutional law," but challenge was still

"suitable for judicial review"); *Booksellers*, 484 U.S. at 390-91, 393 (plaintiffs argued that law "*might* apply to as much as one half of their inventory," but still had "actual and well-founded fear that the law will be enforced against them" (emphasis added)).

In short, "[a] plaintiff who challenges a statute 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. That test is satisfied if the law "arguably" proscribes his speech in the view of the *enforcement authorities*, regardless whether the speaker *agrees*.

II. PETITIONERS FACE A "CREDIBLE THREAT" OF BEING PENALIZED FOR THEIR SPEECH.

The above demonstrates that petitioners have sufficiently alleged their own intended conduct. The other relevant question is whether it is "credible" to expect that petitioners will be penalized if they proceed with those plans. The Commission contends that no credible threat exists because, supposedly, even if petitioners repeat their speech, there are many hurdles that would necessarily precede any criminal prosecution. (Opp.36.) There are three flaws in that argument. *First*, it erroneously focuses exclusively on *criminal* prosecution as the relevant harm, but the Commission's civil enforcement process imposes serious burdens on core political speech that on their own constitute cognizable injury. *Second*, as to criminal prosecution, the Commission wrongly places the burden of uncertainty on the *speakers*, imposing precisely the dilemma and self-censorship that pre-enforcement review is meant to resolve. *Third*, the Commission overstates both the *number* of steps before prosecution and the *plausibility* of each.

A. At the threshold, the Commission errs by exclusively focusing on the harm caused by criminal prosecution, ignoring the harms imposed through the OEC *process*. Just as *prosecution* causes injury even if it does not result in *conviction*, an OEC proceeding causes injury even if it does not result in a final judgment or penalty. *See Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 625 n.1 (1986) (dispute ripe even though "administrative body may rule … in [School's] favor," because "it was equally true that the plaintiffs in *Steffel* … may have prevailed had they in fact been prosecuted"). The point is that the process itself causes independently cognizable harms, namely "embarrassment, expense and ordeal." *Yeager v. United States*, 557 U.S. 110, 117-18 (2009).

The burdens imposed by the mere filing of a false-statement complaint are detailed in the *amicus* brief of Ohio's Attorney General. Whenever a complaint is filed, a probable-cause hearing must be held; there is "no system for weeding out frivolous complaints." Amicus Br. of Ohio Atty. Gen. at 6. Speakers are thus "forced to devote time, resources, and energy" to defending their speech, "typically in the late stages of a campaign." *Id.* The probable-cause hearings are also "by law, public," and become a media circus. *Id.* at 12. Complaints can thus easily "be manipulated … so that the costs they impose on a political opponent form part of the complainant's campaign strategy." *Id.* at 5. Most obviously, where, as here, probable cause is found, the political impact "can be profound," as such a finding "is perceived … as the definitive pronouncement of the State of Ohio as to a … speaker's truthfulness." *Id.* at 6. And burdensome discovery then ensues. *See id.* at 10.

All of these burdens are cognizable injuries. *See WRTL*, 551 U.S. at 468 n.5 ("[L]itigation constitutes a severe burden on political speech."); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 794 (1988) (forcing speaker to "bear the costs of litigation" will "chill speech"); *Meese v. Keene*, 481 U.S. 465, 473-74 (1987) (political harm from government label is "cognizable injury"); *Citizens United v. FEC*, 558 U.S. 310, 366 (2010) ("[D]isclosure requirements may burden the ability to speak ….").[3]

The Commission does not dispute that burdens short of criminal prosecution count as injuries. But it argues that such harms must have already "happened" before a plaintiff can sue. (Opp.55.) Not so. A speaker need not expose itself to non-criminal sanctions any more than to criminal prosecution. *See U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 551 (1973) (pre-enforcement challenge where threatened penalty was loss of job); *Riley*, 487 U.S. at 793-94 (pre-enforcement challenge to law restricting charitable solicitations where threatened burden was being forced to "bear the costs of litigation" over how solicited donations were used). It is therefore enough that petitioners face a "credible threat" of being subjected to the financial, political, and disclosure harms of an OEC proceeding.

