No. 13-193

IN THE

# Supreme Court of the United States

SUSAN B. ANTHONY LIST, ET AL.,
*Petitioners*,

—v.—

STEVEN DRIEHAUS, ET AL.,
*Respondents*.

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

## BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF OHIO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Steven R. Shapiro
*Counsel of Record*
Lee Rowland
Brian M. Hauss
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
sshapiro@aclu.org

Freda J. Levenson
Drew S. Dennis
American Civil Liberties Union of Ohio Foundation
4506 Chester Avenue
Cleveland, Ohio 44103
(216) 472-2220

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## INTERESTS OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Ohio is a statewide affiliate of the national ACLU and filed an *amicus* brief in this case in the District Court. Since its founding in 1920, the ACLU has frequently appeared before this Court in free speech cases, both as direct counsel and as *amicus curiae*, including cases where this Court has upheld pre-enforcement review of laws that chill protected speech. *See, e.g.*, *Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997); *United States v. Stevens*, 559 U.S. 460 (2010). The proper resolution of this case is thus a matter of substantial interest to the ACLU and its members.

## STATEMENT OF THE CASE

Section 3517.21 of the Ohio Revised Code makes it a crime for any person, "during the course of any campaign" to "knowingly and with intent to affect the outcome of such campaign" either "[m]ake a false statement concerning the voting record of a candidate or public official" or "[p]ost, publish, circulate, distribute, or otherwise

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[1] Petitioners and the State Respondents have filed blanket letters of consent to the submission of *amicus* briefs. Respondent Driehaus has submitted a letter indicating that he is no longer participating in this case. None of the parties authored this brief in whole or in part and no one other than *amici* or their counsel contributed money or services to the preparation or submission of this brief.

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." Ohio Rev. Code §§ 3517.21(B)(9)–(10). Enforcement of these crimes must begin with a filing before the Ohio Elections Commission, and any person may file such a complaint. *Id.* §§ 3517.21(C); 3517.153(A), (C). The Commission may then review, investigate, hold a hearing, and recommend action, including criminal prosecution, in response to a complaint. *Id.* §§ 3517.153–157. The Commission may also directly impose a fine. *Id.* § 3517.155. The penalty for a violation of Section 3517.21 is imprisonment for up to six months, a fine of up to $5,000, or both. *Id.* § 3517.992(V).

Petitioner Susan B. Anthony List ("SBA List"), an anti-abortion organization, wished to erect a billboard opposed to the congressional candidacy of Respondent Driehaus in the 2010 general election, charging that Driehaus had "voted FOR taxpayer-funded abortion." Pet. App. 3a. Driehaus believed the statement was false, and his counsel both filed a complaint with the Commission and sent a letter threatening legal action against the billboard owner, who then refused to post SBA List's message. *Id.* A designated panel of the Ohio Elections Commission "voted 2–1 to find probable cause and referred Driehaus's complaint to the full Commission." Pet. App. 4a. SBA List then filed the instant action in the District Court, challenging the constitutionality of the Ohio statutes banning false campaign statements. The court denied preliminary relief, and

stayed the action while the Commission proceedings were pending. Pet. App. 5a.

After the complaint was filed in federal court, Driehaus and SBA List jointly agreed to postpone the Commission hearing until after the election; however, Driehaus lost the election and moved to withdraw his complaint, with the agreement of SBA List. SBA List then amended its lawsuit to argue that the Commission proceedings had chilled its campaign speech, and "stated its intent to engage in 'substantially similar activity in the future.'" *Id.* Petitioner Coalition Opposed to Additional Spending & Taxes ("COAST") separately wished to engage in similar speech accusing Driehaus of funding abortion and directly criticizing the Ohio Elections Commission's inquiry. *Id.* Unlike SBA List, however, COAST declined to "publish these messages because its knowledge of the Commission proceedings against SBA List chilled its ability to speak." Pet. App. 6a. Right before the 2010 election, COAST also filed a federal action against Ohio's false statement statutes. The two organizations' complaints were then consolidated by the District Court.[2]

On the parties' cross-motions for dismissal and summary judgment, the District Court dismissed all of Petitioners' claims, finding them non-justiciable. First, the District Court held that Petitioners' claims

