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No. 13-193

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF STATE RESPONDENTS

MICHAEL DEWINE
Attorney General of Ohio
ERIC E. MURPHY*
State Solicitor
Counsel of Record
SAMUEL C. PETERSON
PETER K. GLENN-APPLEGATE
Deputy Solicitors
30 East Broad St., 17th Floor
Columbus, OH 43215
614-466-8980
eric.murphy@ohioattorneygeneral.gov

Counsel for State Respondents

QUESTION PRESENTED

Is a First Amendment challenge to a statute ripe when plaintiffs have alleged only a generalized and subjective chill of their speech and when they have established facts showing neither that they intend to engage in a course of conduct affected by the statute nor that they face any threat of an actual criminal prosecution under the statute by the named defendants?

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INTRODUCTION

This case requires the Court to resolve a clash between competing constitutional values. On one side, all can agree that courts have gone, and should go, to great lengths to nurture free speech. This Court's "overbreadth" doctrine, for example, sometimes permits parties to invoke the speech of others to avoid "chilling" that third-party speech. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). The Court has also relaxed standards for facial challenges, sometimes requiring challengers to show merely that a "law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (citation omitted). And it has said that "'a more stringent vagueness test should apply'" in free-speech cases. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) (citation omitted).

But there are equally weighty interests on the other side, interests going to the heart of our democracy. Article III adopts "'constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984) (citation omitted). Constitutional limits prohibit courts from judging laws passed by the people's representatives except in actual cases, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006); prudential limits ensure that courts, even in such cases, reach no further than necessary, *Renne v. Geary*, 501 U.S. 312, 324 (1991). Both also promote federalism (by delaying premature federal challenges to state laws), and sound judicial decisionmaking (by directing courts not to resolve claims in amorphous settings). *Id.* at 323-24.

Under a proper balance, these limits can postpone judicial decision on "far-reaching" First Amendment issues. *Id.* at 324. The Court's history with laws banning anonymous campaign leafleting provides a good example. In 1969, it dismissed a challenge to such a law because, while the plaintiff had recently been convicted for leaflets criticizing a congressman, he did not present a justiciable case once the congressman left office. *Golden v. Zwickler*, 394 U.S. 103, 109-10 (1969). It took decades for an Article III case to arise concerning a similar law. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336-38 (1995).

Today's case also involves campaign laws (those governing false statements about candidates) and criticism of a former congressman. Before the 2010 election, Susan B. Anthony List (SBA) stated that Steven Driehaus's vote for the Patient Protection and Affordable Care Act had been a vote for taxpayer-funded abortion. Claiming these statements were false, Driehaus complained to the Ohio Elections Commission, which performs a screening function before any criminal enforcement can commence. Two former commissioners found probable cause for a Commission hearing, but it never resolved the complaint because Driehaus and SBA agreed to dismiss proceedings. SBA and Coalition Opposed To Additional Spending And Taxes (COAST) allege that they intend "to engage in substantially similar activity in the future," JA122, and use such allegations broadly to attack Ohio's laws. But their claims are unripe.

Constitutionally, Petitioners argue (at 17) that plaintiffs need not meet "rigorous or demanding" standards to state a case or controversy based on a

criminal law's potential enforcement against them. But "'threatened injury must be *certainly impending* to constitute injury in fact'"; "'[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (citation omitted). Far from "certainly impending," Petitioners' alleged threat of enforcement arises from the claim that they will engage in unstated "similar" speech against unstated candidates in unstated campaigns on unstated dates, which will result in unstated individuals filing complaints. On top of that, Petitioners vigorously assert that the challenged laws do not even apply, and no state actor has ever found that they would. The Commission would also have to find a violation before any criminal enforcement, and Petitioners could appeal the Commission's finding to state courts (presenting their constitutional claims in the process). If anything, therefore, Petitioners do not seek pre-enforcement review of a threatened prosecution; they seek pre-enforcement review of pre-enforcement review.

Petitioners thus fall back on the argument that normal rules do not apply. This is a First Amendment case, so they seek (at 23) to extend "chill" concerns into Article III. While overbreadth cases invoking "chill" provide important "breathing space" for free speech, *Broadrick*, 413 U.S. at 611, Article III still requires "[t]he constitutional question, First Amendment or otherwise, [to] be presented in the context of a specific live grievance," *Golden*, 394 U.S. at 110. "Chill" does not create such a grievance and should "be distinguished from the immediate threat of concrete, harmful action" that does. *United Pres-*

byterian Church in the U.S.A. v. Reagan, 738 F.2d 1375, 1380 (D.C. Cir. 1984) (Scalia, J.).

Prudentially, the Court should also "ask: Is this conflict really necessary?" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997). Petitioners' claims are not fit because it is far from clear that Ohio's laws would even apply to "similar" speech. *See Renne*, 501 U.S. at 323. The Ohio Supreme Court has interpreted the laws to adopt many safeguards from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and it might continue on that path. Further, Petitioners could have asked for an advisory opinion from the Commission, a "relatively riskless controversy-ripening tool." *Martin Tractor Co. v. FEC*, 627 F.2d 375, 388 (D.C. Cir. 1980).

At day's end, it is safe to say that Petitioners do not like Ohio's laws very much, passionately claiming (at 55) that they should be allowed to proceed because the laws "are almost certainly unconstitutional." But there is no Article III exception for "really" unconstitutional laws. And while the First Amendment does not leave the people "'at the mercy of *noblesse oblige*,'" Pet'rs Br. 37 (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)), Article III also does not leave them at the mercy of a "Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them," *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011). Allowing First Amendment claims to proceed outside of Article III cases upsets the Constitution's delicate balance between individual freedom and democratic self-government.

STATEMENT OF THE CASE

I. OHIO'S FALSE-STATEMENT LAWS

"At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). Ohio thus has an interest in prohibiting campaign falsehoods. It is an interest shared by many States. Pet'rs Br. 55. And it is an interest this Court has recognized. While *McIntyre* invalidated an anonymous-leafleting ban, it agreed that the "interest in preventing fraud and libel" "carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." 514 U.S. at 349.

A. History Of Ohio's False-Statement Laws

Like most States, Ohio historically relied on a criminal-libel statute to regulate false statements against individuals. R.C. 2901.37 (1958); 1 Statutes of the State of Ohio § 109, at 287-288 (H.W. Derby & Co. 1854). But its constitution gave protection to truthful statements. Ohio Const. art. 1, § 11. And, as applied to statements about public officials, *Garrison* required such criminal statutes to include *New York Times*' actual-malice standard. 379 U.S. at 73-75. Several years later, Ohio abolished this statute. 1972 Ohio Laws 1866, 2032-34.

Meanwhile, Ohio passed a law tailored to elections, making it a crime to "print, post, publish, circulate, or distribute a written or printed false statement, knowing the same to be false, concerning a candidate which is designed to promote the defeat of

such candidate." 1961 Ohio Laws 244, 245. In 1976, Ohio added the requirement that the Commission first find a violation. 1976 Ohio Laws 3026, 3029.

In 1991, the Sixth Circuit rejected a facial challenge to this law, finding that it "clearly c[a]me within the Supreme Court's holding[] in *Garrison*" that the First Amendment does not protect knowingly false political speech. *Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 577 (6th Cir. 1991). But the court invalidated the Commission's powers to impose fines and issue cease-and-desist orders because, among other grounds, the law did not contain a clear-and-convincing-evidence standard. *Id.* at 578. Ohio amended the law after *Pestrak*, 1995 Ohio Laws 7902, 7940-43, adopting such a standard and eliminating the Commission's power to impose fines for violations, R.C. 3517.155(D)(1)-(2).

B. Current False-Statement Laws

Ohio's false-statement laws now provide:

> No person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following:
>
> . . .
>
> (9) Make a false statement concerning the voting record of a candidate or public official;

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

R.C. 3517.21(B). This statute defines "voting record" under (B)(9) as "the recorded 'yes' or 'no' vote on" legislation or similar matters. *Id.*

To decide whether a statement is false, the Ohio Supreme Court adopted "an objective standard—that of the reasonable reader." *McKimm v. Ohio Elections Comm'n*, 729 N.E.2d 364, 370 (Ohio 2000). Courts have also said that statements cannot be "false" even if they are "potentially misleading and fail[] to disclose all relevant facts." *In re Pirko*, 540 N.E.2d 329, 332 (Ohio Ct. App. 1988). They have said that ambiguous statements cannot be "false" if they are true under a reasonable interpretation. *Serv. Emps. Int'l Union v. Ohio Elections Comm'n*, 822 N.E.2d 424, 430 (Ohio Ct. App. 2004); *see McKimm*, 729 N.E.2d at 372 (indicating court would adopt "innocent-construction rule"). And they have said that opinions cannot be "false." *Comm. to Elect Straus v. Ohio Elections Comm'n*, No. 07AP-12, 2007 WL 2949543, at *3 (Ohio Ct. App. Oct. 11, 2007).

(B)(9) and (B)(10) also require statements to be made "with intent to affect" an election. The Sixth Circuit interpreted (B)(9) to require knowledge of a falsity. *Pestrak*, 926 F.2d at 577. And the Ohio Supreme Court interpreted (B)(10) to adopt the actual-malice standard. *McKimm*, 729 N.E.2d at 372-75.

C. Commission Procedures

The Commission has seven members, three from each major political party and an unaffiliated member. R.C. 3517.152(A)(1)-(3). Its proceedings must be exhausted "[b]efore a prosecution." R.C. 3517.21(C). Those proceedings "screen away" claims; the Commission may *preclude*, not *initiate*, enforcement. *State ex rel. Common Cause/Ohio v. Ohio Elections Comm'n*, 806 N.E.2d 1054, 1059 (Ohio Ct. App. 2004). It also may not initiate its own proceedings. They get triggered only if a third party files a complaint and affidavit. R.C. 3517.153(A).

If individuals file complaints within certain times before elections, a panel of at least three members (with no party in the majority) "determine[s] whether there is probable cause to refer the matter to the full commission." R.C. 3517.156(A), (B)(1). A probable-cause hearing is brief. The panel hears arguments and/or receives evidence only if parties agree or a member requests it. Ohio Admin. Code 3517-1-10(D)(1). The panel may find no probable cause and dismiss the complaint; find probable cause and refer the complaint to the Commission; or request an investigation. R.C. 3517.156(C). If the panel finds no probable cause, the complaint gets dismissed without judicial recourse. *Common Cause*, 806 N.E.2d at 1059. If the panel finds probable cause, the Commission holds a hearing within ten business days, but the parties may agree to a delay. R.C. 3517.156(C)(2); Ohio Admin. Code 3517-1-06(B)(1).

Before a hearing, parties may seek discovery. Ohio Admin. Code 3517-1-09(C). A party may request subpoenas, R.C. 3517.153(B), but only if they

are not "overly burdensome," Ohio Admin. Code 3517-1-11(B)(3)(a). If the recipient refuses to comply, only a court may impose sanctions in potential contempt proceedings. R.C. 3517.153(B).

At the hearing, parties may make opening and closing statements, examine witnesses, and introduce evidence. Ohio Admin. Code 3517-1-11(B)(2). Ultimately, the Commission may dismiss the case; find a violation but determine that good cause exists not to refer the case to a prosecutor; or refer the case. R.C. 3517.155(A)(1), (D)(2). If the Commission finds a violation, a party may immediately appeal the adverse finding to a state court. R.C. 3517.157(D). And "[t]he ultimate decision on prosecution is clearly made by the prosecuting attorney." *Pestrak*, 926 F.2d at 578. The maximum penalty is six months in jail and/or a $5,000 fine. R.C. 3517.992(V).