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[3] The Commission advises petitioners to ask it to limit discovery (Opp.38), but cites no cases where it has limited discovery into directly relevant facts (*e.g.*, all of the speaker's private communications to assess "reckless disregard" for truth). It also claims that no political harm exists absent a final finding of falsity (Opp.56), but common sense and Ohio's Attorney General say the opposite—that a probable-cause finding alone imposes "profound" harm. Amicus Br. of Ohio Atty. Gen. at 6.

B. As to criminal prosecution, the Commission exaggerates the degree of certainty that is needed. In *Babbitt*, it sufficed that "the State has not disavowed any intention of invoking the criminal penalty provision." 442 U.S. at 302. In *Holder*, it sufficed that "[t]he Government has not argued to this Court that plaintiffs will not be prosecuted." 130 S. Ct. at 2717. And in *Booksellers*, the *only* factor mentioned was that "[t]he State has not suggested that the … law will not be enforced." 484 U.S. at 393. This presumption makes sense, because laws are not suggestion boxes. They are binding rules that regulate citizens' speech and which state officials have sworn to faithfully execute. Thus, absent affirmative disavowal, there is no basis to think the law will not be enforced, and indulging that counterintuitive assumption imposes an immediate, objective burden on speech—the risk of prosecution.

The Commission's supposedly contrary cases foundered for other reasons, not doubt over whether prosecutors would prosecute. (Opp.47-48.) In *Golden*, the problem was that the Congressman who was the plaintiff's "sole concern" was not running again. 394 U.S. at 109; *see also McCollester v. City of Keene, N.H.*, 668 F.2d 617, 620 (1st Cir. 1982) (complaint "inadequate" because "it fails to allege the conduct in which the plaintiff intends to engage"). And *Renne* presented numerous obstacles, having nothing to do with uncertainty over whether state enforcers would do their job. *See supra* n.1.[4]

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[4] The Commission also relies on *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947), but the lack of justiciability there had nothing to do with the likelihood of

The Commission also cites *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), to argue that any doubt about prosecution precludes suit. (Opp.47.) But *Clapper* clarified that its "certainly impending" test does not require harm to be "literally certain"; a "substantial risk" suffices. 133 S. Ct. at 1150 n.5. Moreover, *Clapper* did not involve a law proscribing speech, and there was no assertion that the plaintiffs arguably *violated* the law. *Id.* at 1153. Rather, the law merely *authorized surveillance*, *see id.* at 1149, and so the presumption that prosecutors typically enforce criminal prohibitions did not apply. *Accord* Amicus Br. of United States at 9, 13-15.

More fundamentally, the reason that Article III allows pre-enforcement challenges to laws restricting speech is because *credibly threatened* prosecution, not just actual prosecution, inflicts serious injury. If the law required speakers to "expose [themselves] to actual arrest or prosecution," *Steffel*, 415 U.S. at 459, that would cause "self-censorship; a harm that can be realized even without an actual prosecution,"

(continued…)

prosecution; it stemmed from the plaintiffs' failure (unlike here) to set forth the "contents" of statements or the "kinds of political activity" they wanted to engage in. *Id.* at 90. Anyway, *Mitchell* long predates adoption of the rule that a plaintiff need not "expose himself to actual arrest or prosecution to be entitled to challenge a statute." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Under that standard, which even the Commission accepts, justiciability is clear, as shown by the Court's merits resolution of a constitutional challenge to the *same* statute at issue in *Mitchell* by plaintiffs who alleged only that they were chilled by the statute from engaging in political activity. *See Nat'l Ass'n of Letter Carriers*, 413 U.S. at 551-53.

Booksellers, 484 U.S. at 393. By requiring speakers to definitively disprove the chance of non-prosecution, the Commission is forcing them to expose themselves to precisely the same risk—and thereby inducing self-censorship. *Cf. 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."). Stated differently, the existence of a (presumptively enforced) law prohibiting speech immediately visits a burden on that speech; future actual prosecution simply exacerbates that injury.