[2] COAST also amended its Complaint to add a challenge to Section 3517.20(A)(2) of the Ohio Revised Code, which requires a disclaimer identifying the entity responsible for any "political communication." *Id.* § (A)(2)(a). That provision has not yet been evaluated by the lower courts or deemed critical to the question of justiciability.

were not ripe, because there was no "concrete application of state law" to the Petitioners after SBA List's Commission inquiry had terminated, and there could be no hardship to SBA List where the organization itself consented to the complaint's dismissal. Pet. App. 27a, 57a–58a. Second, the court held that Petitioners lacked standing because a chill on speech is not an injury-in-fact, and enforcement of the false statement law was not imminent. Pet. App. 33a–34a, 60a–61a. Finally, the court briefly considered the question of mootness, holding that because SBA List consented to the dismissal of the Commission process, its claims were moot. Pet. App. 35a. The court accordingly concluded that the claims of both organizational Petitioners in the consolidated case were non-justiciable.

The Sixth Circuit affirmed the District Court's conclusion that Petitioners' claims were not justiciable, but focused exclusively on the question of ripeness. In keeping with Sixth Circuit precedent, but differing significantly from other circuits and this Court, the court held that "chill alone – without some other indication of imminent enforcement – d[oes] not constitute injury in fact." Pet. App. 9a–10a (quoting *Berry v. Schmitt*, 688 F.3d 290, 296 (6th Cir. 2012)). The court ruled that the harms experienced by SBA List "– the billboard rejection and the probable-cause hearing – do not help it show an imminent threat of *future* prosecution." Pet. App. 10a. The court also cited the following factors in support of its determination that SBA List's claim was unripe: that any citizen could initiate a Commission inquiry, Pet. App. 12a; that Driehaus himself had moved to Africa, Pet. App. 14a; and that SBA maintained the truth of its statements, failing

to allege the requisite "intent to disobey the statute," Pet. App. 8a, 14a–15a. The court held, without substantial discussion, that the same analysis applied to COAST. Pet. App. 18a.

## SUMMARY OF THE ARGUMENT

This case involves a challenge to a state law that imposes a direct, content-based restriction on political speech, whether by a candidate or (as here) members of the public, during the course of an election campaign. The First Amendment interests at stake are obvious and significant. The impact of the law on Petitioners' speech is equally clear from the record. The lower courts nonetheless found that Petitioners' claims were non-justiciable. That conclusion cannot be reconciled with this Court's well-established rules for determining justiciability in a First Amendment context, and should be reversed.

Justiciability involves the interplay of three related doctrines: standing, ripeness, and mootness. This brief concentrates on the ripeness doctrine, which was the focal point of the Sixth Circuit's decision, and also briefly discusses the questions of standing and mootness.

In contrast to the Sixth Circuit's reliance on ripeness, this Court has primarily relied on standing and mootness to assess whether claims of the sort raised here – challenging overbroad laws on First Amendment grounds due to their chilling effect – are properly presented for judicial review. The Sixth Circuit's focus on ripeness was, therefore, misguided from the outset. But, even taken on its own terms, its decision that Petitioners' claims were not ripe for

review cannot be sustained under this Court's well-established rules for determining ripeness.

First, there is no need in this case for further factual development. Second, the chill that Petitioners have identified as their principal harm is both substantiated by the record and not contingent on anything other than the fact that the challenged Ohio law remains in full effect. Third, the contention that any claims for prospective relief will not be ripe until the next election ignores the inherently time-limited yet recurring nature of electoral contests.

As a matter of standing and mootness, the justiciability issues in this case are straightforward and easily resolved. Petitioners have standing to litigate this pre-enforcement challenge because they have a credible fear of prosecution demonstrated by both the probable cause finding against SBA List and the State's continued enforcement of the challenged statute. And, Petitioners' First Amendment claims are not moot because they are capable of repetition yet evading review, an exception to mootness that this Court has repeatedly invoked when considering laws regulating election-related speech.