Aside from hearing complaints, the Commission may issue "advisory opinions" about whether a "specific set of circumstances" violates laws within its purview. R.C. 3517.153(D); Ohio Admin. Code 3517-1-02(B). If it concludes that the facts do not violate the law, "the person to whom the opinion is directed or a person who is similarly situated may reasonably rely on the opinion and is immune from criminal prosecution and a civil action." R.C. 3517.153(D).

II. PETITIONERS' COMPLAINTS

SBA's Allegations. Before the November 2010 election, SBA chose to criticize "certain Congressmen" who voted for the Affordable Care Act because it "allows for tax-payer funded abortion." JA113. A Cincinnati-area Congressman, Steve Driehaus, was a pro-life Democrat who voted for the Act. JA35, 114.

SBA sought to post billboards stating: "'Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion.'" JA114. Driehaus's lawyer contacted Lamar Advertising, the billboard owner, and convinced it not to post the ads in exchange for not being named in legal proceedings. JA26-27, 114.

On October 4, 2010, Driehaus filed a complaint with the Commission. JA114. He alleged that SBA's statement violated R.C. 3517.21(B)(9)-(10), as well as R.C. 3517.20 (a disclaimer provision). *Id.* Driehaus later filed a second complaint for subsequent statements. JA115. In a 2-1 vote, a panel found probable cause for a full Commission hearing over whether SBA's statements violated the law. JA118. It dismissed the disclaimer allegation. *Id.* Driehaus then served "extensive discovery," including requests for documents, notices of deposition, and third-party subpoenas. JA118-20. But the parties agreed to postpone proceedings until after the election. JA120. Driehaus lost, and moved to dismiss his complaints. *Id.* SBA consented. JA109, 131.

SBA's complaint alleges these events chilled its speech. JA121. As for past speech, Driehaus's agreement with Lamar kept SBA from posting billboards. *Id.* If documents had been exchanged, SBA also "would have been required to turn over sensitive and confidential strategy materials." *Id.* As for future speech, SBA "intends to engage in substantially similar activity in the future." JA122. And Driehaus "may run for Congress again." JA122, 136-37.

SBA alleged six counts against Driehaus, the Commission's members and Executive Director in their official capacities, and Ohio's Secretary of

State. Count I alleged that R.C. 3517.21(B)(9) was facially unconstitutional because it lacked an actual-malice requirement, was vague, "relie[d] on the intent of the speaker and implications of speech to ascertain its scope and fails strict scrutiny review," and was overbroad. JA122-23. Count II alleged that (B)(9) was unconstitutional "as applied to lobbyists taking positions on political issues." JA123. Counts III and IV alleged that (B)(10) was facially unconstitutional and unconstitutional as applied for the same reasons except the lack of an actual-malice element. JA123-25. Count V alleged that Commission procedures required disclosure of protected information. JA125-26. Count VI challenged R.C. 3517.20's disclaimer requirements. JA126-27. For relief, SBA sought a declaration that (B)(9) and (B)(10) were unconstitutional on their face and as applied, and an injunction prohibiting enforcement. JA127-28.

COAST's Allegations. Before the 2010 election, COAST "desired to engage in core political speech through its mass e-mail communications." JA146. It wanted to send an email message "similar to that sought to be advanced by [SBA], *i.e.*, that Congressman Driehaus' vote in favor of ObamaCare was a vote for wasting taxpayer dollars on abortions." JA147. The email stated that Driehaus filed his complaints knowing of the Commission's "horribly partisan nature" and "history of trampling First Amendment freedoms with tortured interpretations of the truth and 'permissible' discourse." JA163. COAST did not send the email because it was "[f]earful" of "an inquisitional governmental agency who will sit in judgment of the truth of political

speech and being subjected to extensive and intrusive discovery." JA148.

As for future speech, COAST noted that, while "Driehaus lost the election," "there is the potential that he will run again for Congress." *Id.* During the 2012 election, COAST also wanted to make "the same or similar statements about other federal candidates who voted for ObamaCare, as well as about candidates in local or state elections who either voted to support or voiced support of ObamaCare." JA149. And COAST wanted to criticize Cincinnati council members for promoting city "street cars." JA150-52.

COAST alleged eight counts against the Commission, its members and Executive Director in their official capacities, and Ohio's Secretary of State. Counts I through IV challenged (B)(9) and (B)(10), and were largely identical to the same counts in SBA's complaint. JA153-55. Counts V-VII asserted preemption claims. JA155-57. Count VIII challenged the Commission's procedures. JA158-59. COAST sought remedies similar to SBA's. JA159-61.

III. PROCEEDINGS BELOW

A. Petitioners sued before the 2010 election. The district court stayed SBA's case under *Younger v. Harris*, 401 U.S. 37 (1971). Doc.14, Order, at 5-8 (docket references are to Case No. 1:10-cv-720 (S.D. Ohio)). After the election, the court consolidated the cases and lifted the stay. JA4, 109. SBA and COAST filed amended complaints adding claims about future speech. JA110, 138. Respondents moved to dismiss, and Driehaus filed a defamation counterclaim. The court granted Respondents' motions to dismiss. Pet.App.21a, 42a.

1. The court found SBA's claims unripe. Pet.App.23a-31a. It identified three factors: "'(1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims; and (3) the hardship to the parties [if] judicial relief [is] denied.'" Pet.App.24a (citation omitted). The court concluded that all factors militated against ripeness. No imminent harm existed because any prosecution was "contingent on a number of uncertain events." Pet.App.25a-26a & n.6. The factual record required speculation about what SBA would say, whether a candidate would file a complaint, and how the Commission would respond. Pet.App.29a. And SBA imposed any hardship on itself by agreeing to forgo Commission remedies. Pet.App.31a.

The court also held that SBA lacked standing, because a future injury was speculative. Pet.App.33a-34a. Any claim about Driehaus was particularly so, the court found, because he left for an assignment in Africa with the Peace Corps. Pet.App.36a & n.15. And the court found claims related to Driehaus moot because SBA agreed to the dismissal of his complaint. Pet.App.35a.

2. The court issued a similar opinion for COAST. Pet.App.55a-62a. As for ripeness, the court held that COAST's allegations did not implicate Ohio's false-statement laws because its speech was allegedly true. Pet.App.56a. And "[n]o complaint ha[d] been filed against COAST," so "enforcement depend[ed] on a hypothetical" chain of events. Pet.App.57a. As for

standing, a "speculative threat of future, groundless action [was] insufficient." Pet.App.61a.

3. When the district court granted Respondents' motions, it denied SBA's summary-judgment motion on Driehaus's defamation claim. Doc.66, Order. After discovery, the court granted a renewed motion. Doc.108, Order. Driehaus's appeal remains pending.

B. The Sixth Circuit affirmed. It found ripeness the most suitable doctrine, because it "counsels against resolving a case that is 'anchored in future events that may not occur as anticipated, or at all.'" Pet.App.7a (citation omitted).

1. The court applied the same ripeness factors to SBA's complaint as had the district court. It began with the likelihood of harm, which requires plaintiffs to show a credible threat that defendants will enforce the statute. The Court held that this threat was missing. Pet.App.8a.

It rejected SBA's reliance on the probable-cause finding and effort to put up billboards. Pet.App.9a-10a. "[A] prior injury, without more, is not enough to establish prospective harm." Pet.App.9a. The billboard incident was "largely irrelevant" because the Commission "had no role" in it. Pet.App.10a. The probable-cause finding was similar to an unreviewable "reason to believe" finding by federal agencies. Pet.App.10a-11a. It was "not a final adjudication, a finding of a violation, or even a warning that SBA's conduct violated law"; it merely "green-lighted further investigation." Pet.App.12a. The court added that the Commission could not initiate proceedings, and it was "rather speculative" that someone might file a complaint. *Id.* If it sufficed to allege that "any-

one" might do so, "*any* plaintiff could challenge Ohio's election laws based on *any* intended speech." *Id.* And Driehaus "remains in Africa." Pet.App.14a.

The court also found that SBA did not allege sufficient facts to show that it would violate the law. Pet.App.15a. SBA nowhere alleged that it "plans to lie or recklessly disregard the veracity of its speech." *Id.* Instead, SBA alleged that it planned to make true statements, and feared a "false prosecution." *Id.* But such a fear was an inadequate basis to challenge the law's proper applications. *Id.*

The court next found the "factual record" "not sufficiently developed." Pet.App.16a. Review would require the court "to guess about the content and veracity of [SBA's] as-yet unarticulated statement, the chance an as-yet unidentified candidate against whom it is directed will file a Commission complaint, and the odds that the Commission will conclude the statement violates Ohio law." *Id.* The statute's scope was also unclear, so the court would benefit "from knowing what the scheme prohibits." *Id.*

The court lastly found no "hardship" from delay. Pet.App.17a. No proceedings were pending. *Id.* And SBA continued to speak even when they were, including with "radio ads claiming that Driehaus voted for taxpayer-funded abortion." *Id.*

2. The court rejected COAST's claims, because it had "never been involved in a Commission proceeding and no individual ha[d] enforced or threatened to enforce the challenged laws against it." Pet.App.18a.

SUMMARY OF ARGUMENT

I. Ripeness has constitutional and prudential components.

A. Constitutionally, ripeness ensures that those seeking review based on a future injury have sufficiently alleged that injury. When this "future injury" consists of potential enforcement of a law, Article III requires individuals to show a "genuine" or "credible" threat of enforcement. The Court applies this standard on a case-by-case basis examining several factors, including whether plaintiffs have *concretely* alleged the activity in which they plan to engage; whether plaintiffs have alleged they will engage in the activity *imminently*; whether plaintiffs have adequately shown the challenged law *applies* to the activity; whether plaintiffs' future injury is sufficiently *direct*; and whether the threat consists of more than *past* application of the law.

B. Prudentially, ripeness considers the "fitness" of the claims for review and "hardship" from delay. A claim may not be fit if factual development would help the Court consider legal issues. A facial challenge may also be premature if it depends on state-law questions or if it is unclear whether the law would be constitutional as applied to the particularly alleged facts. As for hardship, it exists when plaintiffs are put to the choice of immediately altering their behavior or risking sanctions. If plaintiffs have options short of this Catch-22, hardship is less likely.

II. Petitioners' challenges to the false-statement laws are not constitutionally or prudentially ripe.

A. Petitioners fail to plead an Article III future injury. Alleged *past* injuries arising from Driehaus's

prior complaints do not illustrate a future one. They fall within the rule that past exposure to illegal conduct does not in itself show a present case. Allegations of future injury based on the prospective future candidacy of a former congressman do not suffice.

Aside from allegations about Driehaus, Petitioners' allegations of future harm are speculative. Their general allegations—that they plan to engage in "substantially similar" activity—do not satisfy the concreteness or imminence elements. Petitioners' alleged future injuries are also not direct. Many decisions by independent actors potentially stand between future speech and prosecution. Even future Commission proceedings could get triggered only by an unidentified third party, and candidates could file tort suits instead. It also remains unclear whether the laws would even apply to "similar" speech. Petitioners vigorously assert the laws would not apply, and the prior probable-cause finding merely triggered further investigation. Finally, general allegations of "chill" cannot substitute for the necessary imminent harmful action.

B. Prudential-ripeness factors confirm this result. Petitioners' facial and as-applied claims are not fit. The amorphous as-applied claims do not seek to enjoin the laws on a concrete set of facts. The facial challenges are premature. They rest on state-law questions; it is not clear whether the laws apply to any similar speech; and it is not clear that the laws could constitutionally apply to that specific speech. Petitioners also would not suffer hardship from delay. The Commission exists to provide review before enforcement, and its findings are immediately ap-

pealable to courts. Moreover, Petitioners could have requested an advisory opinion.