None of this is to say that subjective "chill" alone, without any credible threat of enforcement, creates cognizable injury. *Cf. United Presbyterian Church in the USA v. Reagan*, 738 F.2d 1375, 1378-79 (D.C. Cir. 1984). But "[i]f such a threat exists, then it poses a classic dilemma for an affected party: either to engage in the expressive activity, thus courting prosecution, or to succumb to the threat, thus forgoing free expression." *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996). Because the rationale for the credible-threat test is to resolve that dilemma, it makes no sense to adopt a justiciability rule that impractically requires *speakers* to eliminate doubt over whether the *state* will enforce the law. The proper approach, as in this Court's cases, is to shift that burden to the *state*: If it does not disavow enforcement as to the plaintiff's intended speech, the challenge may proceed.

C. The Commission's argument also overstates the number of "steps" preceding criminal prosecution, and downplays the likelihood of these events.

There are actually only three steps preceding a prosecution, not eight. (Opp.36.) A complainant must file a complaint; the OEC must find a violation; and the prosecutor must choose to pursue charges. The Commission counts separately its referral to the prosecutor, but such referral is mandatory if it finds a violation. *See* Ohio Rev. Code § 3517.155(D)(2) (Commission "shall refer the matter to the appropriate prosecutor"). And while a speaker may appeal a Commission's finding to Ohio state courts, doing so does not stay prosecution. (Anyway, judicial review *after* the plaintiff speaks is no better than review after *conviction*; either way, the speaker risks jail if he loses.)

Turning to the three steps that actually precede prosecution, the Commission agrees that the last—a prosecutor's decision to proceed—does not undermine justiciability, because there is *always* the chance for "prosecutorial discretion." (Opp.53.) *Accord Doe v. Bolton*, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring). The only relevant doubts are thus whether anyone will file a complaint and whether the OEC will find a violation. As to both, the complete answer is the Commission's probable-cause finding.

The Commission agrees that the Ohio Secretary of State "has a duty to refer violations" to the OEC, but says that because he did not refer SBA's 2010 statements, it is "speculative to assume" that he would do so in the future. (Opp.37.) But, of course, the Secretary's 2010 decision not to refer occurred *before* the OEC's probable-cause finding that SBA's statements were illegal. That obviously says nothing about whether he will or should do so *after* the expert agency made such a determination. Indeed, such a

referral now is quite probable, if not required by law. *See* Ohio Rev. Code § 3501.05(N)(2) (secretary of state "shall" file OEC complaint "whenever [he] has or should have knowledge of … a violation").

Likewise, *anybody* in Ohio (or elsewhere, for that matter) has the power to file an OEC complaint. Since the Court presumes prosecution by a single government prosecutor subject to ethical and accountability constraints, that presumption is *a fortiori* warranted when millions of unconstrained, politically motivated citizens can do so (with minimal effort or expense). And the fact that the Commission allowed Driehaus' complaint to proceed in 2010 makes such complaints all but inevitable, even if nobody besides Driehaus previously thought that such a complaint was plausible. It is thus not true that "*any* plaintiff" could challenge the Ohio law based on "*any* intended speech." Pet.App.12a. The probable-cause finding sets petitioners apart.[5]

The probable-cause finding is, of course, also the best indicator of how the Commission will adjudicate future complaints. The Commission's sole response is that the finding was only "preliminary." (Opp.40.) But even in *Mitchell*, the Court allowed a challenge by a plaintiff who was the subject of a "preliminary finding" of a Hatch Act violation. 330 U.S. at 92. A

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[5] Citing *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), the Commission says that petitioners cannot invoke the "statistical probability" that someone will file a complaint. (Opp.37.) But *Summers* concerned the chances that *the plaintiff's members* would take certain action. 555 U.S. at 497-98. It is one thing for a plaintiff to bear the burden of uncertainty about *its own* future actions—but quite another to impose upon it the risks that *others* will act.

preliminary finding still represents the Commission's view of the merits—here, after reviewing Driehaus' complaint, SBA's answer (with detailed affidavits, *e.g.*, JA78-103), and counsel's arguments. The full Commission could disagree, much like a prosecutor could decline to prosecute, but a panel's affirmative probable-cause finding is surely better evidence than mere non-disavowals (as in *Holder* and *Babbitt*).