## ARGUMENT

### I. PETITIONERS' FIRST AMENDMENT CHALLENGE IS RIPE FOR JUDICIAL REVIEW.

The ripeness doctrine is meant "to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (quoting *Abbott Labs. v. Gardner*, 387

U.S. 136, 148 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977)). When, as in this case, an overbroad statute chills core election-related speech, that harm is not abstract; it is recurring, urgent, and ripe for adjudication. To hold otherwise would risk insulating unconstitutional statutes regulating election speech from proper judicial review, and inhibit speech that lies at the heart of the First Amendment's protections.

To determine whether a case is ripe for judicial review, a court must evaluate: "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003); *see also, e.g.*, *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). Here, both factors support the conclusion that Petitioners' claims are ripe. First, the issues in this case are fit for judicial decision, both because the contours of Petitioners' chill-based First Amendment challenges require no further factual development and because Petitioners will experience the same chilling of their core political speech during every election cycle. Second, given that even the momentary loss of First Amendment freedoms constitutes irreparable injury, any delay of judicial review will impose a significant and irrevocable hardship on the parties and others whose political speech is directly impeded by this unconstitutional statute.

### A. Petitioners' First Amendment Challenge Is Fit for Judicial Decision.

The fitness of a claim for judicial resolution turns on two considerations. First the court must analyze whether the plaintiff's claim "would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998); *see also, e.g.*, *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82 (1978). Relatedly, the court must determine whether the claim rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Union Carbide*, 473 U.S. 568, 580–81 (1985)) (internal quotation marks omitted).[3] In this case, both analyses suggest that Petitioners' claims were, and remain, fit for judicial review.

First, further factual development is unnecessary given the predominately legal nature of Petitioners' challenge and their past experience under the challenged Ohio law. Where a statute is attacked on broad legal grounds, such as facial invalidity, significant factual development of the plaintiff's particular claim is ordinarily unnecessary. *See, e.g.*, *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997) (noting that facial

[3] The Sixth Circuit addresses this issue as an independent factor in the ripeness analysis. *See* Pet. App. 8a–16a. This Court's precedents, however, make clear that contingency is properly analyzed as part of the fitness inquiry. *See, e.g.*, *Texas*, 523 U.S. at 300; *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 162–64 (1967).

Takings Clause challenges to regulations "are generally ripe the moment the challenged regulation or ordinance is passed"); *Pacific Gas & Elec. Co.*, 461 U.S. at 200–02. *But see Nat'l Park Hospitality Ass'n*, 538 U.S. at 812 (further factual development was required when plaintiff's facial challenge relied on "specific characteristics of certain types of concession contracts" affected by the law). Here, Petitioners have raised facial vagueness and overbreadth challenges to the Ohio election law, neither of which requires significant factual development. *See Renne v. Geary*, 501 U.S. 312, 323–24 (1991); *Able v. United States*, 88 F.3d 1280, 1287, 1290 (2d Cir. 1996); *ACORN v. City of Tulsa*, 835 F.2d 735, 739–40 (10th Cir. 1987). Nor do Petitioners' as-applied claims, contending that the Ohio law violates the First Amendment as applied to individuals or organizations taking "positions on political issues," require additional factual development. Here, Petitioners have unequivocally demonstrated their intent to engage in political speech, and there is no question that the statute has been interpreted to apply to such speech. *See, e.g.*, *McKimm v. Ohio Elections Comm'n*, 729 N.E.2d 364 (Ohio 2000).

Moreover, the demonstrated impact on Petitioners' campaign-related speech under the Ohio law provided a fully adequate factual context for adjudication of their overbreadth and vagueness claims at the time this case was filed. Both SBA List and COAST wished to engage in campaign speech related to Congressman Driehaus's vote in favor of the Affordable Care Act. Petitioner SBA List was unable to purchase a billboard to display its message because the billboard owner was threatened with legal proceedings under the challenged statute. SBA

List was itself dragged before the Ohio Elections Commission to defend the veracity of its statements, requiring it to retain counsel and disclose sensitive membership information. Meanwhile, Petitioner COAST refrained from speaking entirely, out of concern that it would be prosecuted under the statute for speech materially similar to SBA List's.