III. Petitioners' arguments are mistaken.

A. Petitioners' view of the credible-threat test overlooks its fact-specific nature, treating certain factors as dispositive while ignoring others. They also mistakenly support their rule with cases citing "chill" concerns to resolve First Amendment claims. Such considerations should not be incorporated into the case-or-controversy requirement. And Petitioners' cited cases are distinguishable from this one under the case-by-case approach.

B. Petitioners misapply the prudential-ripeness factors. Their assertion that this case is "fit" because they challenge the laws on their face ignores many of their claims. It also conflicts with rules of constitutional avoidance by allowing litigants to prematurely bring the broadest attacks on laws. And Petitioners' hardship arguments rest on a premise, incompatible with our federalist system, that litigants have a broad right to bring pre-enforcement facial challenges to state laws in federal courts.

ARGUMENT

Before analyzing the specific Article III doctrine at issue here, the Court should start with a bird's-eye view of Article III's "judicial Power." After all, its general limits and the purposes they serve can and should "giv[e] meaning" to specific justiciability tests. *Allen*, 468 U.S. at 761 n.26. Justice Jackson, as usual, could not have said it better: "[W]hen all of the axioms have been exhausted and all words of definition have been spent," the propriety of judicial relief often hinges on "a circumspect sense of its fitness in-

formed by the teachings and experience concerning the functions and extent of federal judicial power." *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 243 (1952) (discussing declaratory relief).

"'All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate . . . to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.'" *Allen*, 468 U.S. at 750 (citation omitted). These doctrines interpret Article III as *constitutionally* limiting courts and as granting them power to *prudentially* limit themselves. Constitutionally, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the . . . limitation of federal-court jurisdiction to actual cases or controversies." *Cuno*, 547 U.S. at 341 (internal quotation marks omitted). Prudentially, courts have long followed traditional limits on judicial power that both extend constitutional tests beyond their core, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004), and guide the courts' "discretion when [equitable] relief is sought," *Martin Tractor*, 627 F.2d at 379; *Younger*, 401 U.S. at 43-44.

These constitutional and prudential limits serve important purposes. *First*, they serve the separation of powers—both within the federal government and between the federal government and the States. *Cuno*, 547 U.S. at 341. Most relevant here, the limits implement "principles of equity, comity and federalism." *City of Los Angeles v. Lyons*, 461 U.S. 95, 112

(1983). By barring federal courts from resolving issues except in concrete cases, for example, these limits channel disputes into state courts. *See Texas v. United States*, 523 U.S. 296, 301 (1998); *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 470-71 (1945). In so doing, federal courts give their state counterparts "further opportunity to construe" state laws, *Renne*, 501 U.S. at 323, thereby avoiding "friction-generating error," *Arizonans*, 520 U.S. at 79.

Second, the limits serve democracy. *Winn*, 131 S. Ct. at 1442. They "press with special urgency in cases challenging" a legislature's work, *Poe v. Ullman*, 367 U.S. 497, 503 (1961) (plurality op.), "reflect[ing] the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws," *Broadrick*, 413 U.S. at 610-11. "[F]ree speech issues," for example, often "have fundamental and far-reaching import." *Renne*, 501 U.S. at 324. "For that very reason," the Court must not resolve the issues in "amorphous" cases. *Id.* On top of general limits like that one, moreover, the Court has followed special "'rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.'" *Rescue Army v. Mun. Ct. of Los Angeles*, 331 U.S. 549, 568-69 (1947) (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)).

Third, the limits serve courts. They foster sound decisionmaking by protecting courts from having to resolve far-reaching issues in "abstract" settings that would make them prone to mistakes. *Int'l Longshoremen's & Warehousemen's Union v. Boyd*, 347

U.S. 222, 224 (1954). The limits thus allow for further development. Sometimes that "development" will be of the *facts*, which can "'advance [a court's] ability to deal with the legal issues.'" *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998) (citation omitted). Sometimes it will be of the *law*, which can "'alter the question to be decided.'" *Renne*, 501 U.S. at 323 (citation omitted). Either way, by allowing courts to wait for proper cases to resolve legal questions, the limits help the courts answer those questions correctly.

This case implicates many of these principles. Ohio's false-statement laws reflect its elected representatives' view that "the use of the known lie as a [political] tool is . . . at odds with the premises of democratic government." *Garrison*, 379 U.S. at 75. Disagreeing with that choice, Petitioners assert the broadest attack—to facially eradicate the representatives' work and prohibit them from readjusting it in the future—before any state court or agency has decided whether the laws even cover Petitioners' proposed speech. This despite the Ohio Supreme Court's prior effort to interpret the laws in light of *New York Times* and its progeny. *McKimm*, 729 N.E.2d at 373. And Petitioners ask the Court to resolve these questions implicating numerous state laws in debating-society fashion, divorced of all facts except those that, again, have not been found to violate the law (as compared to, say, facts showing a knowing lie accusing a candidate of accepting illegal bribes or kickbacks).

The Court should keep these overarching principles in mind when interpreting the specific doctrine

at issue here, *see* Part I, when applying it to this case, *see* Part II, and when analyzing Petitioners' contrary arguments, *see* Part III.

I. RIPENESS SETS CONSTITUTIONAL AND PRUDENTIAL LIMITS ON THE JUDICIARY

Ripeness has constitutional and prudential aspects. *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). Constitutionally, it ensures that those seeking review based on future injury have adequately alleged it. Prudentially, it ensures that the case provides a proper vehicle to resolve the claims.

A. Constitutionally, Ripeness Requires Adequate Allegations Of A *Future* Injury To Establish A *Present* "Case"

Article III's case-or-controversy requirement opens federal courthouse doors not simply to those suffering an *actual* injury, but also to some facing a *future* injury. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). When a plaintiff seeks access to federal courts based on that future injury, "[r]ipeness, while often spoken of as a justiciability doctrine distinct from standing, in fact shares the constitutional requirement of standing that [the] injury in fact be certainly impending." *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996); 13B C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 3532.5, at 551 (3d ed. 2008). Whether dressed in standing or ripeness garb, the constitutional issues "boil down to the same question": Do plaintiffs sufficiently allege a *future* injury to make out a *present* "case"? *MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 128 n.8 (2007).

If this "future injury" consists of threatened enforcement of a statute, regulation, or policy, the Court has interchangeably said that Article III requires individuals to show a "genuine" threat of enforcement, *id.* at 129; *Steffel v. Thompson*, 415 U.S. 452, 475 (1974), or a "'credible'" threat of enforcement, *Holder*, 130 S. Ct. at 2717 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). But it has not explained in detail what it means by "genuine" or "credible." *Cf. Steffel*, 415 U.S. at 476 (Stewart, J., concurring) (noting that cases meeting this standard would "be exceedingly rare").

To clarify this standard, it is useful to start at the extremes. On one end, a genuine threat exists if a plaintiff has been told by police that if he again handbills he will likely be prosecuted; a friend has been charged; and he plans to handbill again. *Steffel*, 415 U.S. at 455-56; *Dombrowski v. Pfister*, 380 U.S. 479, 487-88 (1965). If these allegations did not suffice, it would require plaintiffs to undergo prosecution as the sole means to challenge criminal laws—the dilemma the Declaratory Judgment Act seeks to avoid. *MedImmune*, 549 U.S. at 129. On the other end, a genuine threat does not exist just because a law remains on the books. *See Poe*, 367 U.S. at 507 (plurality op.); *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 91 (1947); *Watson v. Buck*, 313 U.S. 387, 400 (1941). If the threat "implied by the existence of the law" sufficed, *Mitchell*, 330 U.S. at 91, it would open courts to "'generalized grievances about the conduct of'" legislatures everywhere, *Unit-*

ed States v. Richardson, 418 U.S. 166, 175 (1974) (citation omitted).

In between, "[t]he difference between an abstract question and a 'case or controversy' is one of degree." *Babbitt*, 442 U.S. at 297. That difference "is not discernible by any precise test," *id.*, or "mechanical exercise," *Allen*, 468 U.S. at 751. The Court instead balances many factors, including: (1) whether plaintiffs *concretely* identify the future activity that could trigger enforcement; (2) whether they plan to engage in that activity *imminently*; (3) whether the challenged provision *applies* to that activity; (4) whether the alleged injury *directly* flows from enforcement; and (5) whether plaintiffs' fear arises from more than *past* enforcement. *See Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 n.29 (1974).

1. *Concrete*. "[A]llegations of future injury [must] be particular and concrete." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998). "Abstract injury is not enough"; the injury "must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Lyons*, 461 U.S. at 101-02. Plaintiffs cannot allege an "injury in only the most general terms," *O'Shea v. Littleton*, 414 U.S. 488, 495 (1974); they must "clearly" "allege facts demonstrating [they are] proper part[ies]," *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 n.8 (1986).

Renne and *Holder* provide a good contrast of this element. In *Renne*, central-committee members of political parties challenged a law banning them from endorsing candidates for nonpartisan office. 501 U.S. at 314-15. This Court found the suit unripe because, among other reasons, allegations that plain-

tiffs wanted to endorse candidates lacked "'concrete form.'" *Id.* at 321-22 (citation omitted). They did "not allege an intention to endorse any particular candidate," and the Court did "not know the nature of [any] endorsement, how it would be publicized, or the precise language" that would be prohibited. *Id.* In *Holder*, the Court found that plaintiffs challenging a law barring material support for terrorist entities concretely alleged future conduct. 130 S. Ct. at 2717 (citing *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185, 1197 (C.D. Cal. 2004)). They identified the two entities they would assist, the aid they would provide, and the periods they intended to do so. *Ashcroft*, 309 F. Supp. 2d at 1196-97.

2. *Imminent*. "A threatened injury [must] be certainly impending." *Whitmore*, 495 U.S. at 158 (internal quotation marks omitted). Thus, if an injury cannot occur until plaintiffs act in a manner that might trigger it, they cannot allege they will "some day" do so. "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992); *McConnell v. FEC*, 540 U.S. 93, 224-26 (2003), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). Yet a delay in enforcement does not doom a suit if plaintiffs are currently engaging in the injury-triggering conduct, and "the inevitability of the operation" of a law is "patent." *Reg'l Rail*, 419 U.S. at 143.

A comparison of *McConnell* and *Virginia v. American Booksellers Association*, 484 U.S. 383 (1988),

shows this divide. In *McConnell*, Senator McConnell challenged a campaign-finance law regulating ads criticizing opponents. 540 U.S. at 224-26. He "plan[ned] to run advertisements critical of his opponents in" future elections and "had run them in the past." *Id.* at 225. But the law would not apply until many years down the road, so allegations that he later planned to engage in conduct triggering the law were "too remote temporally." *Id.* at 226. In *American Booksellers*, booksellers challenged a pending law that would bar them from displaying explicit materials in a manner that gave children access. 484 U.S. at 387, 392. The booksellers alleged the law would apply to at least sixteen books they currently sold and could reach half their inventory. *Id.* at 390-91. The Court found the "imminence" element met, as the "law [was] aimed directly at plaintiffs, who, if their interpretation of the statute [was] correct, will have to take significant and costly compliance measures or risk criminal prosecution." *Id.* at 392.

3. *Applicable*. An adequate connection must exist between planned activity and the challenged law. "Only those to whom a statute applies and who are adversely affected by it can draw in question its constitutional validity." *Ala. State*, 325 U.S. at 463. Thus, the more unclear it is whether the provision would *apply* to the proposed activity and be enforced against it, the less likely the suit will be justiciable. *See Reg'l Rail*, 419 U.S. at 143 n.29; *Boyle v. Landry*, 401 U.S. 77, 81 (1971).