Further increasing the credibility of the threat, the district court found, in Driehaus' defamation suit, that SBA's statements were false. The Commission disingenuously claims that the court just refused to grant summary judgment (Opp.53), but the opinion clearly held that "[t]he express language of the [ACA] does *not* provide for tax-payer funded abortion. That is a fact, and it is clear on its face." *Susan B. Anthony List v. Driehaus*, 805 F. Supp. 2d 423, 431 (S.D. Ohio 2011).[6]

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[6] The Commission argues that the defamation suit shows why petitioners' injuries are non-redressable: Candidates could bring tort suits even if the false-statement law were invalidated. (Opp.38.) But invalidating a statute that directly *criminalizes* petitioners' speech and subjects them to onerous Commission proceedings would directly redress those injuries, regardless of whether tort law provides a damages remedy to someone who is *personally injured* because the speech *defames* him. Anyway, there are no potential tort damages here because associating a public official with a mainstream policy view (*i.e.*, supporting publicly funded abortions) is not defamatory, as even the district court eventually recognized. *Susan B. Anthony List v. Driehaus*, No. 1:10-cv-720, 2013 U.S. Dist. LEXIS 10261 (S.D. Ohio Jan. 25, 2013). Finally, only the candidate could sue for defamation, whereas under the Ohio law *anyone* may file a false-statement complaint; so reducing the pool of complainants "amount[s] to a significant increase in the likelihood" that petitioners' injuries would be redressed. *Utah v. Evans*, 536 U.S. 452, 464 (2002).

Ultimately, the Commission has done nothing to retreat from its articulated position that petitioners' speech was probably criminal. As a defendant in this suit, the Commission could simply have advised the courts that it would *not* treat this speech as a violation. But even in this Court, it has declined to "disavow" enforcement or its probable-cause finding. It should not be permitted to cast doubt on this suit's viability by speculating about its own future actions.

D. All of the above accepts the Commission's premise that petitioners must establish a "future" injury from the Ohio statute. (Opp.33.) But standing turns on the facts at the time the complaint is filed, *Lujan*, 504 U.S. at 569 n.4, and petitioners filed their complaints while Driehaus' OEC action was still pending—when SBA faced *ongoing* enforcement. The OEC's subsequent decision to dismiss triggered the voluntary cessation exception to mootness, and the *Commission* thus bears the burden of proving 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).

The Commission responds that it is the *amended* complaints that matter. (Opp.52.) But its cases address materially different facts. In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the amended complaint was the first pleading to name the viable plaintiffs, so there was nowhere else to look. *Id.* at 49. And *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007), held only that a False Claims Act relator who amends his complaint to *remove* a claim cannot rely on the withdrawn claim to establish jurisdiction. *Id.* at 473-74 & n.6.

No case holds that when a plaintiff with standing amends his complaint after factual developments, to allege facts relevant to mootness, he somehow pleads himself out of court. *See KH Outdoor, LLC v. Clay Cnty.*, 482 F.3d 1299, 1303 (11th Cir. 2007) (applying mootness doctrine where plaintiff amended complaint to seek damages after challenged local ordinance was repealed). And any such rule would illogically mean that a plaintiff who maintains his original complaint in the face of altered facts eliminating the immediate threat has a justiciable claim unless the *defendant* proves non-recurrence with *absolute clarity*, but a plaintiff who faithfully alerts the court to changed circumstances must prove that the injury will recur.

III. PRUDENTIAL FACTORS STRONGLY FAVOR PROMPT JUDICIAL REVIEW.

The Commission erroneously contends that, under ripeness doctrine's "prudential" factors, petitioners' claims are not fit for judicial review and petitioners would suffer no hardship from denying review. Actually, prudential factors strongly favor prompt review given the paramount importance of free and open debate during electoral campaigns.

A. The Commission says that petitioners' claims denominated as "as-applied" are better read as facial objections to Ohio's law. (Opp.42.) Petitioners agree: The statute only *applies* to speakers "taking positions on political issues." JA123-24, 153-54. To invalidate it as to such speakers is thus to invalidate it on its face. In any event, petitioners also expressly alleged that the Ohio law violates the First Amendment on its face. JA122-23, 153-54. The question is thus whether those claims—*i.e.*, that the state may not criminalize campaign speech that it deems "false"—

are fit for judicial review. They obviously are, because they present "purely legal" issues and "will not be clarified by further factual development." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985). (*See* Petrs.Br.28-30.)