These same facts also provide enough context to resolve Petitioners' request for prospective relief enjoining enforcement of the challenged statute in future elections, where the same issues are likely to arise again. *Cf. Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 463 (2007) (holding that a pro-life group's First Amendment challenge to a federal election statute's blackout provision was justiciable because the group credibly claimed that it intended to run advertisements with similar subject matter during future elections). Nor are the facts likely to develop more fully with respect to any future election, given the risks of self-censorship and the inherently transitory nature of election campaigns. As this Court has observed, "[c]hallengers to election procedures often have been left without a remedy in regard to the most immediate election because the election is too far underway or actually consummated prior to judgment." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 300 n.12 (1979). For that reason, "[j]usticiability in such cases depends not so much on the fact of past injury but on the prospect of its occurrence in an impending or future election." *Id.*; *see also Wisconsin Right to Life*, 551 U.S. at 462. By ignoring this principle, the Sixth Circuit's overly stringent ripeness analysis effectively precludes any judicial review of Ohio's election-related speech laws.

Petitioners also meet the requirements of the second prong of the fitness inquiry. Although it is certainly possible that they will not be prosecuted for making false statements in subsequent elections, the harms they allege are not purely contingent upon hypothetical future events. As this Court recognized in *Virginia v. American Booksellers Association, Inc.*, the harm of self-censorship "can be realized even without an actual prosecution." 484 U.S. 383, 393 (1988). That harm will come into play every election cycle, so long as the Ohio statute remains on the books. *281 Care Comm. v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011) ("Plaintiffs' alleged injury is not based on speculation about a particular future prosecution or the defeat of a particular ballot question. Rather, the injury is speech that has already been chilled and speech that will be chilled each time a school funding initiative is on the ballot because of the very existence of section 211B.06."); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1092, 1098 (10th Cir. 2006) (en banc) (rejecting a ripeness challenge on the grounds that plaintiffs' injury was "already occurring," because the challenged provision "by its very existence, chills the exercise of the Plaintiffs' First Amendment rights"); *cf. Wisconsin Right to Life*, 551 U.S. at 463–64 (holding that the plaintiff did not need to allege that it would engage in *identical* political speech in future elections to demonstrate that its First Amendment fell under the capable of repetition yet evading review exception to mootness). These chill-based harms are not contingent on anything other than the fact that the Ohio law remains in full force.

### B. The First Amendment Claims in This Case Present a Recurring, Irreparable, and Severe Hardship.

As this Court has made clear on numerous occasions, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Judicial concern over the irretrievable loss of chilled speech weighs heavily in the ripeness analysis. *See, e.g.*, *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1116 (10th Cir. 2008); 13B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3532.3 n.35 & accompanying text (3d ed. 2014) (collecting cases); *see also Renne*, 501 U.S. at 325–26 (Stevens, J., concurring) (stating that "the case would unquestionably be ripe" if the plaintiffs had alleged that the challenged state constitutional provision chilled their own speech). Indeed, "the extent of the chill upon first amendment rights induced by vague or overbroad statutes," such as the one at issue here, "is the most significant factor in determining whether an otherwise premature or abstract facial attack . . . is ripe for decision." *Martin Tractor Co. v. Federal Election Comm'n*, 627 F.2d 375, 384 (D.C. Cir. 1980) (collecting cases).

In such cases, the plaintiffs represent not only their own interests, but the interests of numerous other individuals whose speech has been chilled by the challenged statute. "For in appraising a statute's inhibitory effect upon (First Amendment) rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar." *Bigelow v. Virginia*, 421 U.S.

809, 816 (1975) (quoting *NAACP v. Button*, 371 U.S. 415, 432 (1963)). *See also Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977); *cf.* Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 847–848 (1970). Neither court below considered the impacts of the challenged law on third parties, or to the health of Ohio's political conversation. To the contrary, both courts treated Petitioner COAST's claims of acute chill to its First Amendment freedoms dismissively, in a manner distinctly at odds with this Court's tradition of addressing and preventing such "irreparable injury." *Elrod,* 427 U.S. at 373.

Judicial sensitivity to the harms caused by delaying resolution of chill-based First Amendment claims is particularly acute where, as here, the speech at issue concerns an election. *See, e.g.*, *Babbitt*, 442 U.S. at 300 n.12 ("There is value in adjudicating election challenges notwithstanding the lapse of a particular election because '[t]he construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.'" (quoting *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974))); *Stout*, 519 F.3d at 1116 (holding that the principle that one need not await the consummation of threatened injury to obtain preventative relief "is particularly true in the election context").