A third comparison—between *Younger* and *Babbitt*—helps show the necessary "applicability." In *Younger*, four plaintiffs challenged a law prohibiting

speech advocating violent acts to accomplish political change. 401 U.S. at 38-40. One was under prosecution; two felt inhibited by this prosecution in advocating for their party's desired change; the fourth feared teaching "about the doctrines of Karl Marx" or other revolutionary works. *Id.* Only the individual undergoing prosecution stated an Article III case. If the others "had alleged that they would be prosecuted for the conduct they planned to engage in, and if the District Court had found this allegation to be true—either on the admission of the State's district attorney or on any other evidence—then a genuine controversy might be said to exist." *Id.* at 42. But mere "inhibited" speech did not suffice. *Id.*

In *Babbitt*, a union sued to enjoin a farm-labor law. 442 U.S. at 292. It challenged, among others, a consumer-publicity provision barring "dishonest, untruthful and deceptive publicity" about agricultural products. *Id.* at 301. The union had "actively engaged in consumer publicity campaigns in the past" and would inevitably make good-faith misstatements in the future. *Id.* The Court found the challenge justiciable, noting it was "clear that [the union] desire[d] to engage at least in consumer publicity campaigns prohibited by the Act." *Id.* at 303; *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1193 (D.C. Cir. 1992) (union's "members inevitably would violate the statute as the union interpreted it").

4. *Direct*. A future injury must be "direct," *Lyons*, 461 U.S. at 102—one that arises *directly* from (and can be redressed *directly* by an injunction against) the challenged law, *see Clapper*, 133 S. Ct. at 1149-50. In standing's terminology, the injury

must be "fairly traceable" to defendants, and "redressed" by an injunction against them. *Lujan*, 504 U.S. at 560-61.

On the front end, an injury is too indirect if its *occurrence* "require[s] guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 133 S. Ct. at 1150. In *O'Shea*, for example, plaintiffs sought to enjoin a magistrate and judge from discriminatorily enforcing laws. 414 U.S. at 491-92. This Court found plaintiffs' threatened injury too indirect: "if [plaintiffs] proceed to violate an unchallenged law and if they are charged, held to answer, and tried in any proceedings before [defendants], they will be subjected to [those defendants'] discriminatory practices." *Id.* at 497.

On the back end, an injury is too indirect if its *redressability* rests on "unfettered choices made by independent actors." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (plurality op.). A statute thus will not create a "direct" injury when an unchallenged law could also trigger that injury. *See Clapper*, 133 S. Ct. at 1149. In *Renne*, for example, the Court expressed skepticism about the challenge to the law banning party endorsements partially because an unchallenged law "might be construed to prevent" the same speech. 501 U.S. at 319.

5. *Past*. Lastly, a *future* injury cannot be based simply on a *past* one. "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea*, 414 U.S. at 495-96; *Ashcroft v. Mattis*, 431 U.S. 171, 172-73 n.2 (1977) (per curiam); *Rizzo v.*

Goode, 423 U.S. 362, 372 (1976). A justiciable case must exist for each *claim*, *Cuno*, 547 U.S. at 352, and each *remedy*, *Lyons*, 461 U.S. at 111.

Golden illustrates this rule. The plaintiff had been prosecuted under an anonymous-leafleting prohibition during a 1964 election when he passed out literature criticizing a congressman's vote. 394 U.S. at 105-06 & n.2. The plaintiff sought to distribute similar literature in future elections. *Id.* at 106. While the congressman had since become a judge, the district court found the challenge justiciable because the law deterred plaintiff from again distributing anonymous handbills. *Id.* at 107. This Court reversed. *Id.* at 108-10. "[I]t was most unlikely that the Congressman would again be a candidate," and the plaintiff's allegations of deterred speech did not establish a "specific live grievance." *Id.* at 109-10.

B. Prudentially, Ripeness Considers The Propriety Of Judicial Review

Prudential ripeness asks practical questions: (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties" from delayed review. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

Fitness. Even if adequate injury exists, courts may decline review if a case does not provide a good vehicle to decide the claims. "Fitness" factors run the gamut, from "considerations of timeliness and maturity" to those "of concreteness, definiteness, [and] certainty." *Rescue Army*, 331 U.S. at 573-74; *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972).

A claim may not be fit, for example, if "factual development would 'significantly advance [a court's]

ability to deal with the legal issues.'" *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003) (citation omitted). So when a First Amendment claim would require the Court to weigh "competing associational and governmental interests," the Court may need a "concrete fact situation" to undertake the necessary balancing. *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 56 (1974).

Similarly, a claim may not be fit if the challenged action has not sufficiently "matured." *See Nat'l Park*, 538 U.S. at 807; *W.E.B. DuBois Clubs of Am. v. Clark*, 389 U.S. 309, 312 (1967). This prematurity factor has heightened importance for challenges to state laws over which this Court lacks the last word. "Postponing consideration of [such claims] until a more concrete controversy arises" can "permit[] the state courts further opportunity to construe" the laws, and "perhaps in the process to 'materially alter the question'" presented. *Renne*, 501 U.S. at 323 (citation omitted). Indeed, state-law resolution could altogether eliminate the need to resolve constitutional issues. *Miles Christi Religious Order v. Twp. of Northville*, 629 F.3d 533, 540 (6th Cir. 2010).

This factor also has heightened importance for constitutional claims. "[T]he First Amendment involvement in [a] case" does not "render inapplicable the rule that a federal court should not extend its invalidation of a statute further than necessary." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). The Court thus prefers considering *as-applied* challenges before *facial* ones. *Renne*, 501 U.S. at 324. The opposite "course would convert use of the overbreadth doctrine from a necessary means

of vindicating the plaintiff's right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485 (1989).

Hardship. Prudential ripeness also considers hardship to the parties. *Ohio Forestry*, 523 U.S. at 733-36. The classic case of hardship exists when, without review, plaintiffs immediately are put to the choice of complying with a challenged provision that unambiguously applies to their conduct or violating that provision on threat of "serious criminal and civil penalties." *Abbott Labs.*, 387 U.S. at 153. Hardship is less likely to exist if plaintiffs do not face this "immediate dilemma." *Reno*, 509 U.S. at 57.

Even if the dilemma looms, hardship is less likely when plaintiffs have options short of any Catch-22. Where, for example, a statute allows plaintiffs to seek advisory opinions about whether their conduct violates it, such a remedy militates against a hardship finding. *Martin Tractor*, 627 F.2d at 384-86; *see also Miles Christi*, 629 F.3d at 538 (plaintiffs could seek variance); *Nat'l Right to Life Political Action Comm. v. Connor*, 323 F.3d 684, 693 (8th Cir. 2003) (plaintiff could seek opinion); *Digital Props., Inc. v. City of Plantation*, 121 F.3d 586, 590 (11th Cir. 1997) (plaintiffs could seek "administrative decision"); *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529, 531 (3d Cir. 1988) (plaintiffs had "expeditious means" of review). Even if these alternative avenues might add more expense, moreover, that does not necessarily create a sufficient hardship. *See Ohio Forestry*, 523 U.S. at 735; *Lujan v. Nat'l Wildlife*

Fed'n, 497 U.S. 871, 894 (1990); *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980).

II. PETITIONERS' AMENDED COMPLAINTS DO NOT ASSERT CONSTITUTIONALLY OR PRUDENTIALLY RIPE CLAIMS

The Sixth Circuit properly affirmed the dismissal of Petitioners' complaints. In the Sixth Circuit and here, Petitioners have not sought to restore claims regarding Ohio's disclaimer provision, claims regarding Commission procedures, or preemption claims. The Court thus should affirm the dismissal of SBA Counts V-VI and COAST Counts V-VIII. JA125-27, 155-59; *United States v. Jones*, 132 S. Ct. 945, 954 (2012). Instead, Petitioners challenge the false-statement laws, but they fail to allege justiciable claims concerning those laws either.

A. Petitioners Do Not Adequately Allege An Article III Future Injury

Petitioners fail to plead an adequate future injury because they rely largely on *past* allegations concerning Driehaus, and assert only generic allegations of *future* injury concerning others.

1. Petitioners' alleged past injury arising from Driehaus's complaints does not establish a future one

The complaints initially detail Driehaus's actions during the 2010 elections. As for SBA, Driehaus allegedly prevented it from posting billboards, forced it to participate in Commission proceedings, and requested discovery. JA114, 118-22. As for COAST, he chilled it from sending an email. JA146-48.

These alleged *past* injuries do not establish the necessary *future* one. *Lyons*, 461 U.S. at 102-05. Instead, they fall within the rule that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea*, 414 U.S. at 495-96; Pet.App.9a.

In this regard, this case is like *Golden*. There, as here, plaintiffs challenged speech-regulating laws. In *Golden*, the law banned anonymous leafleting, 394 U.S. at 104; in this case, the laws ban false statements, R.C. 3517.21(B)(9)-(10). There, as here, plaintiffs' alleged prior speech implicated those laws. In *Golden*, the plaintiff criticized Congressman Multer's vote against amendments disapproving of Soviet and Middle Eastern anti-Semitism, 394 U.S. at 105 & n.2; in this case, Petitioners criticized Congressman Driehaus's vote for the Affordable Care Act, JA114, 146-47. There, as here, the congressman left office, and plaintiffs alleged he could be a "'candidate for Congress again.'" 394 U.S. at 109; JA122, 148. *Golden* rejected these "allegations of future injury" based "on the prospective future candidacy of a former Congressman." *Whitmore*, 495 U.S. at 158. Petitioners' claims that Driehaus "'may run for office again,'" therefore, "are too speculative." *Nader v. FEC*, 725 F.3d 226, 229 (D.C. Cir. 2013). That is particularly true since he remains overseas, JA179-82, and expressed considerable ambivalence about Capitol Hill, JA136-37.

2. Petitioners' general allegations of future injury are too speculative

Apart from allegations about Driehaus, the only forward-looking allegation in SBA's complaint is that it "intends to engage in substantially similar activity in the future." JA122. The only forward-looking allegations in COAST's complaint are that it seeks to make "the same or similar statements" about others who supported the Affordable Care Act in the next election cycle and to "aggressively" speak about members of Congress. JA149-50. (COAST's complaint also contains, but it rightly does not cite, speculative allegations concerning Cincinnati council members. JA150-53; *Younger*, 401 U.S. at 42.) As Petitioners' future injuries, the complaints allege the threat of enforcement of the false-statement laws and of merely having to participate in a Commission hearing. JA121-22, 148-50. They also allege the false-statement laws will "chill" future speech. JA121, 149. These sparse allegations do not suffice.

a. The general allegations concerning future conduct—that Petitioners plan to engage in "substantially similar" activity—do not satisfy the concreteness or imminence elements. As in *Renne*, the complaints do not identify "any particular candidate" or the "precise language" they plan to use. 501 U.S. at 321-22 As in *Lujan*, the complaints assert "some day" intentions to speak in upcoming elections. 504 U.S. at 564; *McConnell*, 540 U.S. at 224-26.

Indeed, the plaintiff in *Golden* also relied on generic statements. His complaint alleged an intent to distribute "'similar anonymous leaflets'" during the 1966 election and "'in subsequent election campaigns

or in connection with any election of party officials, nomination for public office and party position that may occur subsequent to said election campaign.'" 394 U.S. at 105-06. Before this Court, he argued his leaflet had been "a political tract," not a "'[d]on't vote for Multer' leaflet," suggesting that it discussed an issue of "significance to the political life of our time." Appellee Br. at 32, *Golden v. Zwickler*, 394 U.S. 103 (1969) (No. 370). Yet the Court held that the "record" showed that plaintiff's "sole concern" had been the congressman and that the general allegations were directed only at him since he had held a party position. 394 U.S. at 109 & n.5. It thus held that the district court "should have dismissed his complaint." *Id.* at 110; *see also Mitchell*, 330 U.S. at 87-91 & n.18 (rejecting general allegations that plaintiffs wanted "to engage actively in political management and political campaigns").