The Commission argues, however, that these claims are not fit because they supposedly turn on uncertain questions of state law. (Opp.43.) But there is no relevant uncertainty about the statute's scope; it concededly criminalizes "false" political speech, and that is precisely what petitioners allege violates the Constitution. The Commission offers no construction of the law that would avoid the constitutional issue.

The hypothesis that Ohio courts might find, after the fact, that petitioners did not *violate* the facially unconstitutional law (Opp.43-44) is irrelevant to whether the law is facially unconstitutional. And such post-enforcement review does not alleviate the pre-enforcement concrete harm caused by the credible threat of enforcement. A state law criminalizing "unfair criticism" of the incumbent Governor is subject to pre-enforcement challenge regardless whether state courts might ultimately find a plaintiff's particular criticism not "unfair."

The Commission suggests that petitioners should have pursued a true "as-applied" constitutional claim. (Opp.44.) It does not explain what such a challenge would look like, however, and for good reason. The defect in Ohio's false-statement regime—*i.e.*, that it creates a "Ministry of Truth" that chills core political speech, failing strict scrutiny—condemns the law in all its applications. Anyway, petitioners are masters of their own complaints, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987); and while "the broadest,

most consequential attacks" might be hardest to *win* (*cf.* Opp.57), that is no basis for courts to abdicate. *Cf. Lexmark Int'l, Inc. v. Static Control Components, Inc.*, No.12-873, 2014 WL 1168967, at *6 (U.S. Mar. 25, 2014) ("prudential" doctrines are "in some tension with our recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction is 'virtually unflagging'").[7]

B. As to hardship, the Commission's position is that the law's chilling effect on core political speech—a classic form of hardship, *Steffel*, 415 U.S. at 462—is of petitioners' own making, because they should have asked the OEC for an "advisory opinion" allowing their speech (which the Commission has no obligation to render, Ohio Rev. Code § 3517.153(D)). (Opp.45.) But "[t]he First Amendment does not permit laws that force speakers to … seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United*, 558 U.S. at 324. This "solution" is thus to turn an unconstitutional speech *suppression* into an unconstitutional *prior restraint*. Anyway, the Commission admits this approach would be "infeasible" (Opp.46) before an election.

The Commission also faults SBA for not objecting to Driehaus' motion to withdraw his OEC complaint. (Opp.45, 58.) How that decision to avoid potential

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[7] Below, petitioners also challenged a disclaimer provision (JA126-27, 156-57), and COAST raised preemption and due process claims (JA154-59). Petitioners do not pursue those claims before this Court, however. Nor do they contend that the OEC's procedures are unconstitutional if used to enforce an otherwise constitutional law, only that they exacerbate the First Amendment chill posed by the law's substantive prohibition.

prosecution in 2010 eliminates the threat of hardship in 2012 or 2014 escapes petitioners. Petitioners' whole point is that they should not be forced to accept an adjudication of their speech's lawfulness with the threat of sanctions hanging over them.

C. If anything, prudential factors underscore the critical need for prompt judicial review of the false-statement regime. The Commission does not deny that Ohio's law is actually inhibiting political speech during elections, when the First Amendment "has its fullest and most urgent application." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Yet the cases it cites for the proposition that judicial review is not wholly unavailable in the Sixth Circuit only prove petitioners' point: that a speaker may obtain such review only *after* being found guilty. *See Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 576-77 (6th Cir. 1991) (review only after OEC "recommended … prosecution"); *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 490 (6th Cir. 1995) (review only after OEC "found Briggs guilty"). (Opp.59.) Such a backward rule guarantees that truthful speech during election campaigns will be substantially burdened.

Moreover, even speakers hardy enough to expose themselves to prosecution are routinely stymied by either (i) the Commission's dismissal of the charges *after* imposing "costs in time and money"; or (ii) the withdrawal of the charges "after the election" as part of a "cynical" strategy to manipulate the system. Amicus Br. of Ohio Atty. Gen. at 6, 13. The resulting Catch-22 has perpetuated a grossly unconstitutional regime for decades. Enough is enough.

CONCLUSION

This Court should reverse the decision below.

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APRIL 2014