This special solicitude for election-related speech is a function of both its central status under the First Amendment, *see, e.g.*, *Mills v. Alabama,* 384 U.S. 214, 218–19 (1966), and the recognition that it is particularly difficult to review election-related

speech regulations under normal justiciability standards, *see Renne*, 501 U.S. at 332 (White, J., dissenting) (collecting cases). Indeed, if Petitioners cannot bring a pre-enforcement challenge against the Ohio statute now, it is doubtful they will ever have sufficient opportunity to challenge it. *See, e.g.*, *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 334 (2010) ("By the time the lawsuit concludes, the election will be over and the litigants in most cases will have neither the incentive nor, perhaps, the resources to carry on, even if they could establish that the case is not moot because the issue is 'capable of repetition, yet evading review.'"). Thus, delaying resolution of Petitioners' claims would cause serious, irreparable, and recurring harm to the parties and the public interest.

Petitioners have already suffered significant hardships under the Ohio election law. As discussed above, SBA List has experienced difficulty finding venues to disseminate its message because vendors are afraid of prosecution under the challenged statute, and has had to expend valuable resources during the campaign to defend itself in pre-prosecution administrative proceedings before the Ohio Elections Commission. COAST, on the other hand, so fears the Sword of Damocles that it has opted to refrain from speaking rather than risk liability under the law. The Sixth Circuit's casual indifference to these harms means that, every election cycle, Petitioners, other Ohio political organizations, and even individual speakers will have to decide whether their political convictions are strong enough to risk prosecution. This Court's precedents, however, make clear that such a choice cannot be compelled as a prerequisite to judicial

review. *See Babbitt*, 442 U.S. at 302 ("[W]hen fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not 'first expose himself to actual arrest or prosecution to be entitled to challenge the statute.'" (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)).

Having established that the text of the Ohio election statute casts an ongoing and objectively reasonable chill on core election-related speech, Petitioners present claims fit for adjudication. Given the singular harms that flow from the inhibition of campaign speech, their claims not only are ripe, but urgently demand review.

### C. The Sixth Circuit's Ripeness Analysis Risks Insulating Laws That Inhibit Core Political Speech from Judicial Review.

As the Sixth Circuit's opinion correctly observed, the concepts of standing, ripeness, and mootness are closely related and may be addressed in any order. Pet. App. 6a–7a. This Court, while also noting this overlap, has consistently found challenges to laws that chill election-related speech to be justiciable. Taking pains to ensure that laws inhibiting political speech do not evade proper judicial review, this Court has recognized that a credible fear of prosecution for engaging in protected speech is presumed to supply justiciability. *See, e.g., Babbitt*, 442 U.S. at 298–99; *id.* at 302 ("Appellees are thus not without some reason in fearing prosecution for violation of the ban on specified forms of consumer publicity. In our view, the positions of the parties are sufficiently adverse with respect to

the consumer publicity provision proscribing misrepresentations to present a case or controversy within the jurisdiction of the District Court."); *Renne v. Geary*, 501 U.S. 312, 325 (1991) (Stevens, J., concurring) ("[I]f the complaint had alleged that these organizations wanted to endorse, support, or oppose a candidate for nonpartisan office but were inhibited from doing so because of the constitutional provision, the case would unquestionably be ripe").

In contrast to this Court's flexible approach to the justiciability of chill-based First Amendment injuries, the Sixth Circuit held simply that Petitioners' claims were unripe because "prior injury, without more, is not enough to establish prospective harm." Pet. App. 9a. This misapplication of the ripeness doctrine contradicts this Court's approach in any context, *see, e.g.*, *City of Houston v. Hill*, 482 U.S. 451, 459 n.7 (1987) ("the fact that Hill has already been arrested four times under the ordinance lends compelling support to the threat of future enforcement"), but is particularly troubling when it involves speech in the election cycle. The Sixth Circuit committed error by holding that the repeat nature of the election cycle undermined, rather than underscored, the justiciability of Petitioners' claims. And it compounded this error when it reasoned that Petitioners' claims failed the ripeness test because the object of their speech, Respondent Driehaus, had moved to Africa after the election and was unlikely to run again as an Ohio candidate. Pet. App. 14a ("The degree of speculation required to consider Driehaus a present threat is fatal to SBA List's claimed fears."). In requiring that a continuing, identical relationship between all parties survive the length of litigation for claims to remain ripe, the Sixth Circuit's analysis

effectively *guarantees* that campaign-related free speech claims will always become "unripe" between elections.