The same is true here. If anything, the standards should be more demanding now. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-63 (2007). Since the Court has retired the "no-set-of-facts test," *Ashcroft v. Iqbal*, 556 U.S. 662, 670 (2009), it no longer "presumes that general allegations embrace those specific facts that are necessary to support the claim," *Nat'l Wildlife Fed'n*, 497 U.S. at 889 (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Petitioners' failure to identify the targets or content of future speech shows they lack a "specific live grievance." *Golden*, 394 U.S. at 110. As for targets, it is far from clear a future Ohio candidate would draw Petitioners' "similar" speech. SBA's 2010 campaign focused on "certain Congressmen," JA113; i.e.,

"so-called 'pro-life' Democrats who voted for the" Act, JA52. COAST's speech was even more closely tied to Driehaus; it criticized his decision to file complaints with the Commission on the ground that SBA's speech was true. JA162-63. As for content, in the false-statement context, "precise language" matters. *Renne*, 501 U.S. at 322. After all, the "reasonable import of a defendant's statements—whether, for example, they fairly convey a false representation"—depends on the words chosen. *United States v. Williams*, 553 U.S. 285, 306-07 (2008); *see Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (noting, as a constitutional matter, that "falsity" may turn on specific words and punctuation).

b. Additionally, Petitioners' alleged injuries are not "direct." A prosecution would depend on a chain of events that surpasses "path[s]" to injury this Court has found too speculative. *Whitmore*, 495 U.S. at 157. Between speech and penalties could potentially lie: (1) a complainant filing a complaint; (2) a panel's decision to refer the case to the Commission; (3) a Commission finding that the speech violated the law; (4) a Commission decision to refer a case to a prosecutor; (5) a trial court's decision upholding the Commission's finding; (6) an appellate court's affirmance; (7) the Ohio Supreme Court's decision to affirm or deny review; and (8) the prosecutor's decision about whether to prosecute. The "guesswork as to how [the many] independent decisionmakers [would] exercise their judgment" prevents a prosecution itself from qualifying as an Article III injury. *Clapper*, 133 S. Ct. at 1150.

The complaints thus rely not just on threatened prosecution, but also on threatened administrative proceedings before the Commission with the potential for discovery. JA121-22, 149. But that alleged injury is itself indirect. On the front end, the Commission is powerless to initiate proceedings. R.C. 3517.153(A). Any proceeding would rest on third-party responses to speech about an unidentified candidate. As the Sixth Circuit noted, if Petitioners could make out an imminent injury by alleging that a "'citizen in Ohio who supports Obama'" might file a complaint, "*any* plaintiff could challenge Ohio's election laws based on *any* intended speech." Pet.App.12a. Just as environmental groups with hundreds of thousands of members cannot rely on the "statistical probability" that a member would visit affected sites to show a concrete injury, *Summers v. Earth Island Instit.*, 555 U.S. 488, 497-98 (2009), Plaintiffs cannot rely on a "probability" that some unidentified individual would file a complaint.

Further, the amended complaints identify nobody who threatens to do so. When the Affordable Care Act was front and center in 2010, *only* Driehaus filed a complaint (even though SBA's literature suggested it planned to target another Ohio representative, JA52). The only other person identified as possibly doing so is Secretary of State Husted, who has a duty to refer violations. JA113, 143. But the Secretary did not file a complaint for SBA's prior speech within the two-year window, R.C. 3517.157(A), making it speculative to assume he would change course now.

It is equally speculative to suggest that a proceeding would require Petitioners to "turn over sensitive

and confidential strategy materials." JA121-22. They could ask the Commission to limit discovery, Ohio Admin. Code 3517-1-11(B)(3)(a), just as SBA asked the district court to do in regard to Driehaus's defamation counterclaim, Doc.95, Mot. for Protective Order. And no such harm materialized previously because SBA and Driehaus agreed to delay proceedings until after the election. Pet.App.27a. Unlike in a civil suit, moreover, a complaint with the Commission must include an affidavit based on personal knowledge and subject to penalties for perjury. R.C. 3517.153(A). And the Commission may require the complainant to pay its costs and the other side's attorney's fees for frivolous filings. R.C. 3517.155(E); *Massey v. Ohio Elections Comm'n*, No. 13AP-20, 2013 WL 4055739, at *1 (Ohio Ct. App. Aug. 13, 2013).

On the back end, Petitioners' relief would not "directly" redress discovery risks. *See Clapper*, 133 S. Ct. at 1149. "To the extent [Ohio's false-statement laws] may be underinclusive, Ohio courts also enforce the common-law tort of defamation." *McIntyre*, 514 U.S. at 350 n.13. If the laws were invalidated, candidates could use tort options "in [their] absence." *Renne*, 501 U.S. at 319; *Babbitt*, 442 U.S. at 305 (finding union's challenge to arbitration provision non-justiciable because employers could "elect to pursue a range of responses other than" provision). This case is Exhibit A. After SBA sued, Driehaus filed a defamation claim. Doc.27, Answer. And in the letter to Lamar, his lawyer noted that, if Lamar posted SBA's billboards, they might "proceed against [it] before the [Commission] *and/or in a court of law*." JA27 (emphasis added). Because "invalidation

of [the laws] may not impugn" a candidates' ability to file claims, *Renne*, 501 U.S. at 319, it might not redress the risks of threatened litigation and discovery.

c. Petitioners also have not alleged that the false-statement laws would even apply to "similar" speech. They vigorously assert the laws do *not* apply because it would be truthful. JA75, 162. That makes Petitioners another "degree," *Babbitt*, 442 U.S. at 297, removed from the leafleter in *Golden* (whose conduct led to a prosecution, 394 U.S. at 104-05); the humanitarian groups in *Holder* (whose conduct this Court found to fall within the law, 130 S. Ct. at 2717-18); the booksellers in *American Booksellers* (who claimed that the law could reach half their inventory or at least about a shelf's worth, 484 U.S. at 390-91, 394), or the union in *Babbitt* (which "desire[d] to engage at least in consumer publicity campaigns prohibited by the Act," 442 U.S. at 303).

Instead, as the Sixth Circuit found, Pet.App.15a, Petitioners' complaints allege that the prior probable-cause decision shows that they might face a "false prosecution." But since "[t]he ultimate decision on prosecution is clearly made by the prosecuting attorney," *Pestrak*, 926 F.2d at 578, it is speculative to suggest that this alleged "false" finding would lead to enforcement. *Younger*, 401 U.S. at 42. That is especially so since parties may appeal Commission findings, where courts "'make an independent examination of the whole record.'" *Flannery v. Ohio Elections Comm'n*, 804 N.E.2d 1032, 1036 (Ohio Ct. App. 2004) (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984)).

Even with respect to a Commission finding, it is important to remember the preliminary nature of the probable-cause decision. That finding was "not a final adjudication, a finding of a violation, or even a warning that SBA's conduct violated Ohio law." Pet.App.12a. It merely "green-lighted further investigation" after a review of the pleadings. *Id.* A preliminary belief in the need for further review after a brief hearing might be explained by the complexity of the topic; the Affordable Care Act, after all, "stretch[es] over 900 pages." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012). In short, neither a panel member nor the full Commission ever found a violation. *Cf. Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Local 54*, 468 U.S. 491, 512 (1984) (holding that because state agency did not conclusively apply provision, the issue was "not ripe for review").

Further, as the State Respondents told the Sixth Circuit, such an ultimate finding would likely prove difficult in light of the complexities, structure, and negotiation history of the Affordable Care Act. Appellees Br., No. 11-3894, at 24 n.5 (6th Cir.). The Ohio Supreme Court might categorically hold that statements representing "rational interpretations" of ambiguous topics cannot be knowingly or recklessly false. *See McKimm*, 729 N.E.2d at 373 (distinguishing *Bose*, 466 U.S. at 512). Even if the full Commission did find a violation, that still would not result in "civil enforcement" in the traditional sense because the Commission cannot impose sanctions like fines or cease-and-desist orders. *Cf. Ohio Civil Rights*

Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, 626 n.1 (1986); *Babbitt*, 442 U.S. at 302 n.13.

d. The complaints, lastly, allege the threat of "chilled" speech. JA121, 149. But allegations of "chill" do not establish an Article III injury. As then-Judge Scalia noted, the "harm of 'chilling effect'"—the "present deterrence from First Amendment conduct because of the difficulty of determining the application of a regulatory provision to that conduct"—does not create a case or controversy. *United Presbyterian*, 738 F.2d at 1380. Rather, "[t]he constitutional question, First Amendment or otherwise, must be presented in the context of a specific live grievance." *Golden*, 394 U.S. at 110. And "chill" allegations cannot substitute for what is required—"a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 14 (1972). Either Petitioners have sufficiently asserted a genuine threat of imminent injury (in which case they have stated an Article III case) or they have not (in which case they have not).

In sum, the balance of factors that this Court considers under its "case-by-case" approach shows that the complaints do not allege an adequate Article III future injury. *Reg'l Rail*, 419 U.S. at 143 n.29.

B. Prudential Factors Reinforce That The Complaints Should Be Dismissed

Prudential-ripeness factors confirm the Sixth Circuit's result. None of Petitioners' claims is fit, and they would not suffer undue hardship from delay.

Fitness. Petitioners bring as-applied and facial challenges to the false-statement laws. JA122-25, 153-55. Neither is fit. To begin with, for the reasons discussed, both rest on "contingent future events

that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 299 (internal quotation marks omitted). Whether or not Petitioners have alleged Article III injuries, those same facts at least show that their claims lack the "concreteness, definiteness, [and] certainty" to be fit for decision. *Rescue Army*, 331 U.S. at 573.

Turning to the as-applied claims (Counts II and IV), they are "as applied" in name only. They do not ask courts to declare Ohio's laws unconstitutional on a specific set of concrete facts. Instead, they assert that the laws are unconstitutional "as applied to lobbyists" (for SBA) or "citizens and organizations" (for COAST) that "tak[e] positions on political issues, because [they] unconstitutionally penalize[] protected opinions." JA123-25, 154. It is difficult to imagine more "ill-defined" claims, *Renne*, 501 U.S. at 324, and Petitioners fail to "flesh[] out" their ambiguous scope, *Nat'l Wildlife Fed'n*, 497 U.S. at 891. Since these claims do not identify a specific set of applications, imagine a court's difficulty crafting an injunction providing sufficient notice. *See Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam). And Ohio's Constitution has an "'independent guarantee of protection' for statements that constitute opinion." *Straus*, 2007 WL 2949543, at *3 (citation omitted). So these claims ask federal courts to grant as-applied injunctions in the face of substantial uncertainty over whether state courts would hold that the laws reach the enjoined applications.

The facial challenges (Counts I and III) fare no better. They allege the false-statement laws are unconstitutional because R.C. 3517.21(B)(9) lacks an

actual-malice requirement; because both (B)(9) and (B)(10) are vague; because both rely "on the intent of the speaker and implications of speech to ascertain [their] scope and fail[] strict scrutiny review"; and because both are overbroad in that they cover more than "express advocacy." JA122-23, 153-54. These claims are triply premature.

For one, as a first step in such a challenge, courts must "construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Williams*, 553 U.S. at 293. That duty is simple enough for federal laws. *Stevens*, 559 U.S. at 474-77. But this case involves state law. In that context, a facial challenge should not proceed if it requires courts to consider "questions of construction, essentially matters of state law." *Rescue Army*, 331 U.S. at 574. The complaints' facial challenges do just that. Constitutional analysis might be different for a law that lacks an intent element or reaches subjective implications than for one that does not. JA122-23, 153-54. Further, "[s]tate courts, when interpreting state statutes, are . . . equipped to apply th[e] cardinal principle" of constitutional avoidance. *Arizonans*, 520 U.S. at 78. The Ohio Supreme Court has taken this Court's lead when interpreting (B)(10) in the past, *McKimm*, 729 N.E.2d at 370-74, and may continue on that path to make it largely coextensive with civil defamation. Because Petitioners' facial claims cannot avoid state-law questions, they are premature. *Cf. Babbitt*, 442 U.S. at 306-13.

For another, no matter how state law is interpreted, it is not clear it would cover Petitioners' "sim-

ilar" speech. Ripeness is designed to "avoid[] the premature resolution of constitutional questions, including First Amendment questions." *Miles Christi*, 629 F.3d at 540; *see Ala. State*, 325 U.S. at 463. The Ohio Supreme Court could hold that statements cannot meet the law's actual-malice standard if "the language chosen was 'one of a number of possible rational interpretations'" of an ambiguous topic. *Bose*, 466 U.S. at 512 (citation omitted); *cf. McKimm*, 729 N.E.2d at 373. It is thus premature "to decide the constitutionality" of these laws before it is "clear that [they] would be applied." *W.E.B. DuBois*, 389 U.S. at 312; *Brown*, 468 U.S. at 512. Such "review now may turn out to have been unnecessary" if statutory review later would remedy any alleged injury. *Ohio Forestry*, 523 U.S. at 736.

For a third, it is not clear a true *as-applied* challenge (that is, one tailored to Petitioners' proposed speech) would have been unsuccessful. "As-applied challenges—the 'basic building blocks of constitutional adjudication'—remain the preferred route." *Warshak v. United States*, 532 F.3d 521, 529 (6th Cir. 2008) (Sutton, J.) (citation omitted). Even in free-speech cases, "'[i]t is not the usual judicial practice, . . . nor [does the Court] consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied." *Renne*, 501 U.S. at 324 (quoting *Fox*, 492 U.S. at 484-85). Yet Petitioners did not bring narrow claims. While *litigants* might not prefer the *courts'* preferred route, ripeness ensures courts, not litigants, get to decide whether to depart from "[t]he case-by-case approach" that is the

"traditional, and remains the normal, mode of operation." *Nat'l Wildlife Fed'n*, 497 U.S. at 894; *cf. United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 592 (1957) (noting that, while litigants "are prone to shape litigation," "the Court has its responsibility").

Hardship. The hardship factor confirms that Petitioners' claims are unripe. This was not a classic case where Petitioners faced the "immediate dilemma" of changing conduct or facing sanctions. *Reno*, 509 U.S. at 57. The laws apply during the course of election campaigns. R.C. 3517.21(B). When Petitioners filed their amended complaints, any election lay substantially in the future. JA5-6.

Further, the Commission exists to provide review over claims *before* enforcement. It acts as a buffer between prosecutors and speech. And parties obtain access to courts from its adverse findings. R.C. 3517.157(D); *see, e.g.*, *Serv. Emps.*, 822 N.E.2d at 428; *Flannery*, 804 N.E.2d at 1035. Here, however, SBA agreed to delay and then dismiss Commission proceedings. JA131. But, after the probable-cause hearing, Driehaus could *not* dismiss his complaints without permission. R.C. 3517.157(B)(1). If SBA objected, the Commission would have taken that into account when deciding whether to dismiss.

Even then, Petitioners could have sought an advisory opinion. R.C. 3517.153(D). If the Commission had found that proposed statements did *not* violate the false-statement laws, it would have immunized them. *Id.* If the Commission found that Petitioners' statements *did* violate the laws, it would have served as a "controversy-ripening tool." *Martin Tractor*, 627

F.2d at 388. To be sure, the advisory-opinion process takes a few months, which might prove infeasible in the heat of election season. But Petitioners faced no such constraints when they filed their amended complaints. Had Petitioners traveled an administrative course, rather than a judicial one, they could have eliminated any alleged dilemma from the prior probable-cause finding years ago. And this option would have eliminated any need for courts prematurely to "undertake the most important and the most delicate of [their] functions." *Rescue Army*, 331 U.S. at 569.

III. PETITIONERS' CONTRARY ARGUMENTS ARE MISTAKEN

Petitioners characterize the Sixth Circuit's analysis as, among other things, "wrongheaded" (at 15), "perverse" (at 34), "bizarre" (at 40), and "warped" (at 52). Respectfully, Petitioners are mistaken.

A. Petitioners' "Credible Threat" Test Substantially Reduces Article III Standards

Petitioners are incorrect in their interpretation of Article III's "credible threat" standard, their efforts to incorporate First Amendment questions into that standard, and their application of it here.

1. Petitioners' bright-line rule ignores the fact-specific nature of the inquiry

Rejecting the view that cases meeting the genuine-threat test would be "exceedingly rare," *Steffel*, 415 U.S. at 476 (Stewart, J., concurring), Petitioners argue (at 16) for a test that "is not especially demanding." They assert (*id.*) that any plaintiff whose "intended speech arguably falls" within a "speech-proscribing law" can sue if the law "has not been dis-

avowed." But a Court that has said that a future injury "'must be *certainly impending*'" rather than merely "'*possible*,'" *Clapper*, 133 S. Ct. at 1147 (citation omitted), and that the justiciability question "is not discernible by any precise test," *Babbitt*, 442 U.S. at 297, might find an easy-to-meet, bright-line rule surprising. Petitioners overlook necessary elements of the inquiry as well as its fact-specific nature.

First, the argument (at 16-25) that plaintiffs need to allege only an "intent to speak" downplays normal standards—that plaintiffs identify a concrete, imminent, and direct injury. *Clapper*, 133 S. Ct. at 1147. The Court has not exempted threat-of-enforcement cases from these rules. *Renne* applied them, when it held that political parties had not concretely alleged future endorsements. 501 U.S. at 321-22; *Mitchell*, 330 U.S. at 87-91 n.18. And *Holder* applied them, when it held that humanitarian groups had identified the specific services they would provide the specific entities. 130 S. Ct. at 2717; *see Elend v. Basham*, 471 F.3d 1199, 1211 (11th Cir. 2006).

Second, Petitioners repeatedly suggest (at 16, 19, 38) that a credible threat exists if authorities do not "disavow" the law. This turns a *single* factor into the *dispositive* one. In *Babbitt*, for example, the Court merely added that "[m]oreover" the state had not "disavowed" penalties. 442 U.S. at 302; *see Holder*, 130 S. Ct. at 2717; *Am. Booksellers*, 484 U.S. at 393. In *Golden*, *Renne*, and *Mitchell*, by contrast, no disavowal occurred. In *Golden*, a prosecution had just happened, 394 U.S. at 104-05; in *Mitchell*, proceedings were ongoing to terminate the sole plaintiff who presented a justiciable claim, 330 U.S. at 91-93; in

Renne, silence existed, 501 U.S. at 322; *cf. Boyd*, 347 U.S. at 225 (Black, J., dissenting). This "disavowal" rule would at least require the Court to disclaim cases holding that Article III requires more than the threat "implied by the existence of the law." *Mitchell*, 330 U.S. at 91; *Watson*, 313 U.S. at 400; *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) ("We have held that neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement."); *J.N.S., Inc. v. Indiana*, 712 F.2d 303, 305 (7th Cir. 1983); *McCollester v. City of Keene*, 668 F.2d 617, 621 (1st Cir. 1982).

Third, Petitioners argue (at 31-36) that plaintiffs' view about whether their activities violate the law "has nothing to do with the credible-threat test." But there is at least a "degree" difference between litigants who allege their conduct could violate the law and litigants who vigorously allege it would not. *Babbitt*, 442 U.S. at 297; *Ala. State*, 325 U.S. at 463 ("[o]nly those to whom a statute applies and who are adversely affected by it" may challenge it). Indeed, in cases this Court has let proceed, plaintiffs generally asserted their activities violated an arguable interpretation of the law. In *Babbitt*, for example, the union alleged that its inevitable misstatements violated a law that arguably lacked an actual-malice element. 442 U.S. at 301. Similarly, Wisconsin Right to Life "recognized" its ads "would be illegal" under the Bipartisan Campaign Reform Act. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 460 (2007). And the booksellers in *American Booksellers* alleged that "half of their inventory" might fall within a statute

regulating materials deemed "'harmful to juveniles.'" 484 U.S. at 387, 390-91.

Fourth, Petitioners contend (at 36-41) that a past government action's *preliminary* nature should have no effect on whether the action establishes a credible threat of future injury. This, too, overstates things. That the government had merely "green-lighted further investigation" in a past case, Pet.App.12a, makes a genuine threat *less likely* than if it had concluded, as in *Steffel*, that prior action violated the law. 415 U.S. at 455-56; *see Am. Fed'n of Gov't Emps. v. O'Connor*, 747 F.2d 748, 753 (D.C. Cir. 1984) (Ginsburg, J.) (finding claim unripe partially because government action consisted of "only the advice of an officer Congress did not authorize to speak definitively"); *Digital Props.*, 121 F.3d at 590 (claim unripe without "conclusive administrative decision").

2. Petitioners mistakenly extend "chill" cases into the case-or-controversy requirement

Petitioners justify (at 21-25, 36, 41-44) a reduced case-or-controversy requirement based on the risk of "chill" from speech-regulating laws. "[I]f the risk of 'chill' is enough to invalidate a statute *on the merits*," the argument goes (at 23), "it is *a fortiori* sufficient to allow the speaker to seek preemptive review." The Court should reject these efforts to incorporate merits considerations into the case-or-controversy rule.

To begin with, the Court's cases have not made this leap. Petitioners' cited cases (at 21-23) involved, among others, injunction standards, *see Aschroft v. ACLU*, 542 U.S. 656, 670-71 (2004), defamation rules, *see Rosenbloom v. Metromedia, Inc.*, 403 U.S.

29, 50 (1971); *N.Y. Times*, 376 U.S. at 279, and, most commonly, the "overbreadth" doctrine, *see Hicks*, 539 U.S. at 119; *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57 (1984); *Dombrowski*, 380 U.S. at 486. None addressed Article III's constitutional core.

The Court's Article III cases, by contrast, have not adopted special speech rules. Those finding no Article III case have recognized that a case or controversy must exist for whatever type of claim a plaintiff presents—"*First Amendment or otherwise*." *Golden*, 394 U.S. at 110 (emphasis added); *Laird*, 408 U.S. at 13-14 ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."). Conversely, those finding an Article III case do not mention "chill." *See Holder*, 130 S. Ct. at 2717; *Babbitt*, 442 U.S. at 297-303; *see also Barr*, 956 F.2d at 1193 (noting that "*Babbitt* did not mention a 'chilling effect'"). While *American Booksellers* referenced risks of "self-censorship," the booksellers were asserting the rights of *bookbuyers* in an *overbreadth* claim. 484 U.S. at 392-93 & n.6.

As these cases show, it is only to determine whether a plaintiff may invoke the "overbreath" doctrine—an exception to the prudential rule against third-party standing—"that 'chilling effect' has anything to do with the doctrine of standing." *United Presbyterian*, 738 F.2d at 1379. The cases cite a "chilling effect" "as the *reason* why the governmental imposition is invalid rather than as the *harm* which entitles the plaintiff to challenge it." *Id.* at 1378. The "harm of 'chilling effect'" thus does not create a

case or controversy. *Id.* at 1380. Instead, an "immediate threat of concrete, harmful action" must exist. *Id.*; *Morrison v. Bd. of Educ. of Body Cnty.*, 521 F.3d 602, 609-10 (6th Cir. 2008) (adopting *United Presbyterian*). Petitioners wrongly seek to incorporate the free-speech merits (i.e., the *reason*) into the case-or-controversy requirement (i.e., the *harm*).