This Court's precedent affirms the impropriety of applying the ripeness analysis to *prevent* review of laws that inhibit political speech, and demonstrates that a more flexible justiciability standard is appropriate. However, even among courts that do opt to apply ripeness analysis in facial free speech challenges, the principle that First Amendment challenges are "particularly apt to be found ripe" is black letter law. 13B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3532.3 (3d ed.) ("First Amendment rights of free expression and association are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss. In a wide variety of settings, courts have found First Amendment claims ripe, often commenting directly on the special need to protect against any inhibiting chill.") (collecting cases); *see also, e.g.*, *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995) ("The customary ripeness analysis outlined above is, however, relaxed somewhat in circumstances such as this where a facial challenge, implicating First Amendment values, is brought."). The Sixth Circuit's application of the doctrine improperly omitted any consideration of the harm inflicted by vague or overbroad regulation of campaign speech, or the dangers to our democratic system when such laws continually evade judicial review.

## II. PETITIONERS HAVE STANDING TO RAISE A PRE-ENFORCEMENT CHALLENGE.

Having dismissed Petitioners' claims on ripeness grounds, the Sixth Circuit did not separately address the question of standing. That question, however, is easily answered in Petitioners' favor.

Because the harm of self-censorship "can be realized even without an actual prosecution," *American Booksellers*, 484 U.S. at 393, this Court has consistently held that pre-enforcement First Amendment challenges to criminal statutes are justiciable, so long as the "fear of criminal prosecution under [the] allegedly unconstitutional statute is not imaginary or wholly speculative," *Babbitt*, 442 U.S. at 302. *See also id.* at 299 & n.11. This Court has also made clear that a credible threat of prosecution exists, for justiciability purposes, where "the State has not disavowed any intention of invoking the criminal penalty provision." *Id.* Thus, in *American Booksellers*, this Court was "not troubled" by the pre-enforcement nature of the plaintiffs' First Amendment challenge to a state law restricting the display of sexually explicit materials because "[t]he State ha[d] not suggested that the newly enacted law [would] not be enforced," and there was "no reason to assume otherwise." 484 U.S. at 393. Likewise, in *Holder v. Humanitarian Law Project*, the Court allowed pre-enforcement review of the federal government's criminal prohibition against providing material support to designated foreign terrorist organizations because "[t]he Government has not argued . . . that plaintiffs will not be prosecuted if

they do what they say they wish to do." 130 S. Ct. 2705, 2717 (2010).

Here, there can be little doubt that Petitioners face a credible threat of future enforcement proceedings and/or prosecution. Far from disavowing the challenged statute, Ohio continues to enforce it regularly. *See, e.g.*, *Krikorian v. Ohio Elections Comm'n,* No. 1:10-CV-103, 2010 WL 4117556, at *2 (S.D. Ohio Oct. 19, 2010); *Citizens for a Strong Ohio v. Marsh*, 123 F. App'x 630, 631 (6th Cir. 2005); *The Team Working for You v. Ohio Elections Comm'n*, 754 N.E.2d 273, 276 & n.2 (Ohio Ct. App. 2001); *State v. Davis*, 499 N.E.2d 1255 (Ohio Ct. App. 1985); *see also Doe v. Bolton*, 410 U.S. 179, 188–89 (1973) (holding that ongoing enforcement proceedings support justiciability). Moreover, the Ohio Elections Commission previously conducted pre-prosecution proceedings against Petitioner SBA List. During those proceedings, a panel of the Commission determined that probable cause existed to believe that SBA List had violated the statute. Although these prior enforcement proceedings terminated before the full Commission had decided whether to refer SBA List's case for prosecution or otherwise sanction the organization, they nevertheless lend "compelling support to the threat of future enforcement." *Hill*, 482 U.S. at 459 n.7 (1987).