To be sure, Petitioners (at 41-43) distinguish *Clapper*, *Laird*, and *United Presbyterian* as involving government-surveillance activities rather than laws "*directly proscrib[ing] or penaliz[ing] speech*." But other cases have also refused to incorporate "chill" concerns into the case-or-controversy requirement. *Younger* held that the plaintiffs had not pleaded a case even if the speech-proscribing law chilled (in their words, "'inhibited'") their speech. 401 U.S. at 42. *Golden* held that the plaintiff had not stated a "live grievance" even if the anonymous-leafleting ban chilled (in his words, "deterr[ed]") his speech. 394 U.S. at 107, 110. When rejecting "chill" allegations, moreover, *Laird* cited *Mitchell*, which involved a law prohibiting public employees from engaging in political speech. 408 U.S. at 14; *see Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 761 (11th Cir. 1991) (rejecting attempt to distinguish *Laird* as involving surveillance law).

This refusal to conflate First Amendment and Article III questions follows from first principles. "Implicit" in that fusion "is the philosophy that the business of the federal courts is correcting constitutional errors, and that 'cases and controversies' are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they be-

come obstacles to that transcendent endeavor." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 489 (1982). Here, for example, Petitioners repeatedly foreshadow their view on the merits, suggesting (at 55) the Court should let them proceed because Ohio's laws "are almost certainly unconstitutional" after *United States v. Alvarez*, 132 S. Ct. 2537 (2012). But this notion that courts should relax Article III's standards based on their views of a constitutional claim's merits "has no place in our constitutional scheme." *Valley Forge*, 454 U.S. at 489.

3. Petitioners' application of their credible-threat standard lacks merit

Petitioners err when applying the credible-threat standard to their amended complaints.

a. They initially suggest (at 25) that the Court should look to the time of their original complaints. They rightly spend one sentence on this argument. Standing ensures that an adequate injury exists based on the claims and allegations in the amended complaints. *See Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 50-51 (1991) (looking "at the time the second amended complaint was filed"); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 (2007) ("[W]hen a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction."). And ripeness ensures that an adequate future injury remains at the time of decision. *Anderson v. Green*, 513 U.S. 557, 559 (1995) (per curiam).

b. Petitioners claim (at 25-26) that the prior probable-cause finding and the district court's "hold-

ing, in the related defamation action, that SBA's statements were factually false" makes this case easier than *Holder*, *American Booksellers*, and *Babbitt*. But the district court did not "hold" that SBA's statements were false; it held that it could not grant summary judgment "at this early stage." Doc.66, Order, at 21. And these three cases do not illustrate that Petitioners' claims are justiciable.

In *Holder*, the humanitarian groups identified *two* entities they sought to support. 130 S. Ct. at 2717. They did not allege that they had supported a now de-designated terrorist entity in the *past* and might want to support *unnamed* terrorist entities in the future. *Cf. Renne*, 501 U.S. at 321. It was also clearer that the challenged law applied to the groups; indeed, this Court held that it would. *Holder*, 130 S. Ct. at 2717-18. And *Holder* involved a typical criminal statute, not one requiring independent decisions by independent actors before any prosecution could ensue. *See Clapper*, 133 S. Ct. at 1150.

In *American Booksellers*, the booksellers identified sixteen books they currently sold that might be covered by the law. 484 U.S. at 390-91. They did not allege that they had sold those sixteen books in the past and they might someday sell "similar" books in the future. *Cf. Golden*, 394 U.S. at 109. And *American Booksellers* also involved a standard criminal statute where, unlike here, the only thing standing between the booksellers and prosecution was prosecutorial discretion.

In *Babbitt*, while the union (like Petitioners) had not yet been subject to criminal penalties, it had been subjected to more than a prior finding trigger-

ing an investigation. It asserted that "some seven suits [had] been filed against" it and its members under various provisions of the challenged law, and "that as a result speech activities have been enjoined including handbilling and oral conversations on three occasions by an ex parte temporary restraining order without notice or hearing." *United Farm Workers Nat'l Union v. Babbitt*, 449 F. Supp. 449, 452 (D. Ariz. 1978); *see also Babbitt*, 442 U.S. at 302 n.13 (noting that the prospect of a court-ordered injunction "provides substantial additional support for the conclusion that [union's] challenge to the publicity provision is justiciable"). Here, no government agent ever prevented Petitioners from speaking. JA108. Further, unlike Petitioners, the union alleged that it would inevitably make honest misstatements that it believed would violate the law. 442 U.S. at 301, 303.

Petitioners also ignore the big picture. In *Babbitt* and *American Booksellers*, the Court *declined* to resolve most of the challenges. *Babbitt* abstained from adjudicating the challenge to the consumer-publicity statute given the uncertainty in state law. 442 U.S. at 306-12. *American Booksellers* certified state-law issues to state court. 484 U.S. at 393-98. These results support dismissal here for similar fitness reasons. *Holder*, by contrast, involved federal law, and did not present the same "issues of federalism." *MedImmune*, 549 U.S. at 134 n.12. The Court, moreover, resolved a *statutory* question ahead of *constitutional* ones; it did not leap to the broadest constitutional question. *Holder*, 130 S. Ct. at 2717-18.

c. Petitioners also argue (at 44-49) that the false-statement laws' unique structure makes threatened enforcement more likely. Because anyone can file complaints with the Commission, there are "millions" of prosecutors waiting to enforce the laws. But these individuals do not enforce laws; the enforcement decision remains with the prosecutor. *Pestrak*, 926 F.2d at 578. Further, the prosecutor's discretion gets triggered only if the *Commission* agrees with a complainant and believes the case should be referred to a prosecutor. And the state *courts* can reject the Commission's finding. A process designed to screen away enforcement does not make it more likely. *See Common Cause*, 806 N.E.2d at 1059.

Recognizing the speculative nature of enforcement, Petitioners turn (at 47-49) to different alleged injuries—the "financial, political, and disclosure burdens imposed by" Commission proceedings. They argue (at 47-48) that the Court has allowed challenges not just to criminal laws but also to laws "restricting bar membership, threatening discharge from public employment, and burdening receipt of certain mail." But the injuries had happened in the referenced cases. The litigants "ha[d] been *denied* admission to the bar, *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971), or *discharged* from state employment, *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), or *denied* the delivery of mail, *Lamont v. Postmaster General*, 381 U.S. 301 (1965)." *United Presbyterian*, 738 F.2d at 1378 (emphases added). Regardless, this type of threatened injury is not sufficiently alleged for the reasons already explained. *See* Part II.A.2.

Lastly, citing *Meese v. Keene*, 481 U.S. 465 (1987), Petitioners argue (at 49) that a falsity finding could create reputational injuries as well. But *Meese* found standing because "the plaintiff in that case was *unquestionably* regulated by the relevant statute, and the films that he wished to exhibit had *already* been labeled as 'political propaganda.'" *Clapper*, 133 S. Ct. at 1153 (emphases added). To make that case like this one, Petitioners would have needed to allege that the Commission had *already* found their statements false. But, as noted, no such thing occurred, and their speech is not "unquestionably" regulated by the challenged laws. Pet.App.12a. And this threatened injury, too, is just as speculative as the threatened discovery burdens. *See* Part II.A.2.

B. Petitioners' Prudential Arguments Overlook Important Considerations

With respect to prudential ripeness, Petitioners argue (at 28-29) that their claims are "fit" because they assert that the false-statement laws are invalid on their face, present legal questions, and do not depend on facts. But Petitioners also made as-applied claims, and their facial claims hinge on state-law questions. If they seek to alter the nature of their claims now, such a change itself contravenes the requirement "for reasonable clarity and definiteness, as well as for timeliness, in raising and presenting constitutional questions." *Rescue Army*, 331 U.S. at 568. Their facial claims are anything but clear.

Regardless, Petitioners' arguments do not prove the fitness of their facial claims. Justice Brandeis certainly would disagree that a purely "legal" challenge of the type Petitioners envision is fit for review.

It violates two of his cardinal principles—not to reach constitutional questions ahead of statutory ones or to decide broad constitutional questions ahead of narrow ones. *Ashwander*, 297 U.S. at 347; *see also Nat'l Park*, 538 U.S. at 807 (noting that the Court called for ripeness briefing "[b]ecause petitioner has brought a facial challenge"); *Renne*, 501 U.S. at 324 (noting that "even if one may read the complaint to assert a facial challenge, the better course might have been to address in the first instance the constitutionality of [the law] as applied").

None of Petitioners' cases rejects these principles. The ripeness analysis in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), concerned a question "of statutory interpretation." *Id.* at 479. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983), raised a preemption question. *Id.* at 201. And while *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), did decide a constitutional question, it did not identify any unexhausted grounds before reaching the question, and it involved a federal statute. *Id.* at 81-82. Finally, *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), resolved a constitutional claim only after the litigant had gone through the ripening process this Court's prior decision directed. *Id.* at 580-81 (discussing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019-20 (1984)).

Beyond case law, something is intuitively wrong with the notion that the broadest, most consequential attacks on democratically passed laws should be the easiest to bring. That view flips cardinal rules of

judicial restraint on their head. "[I]f it is not necessary to decide more, it is necessary not to decide more," *PDK Labs., Inc. v. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring), except, apparently, when it comes to ripeness—where a case will be fit to decide more if plaintiffs make it unfit to decide less. To the contrary, that the narrower claims are premature can also establish that the broader ones are as well. *See Renne*, 501 U.S. at 324.

As to hardship, Petitioners claim (at 29) that they will suffer the classic case of having to choose between staying silent or risking prosecution. But this hardship was not looming when they amended their complaints, *see* R.C. 3517.21(B), and, before any future election, they could have opted for the "relatively riskless controversy-ripening tool" of an advisory opinion, *Martin Tractor*, 627 F.2d at 388.

More broadly, Petitioners claim hardship (at 40, 56) in an alleged inability to obtain judicial review. In the state system, they assert (*id.*), complainants obtain probable-cause findings and then delay and dismiss proceedings after elections. But any delay typically arises from the *consent* of both sides. Ohio Admin. Code 3517-1-06(B)(1). And any dismissal, which is typically *unopposed*, requires the Commission's permission. R.C. 3517.157(B)(1). Here, SBA and Driehaus "first jointly postponed the hearing and then voluntarily agreed to dismissal." Pet.App.27a. By doing so, SBA "agreed to forego its 'meaningful remedy' with the Commission," Pet.App.31a, which could have led to state-court review of adverse findings. *See Ruhrgas AG v. Mara-*

thon Oil Co., 526 U.S. 574, 586 (1999) ("[F]ederal and state courts are complementary systems for administering justice in our Nation.").

In the federal system, Petitioners assert (at 40, 56), the Sixth Circuit's analysis bars all review of the false-statement laws. But simply because that court did not let *Petitioners* proceed does not mean it prohibits *everyone* from doing so. After all, its prior decisions all but eliminated the Commission's enforcement powers, *Pestrak*, 926 F.2d at 578, and also permitted an as-applied challenge, *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 494 (6th Cir. 1995). In all events, Petitioners overlook a "more basic consideration" in suggesting that litigants have a broad right to bring federal pre-enforcement suits seeking to enjoin state laws. *Younger*, 401 U.S. at 52. "Procedures for testing the constitutionality of a statute 'on its face' . . . , and for then enjoining all action to enforce the statute until the State can obtain court approval for a modified version, are fundamentally at odds with the function of the federal courts in our constitutional plan." *Id.* The Sixth Circuit was entirely correct in exercising "[a] maximum of caution" when considering the type of far-reaching litigation that Petitioners seek to bring in federal court against Ohio's laws. *Wycoff*, 344 U.S. at 243.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio
ERIC E. MURPHY*
State Solicitor
Counsel of Record
SAMUEL C. PETERSON
PETER K. GLENN-APPLEGATE
Deputy Solicitors
30 East Broad St., 17th Floor
Columbus, OH 43215
614-466-8980
eric.murphy
@ohioattorneygeneral.gov

Counsel for State Respondents Kimberly Allison, Degee Wilhelm, Helen Balcolm, Terrance Conroy, Lynn Grimshaw, Jayme Smoot, William Vasil, Philip Richter, Ohio Elections Commission, and Jon Husted

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APPENDIX

1. R.C. 3517.153.

(A) Upon the filing of a complaint with the Ohio elections commission, which shall be made by affidavit of any person, on personal knowledge, and subject to the penalties for perjury, or upon the filing of a complaint made by the secretary of state or an official at the board of elections, setting forth a failure to comply with or a violation of any provision in sections 3517.08 to 3517.13, 3517.17, 3517.18, 3517.20 to 3517.22, 3599.03, or 3599.031 of the Revised Code, the commission shall proceed in accordance with sections 3517.154 to 3517.157 of the Revised Code.

(B) The commission shall prescribe the form for complaints made under division (A) of this section. The secretary of state and boards of elections shall furnish the information that the commission requests. The commission or a member of the commission may administer oaths, and the commission may issue subpoenas to any person in the state compelling the attendance of witnesses and the production of relevant papers, books, accounts, and reports. Section 101.42 of the Revised Code governs the issuance of subpoenas insofar as applicable. Upon the refusal of any person to obey a subpoena or to be sworn or to answer as a witness, the commission may apply to the court of common pleas of Franklin county under section 2705.03 of the Revised Code. The court shall hold proceedings in accordance with Chapter 2705. Of the Revised Code.

(C) No prosecution shall commence for a violation of a provision in sections 3517.08 to 3517.13, 3517.17, 3517.18, 3517.20 to 3517.22, 3599.03, or

3599.031 of the Revised Code unless a complaint has been filed with the commission under this section and all proceedings of the commission or a panel of the commission, as appropriate, under sections 3517.154 to 3517.157 of the Revised Code are completed.

(D) The commission may recommend legislation and render advisory opinions concerning sections 3517.08, 3517.082, 3517.092, 3517.102, 3517.105, 3517.1014, 3517.13, 3517.18, 3517.20 to 3517.22, 3599.03, and 3599.031 of the Revised Code for persons over whose acts it has or may have jurisdiction. When the commission renders an advisory opinion relating to a specific set of circumstances involving any of those sections stating that there is no violation of a provision in those sections, the person to whom the opinion is directed or a person who is similarly situated may reasonably rely on the opinion and is immune from criminal prosecution and a civil action, including, without limitation, a civil action for removal from public office or employment, based on facts and circumstances covered by the opinion.

(E) The commission shall establish a web site on which it shall post, at a minimum, all decisions and advisory opinions issued by the commission and copies of each election law as it is amended by the general assembly. The commission shall update the web site regularly to reflect any changes to those decisions and advisory opinions and any new decisions and advisory opinions.

2. R.C. 3517.155.

(A)

(1) Except as otherwise provided in division (B) of this section, the Ohio elections commission shall hold its first hearing on a complaint filed with it, other than a complaint that receives an expedited hearing under section 3517.156 of the Revised Code, not later than ninety business days after the complaint is filed unless the commission has good cause to hold the hearing after that time, in which case it shall hold the hearing not later than one hundred eighty business days after the complaint is filed. At the hearing, the commission shall determine whether or not the failure to act or the violation alleged in the complaint has occurred and shall do only one of the following, except as otherwise provided in division (B) of this section or in division (B) of section 3517.151 of the Revised Code:

(a) Enter a finding that good cause has been shown not to impose a fine or not to refer the matter to the appropriate prosecutor;

(b) Impose a fine under section 3517.993 of the Revised Code;

(c) Refer the matter to the appropriate prosecutor;

(2) As used in division (A) of this section, "appropriate prosecutor" means a prosecutor as defined in section 2935.01 of the Revised Code and either of the following:

(a) In the case of a failure to comply with or a violation of law involving a campaign committee or the committee's candidate, a political party, a legislative campaign fund, a political action committee, or a po-

litical contributing entity, that is required to file a statement of contributions and expenditures with the secretary of state under division (A) of section 3517.11 of the Revised Code, the prosecutor of Franklin county;

(b) In the case of a failure to comply with or a violation of law involving any other campaign committee or committee's candidate, or any other political party, political action committee, or political contributing entity either of the following as determined by the commission:

(i) The prosecutor of Franklin county;

(ii) The prosecutor of the county in which the candidacy or ballot question or issue is submitted to the electors or, if it is submitted in more than one county, the most populous of those counties.

(B) If the commission decides that the evidence is insufficient for it to determine whether or not the failure to act or the violation alleged in the complaint has occurred, the commission, by the affirmative vote of five members, may request that an investigatory attorney investigate the complaint. Upon that request, an investigatory attorney shall make an investigation in order to produce sufficient evidence for the commission to decide the matter. If the commission requests an investigation under this division, for good cause shown by the investigatory attorney, the commission may extend by sixty days the deadline for holding its first hearing on the complaint as required in division (A) of this section.

(C) The commission shall take one of the actions required under division (A) of this section not later

than thirty days after the close of all the evidence presented.

(D)(1) The commission shall make any finding of a failure to comply with or a violation of law in regard to a complaint that alleges a violation of division (A) or (B) of section 3517.21, or division (A) or (B) of section 3517.22 of the Revised Code by clear and convincing evidence. The commission shall make any finding of a failure to comply with or a violation of law in regard to any other complaint by a preponderance of the evidence.

(2) If the commission finds a violation of division (B) of section 3517.21 or division (B) of section 3517.22 of the Revised Code, it shall refer the matter to the appropriate prosecutor under division (A)(1)(c) of this section and shall not impose a fine under division (A)(1)(b) of this section or section 3517.993 of the Revised Code.

(E) In an action before the commission or a panel of the commission, if the allegations of the complainant are not proved, and the commission takes the action described in division (A)(1)(a) of this section or a panel of the commission takes the action described in division (C)(1) of section 3517.156 of the Revised Code, the commission or a panel of the commission may find that the complaint is frivolous, and, if the commission or panel so finds, the commission shall order the complainant to pay reasonable attorney's fees and to pay the costs of the commission or panel as determined by a majority of the members of the commission. The costs paid to the commission or panel under this division shall be deposited into the Ohio elections commission fund.

3. R.C. 3517.156.

(A) If a complaint filed with the Ohio elections commission is to receive an expedited hearing pursuant to section 3517.154 of the Revised Code, a panel of at least three members of the commission shall hold a hearing on the complaint to determine whether there is probable cause to refer the matter to the full commission for a hearing under section 3517.155 of the Revised Code. Not more than one-half of the members of a panel shall be affiliated with the same political party. The chairperson of the commission shall call for the selection of a panel, as needed, and shall select the members of the panel by lot.

(B)(1) Except as otherwise provided in section 3517.154 of the Revised Code and divisions (B)(2) and (3) of this section, the panel shall hold one expedited hearing on a complaint forwarded to it by the commission for an expedited hearing in accordance with this division. If a complaint is filed on or after the sixtieth day prior to a primary or special election or on or after the ninetieth day prior to the general election, but not later than the day of the primary, special, or general election to which the complaint relates, the hearing shall be held not later than two business days after the determination required to be made under division (A) of section 3517.154 of the Revised Code is made, unless the panel has good cause to hold the hearing after that time, in which case it shall hold the hearing not later than seven business days after that determination is made. All members of the panel shall be present before any official action may be taken, and a majority vote of the panel is required for any official action.

(2) The commission shall hold a hearing on a complaint that is filed prior to the periods of time specified in division (B)(1) of this section, or filed after the date of the election to which the complaint relates, at the times specified for hearing complaints in section 3517.155 of the Revised Code.

(3) The deadlines provided for in division (B)(1) of this section may be extended by agreement of all parties to the complaint but shall not be extended beyond the deadlines provided for in division (A) of section 3517.155 of the Revised Code.

(C) At the expedited hearing held under division (B)(1) of this section, the panel shall make only one of the following determinations:

(1) There is no probable cause to believe that the failure to comply with or the violation of a law alleged in the complaint has occurred. If the panel so determines, it shall dismiss the complaint.

(2) There is probable cause to believe that the failure to comply with or the violation of a law alleged in the complaint has occurred. If the panel so determines, it shall refer the complaint to the full commission, and the commission shall hold a hearing on the complaint under section 3517.155 of the Revised Code not later than ten days after the complaint is referred to it by the panel.

(3) The evidence is insufficient for the panel to make a determination under division (C)(1) or (2) of this section and further investigation of the complaint is necessary. If the panel so determines, it immediately shall request that an investigatory attorney investigate the complaint, and an investigato-

ry attorney shall make an investigation in order to produce sufficient evidence upon which to decide the matter. If the panel requests that an investigatory attorney make an investigation, the complaint shall be referred to the full commission, and the commission shall hold a hearing on the complaint under section 3517.155 of the Revised Code.

(D) No panel of the commission shall impose a fine.

(E) If the panel dismisses the complaint under division (C)(1) of this section, the person who made the complaint may petition the full commission to reconsider the dismissal at a hearing under section 3517.155 of the Revised Code. A petition for reconsideration shall be filed not later than two business days after the dismissal of the complaint. The commission shall render its decision on the petition not later than three business days after receiving the petition. If the petition for reconsideration is granted, the commission shall hold a hearing on the complaint under section 3517.155 of the Revised Code not later than five business days after granting the petition.

If the petition for reconsideration is not granted, the commission shall order the person who filed the complaint to pay reasonable attorney's fees and to pay the costs of the panel that dismissed the complaint as determined by a majority of the members of the commission. The costs paid to the commission under this division shall be deposited into the Ohio elections commission fund.

(F) As used in this section, "expedited hearing" includes an automatic expedited hearing as prescribed in section 3517.154 of the Revised Code.

4. R.C. 3517.157

(A) A complaint shall be filed with the Ohio elections commission within two years after the occurrence of the act or failure to act that is the subject of the complaint, except that if the act or failure to act involves fraud, concealment, or misrepresentation and was not discovered during that two-year period, a complaint may be filed within one year after discovery of such act or failure to act.

(B) Whoever files a complaint with the commission under section 3517.153 of the Revised Code may withdraw it at the following times:

(1) If the complaint receives an expedited hearing under section 3517.156 of the Revised Code, at any time prior to the hearing without the permission of the commission, or at any time after the hearing begins but only with the permission of the commission;

(2) If the complaint does not receive an expedited hearing, at any time.

(C) The commission may dismiss a complaint pending before it or before a panel of the commission.

(D) The commission or a panel of the commission shall conduct hearings in accordance with Chapter 119. of the Revised Code and the Rules of Civil Procedure, except as they are inconsistent with rules adopted by the commission. A party adversely affected by a final determination of the commission may appeal from the determination under section 119.12 of the Revised Code.

(E) The privilege granted to an attorney under section 2317.02 of the Revised Code shall be granted

to the full-time attorney employed by the commission under division (H)(2) of section 3517.152 of the Revised Code, and the commission or a panel of the commission shall be considered the client of that attorney for purposes of that privilege.

(F) The members of the commission shall not do either of the following except at a meeting of the commission subject to section 121.22 of the Revised Code:

(1) Discuss among themselves a complaint pending before the commission or a panel of the commission;

(2) Discuss a complaint pending before the commission or a panel of the commission with a party to the complaint, an attorney representing a party to the complaint, or an investigatory attorney of the commission.