Unlike the Sixth Circuit, the District Court did reach the question of standing, holding that Petitioners lack standing to challenge the Ohio law because they allege that their intended speech is true and does not violate the challenged false statement

law.[4] *See* Pet. App. 34a, 60–61a. However, although plaintiffs raising a pre-enforcement challenge ordinarily must allege an intent to engage in conduct that violates the challenged statute, *see, e.g.*, *Babbitt*, 442 U.S. at 298, that rule does not apply to pre-enforcement First Amendment challenges against statutes proscribing false speech. Especially in the contentious world of political debate, the threat of prosecution for making a false statement may very well inhibit speakers from making true statements. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("[P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press."); *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring in the judgment) ("[T]he threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that

[4] The District Court also provided two additional reasons for disregarding this Court's precedents regarding the justiciability of pre-enforcement First Amendment challenges: (1) the Ohio false statement statute does not proscribe any constitutionally protected speech; and (2) the Ohio Elections Commission "lacks the power to initiate prosecution in false statement cases." Pet. App. 61a; *see also* Pet. App. 34a. The first rationale was flatly rejected in *United States v. Alvarez*, 132 S. Ct. 2537 (2012). The second rationale presents an incomplete picture of the statutory framework. Under Ohio law, the Commission is the sole gateway to prosecution for violation of the false statement statute, Ohio Rev. Code § 3517.21, and if the Commission finds probable cause for such violation, the Commission may *directly* impose a fine or refer the case for prosecution. *Id.* § 3517.155. Since *amicus curiae*'s focus is the Sixth Circuit's ripeness rationale, this brief does not further address these erroneous holdings by the District Court, neither of which factored into the Sixth Circuit's decision.

lies at the First Amendment's heart."); *id.* at 2564 (Alito, J., dissenting) ("Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern" create a "grave and unacceptable danger of suppressing truthful speech.").

That is why this Court has repeatedly held that "First Amendment freedoms need breathing space to survive." *Citizens United,* 558 U.S. at 329 (quoting *Wisconsin Right to Life,* 551 U.S. at 469). *See also Gertz*, 418 U.S. at 341 ("The First Amendment requires that we protect some falsehood in order to protect speech that matters"). To honor our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), this Court has cautioned against allowing the government to criminally regulate the veracity of speech on matters of politics.

For example, in *Babbitt*, this Court held that the plaintiff could raise a pre-enforcement challenge to a statute prohibiting unions from encouraging boycotts through the use of "dishonest, untruthful and deceptive publicity," even though the plaintiffs alleged that they did "not plan to propagate untruths," because the plaintiffs were "not without some reason in fearing prosecution for violation of the ban." 442 U.S. at 301–02. *See also 281 Care Comm.*, 638 F.3d at 628–31 (holding that the plaintiffs had reasonable cause to fear prosecution under a false statements statute, even though they did not intend to make any false statements, because they intended to engage in conduct that could

reasonably be interpreted as making a false statement). Similarly here, Petitioners face a credible threat of prosecution under the Ohio law if they choose to speak in subsequent elections. Requiring Petitioners to await prosecution in order to challenge the Ohio statute would inappropriately force them to choose between silence and risking criminal liability for speech they deem to be true. *See Steffel*, 415 U.S. at 459 ("[I]t is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.").

## III. THE CONSTITUTIONAL HARM CAUSED BY AN OVERBROAD RESTRICTION ON CAMPAIGN SPEECH REPEATS EACH ELECTION CYCLE, AND PETITIONERS' CHALLENGE IS THEREFORE NOT MOOT.

The protection of political speech lies at the zenith of the First Amendment's protections. *See, e.g., Citizens United*, 558 U.S. at 329. This protection includes the judicial review of statutes that cast a chill on protected speech. "The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere." *Ashcroft v. Free Speech Coal.,* 535 U.S. 234, 244 (2002). It is therefore critical to employ a procedural doctrine that reflects the weighty constitutional issues at stake when laws restrain campaign speech, directly or indirectly.

This Court has long recognized that while an expiration of the underlying action that triggered a lawsuit may ordinarily render a case moot, there are

"broader consideration[s]" at play when a case is "capable of repetition, yet evading review." *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911) (case was not moot despite termination of administrative process). Where a government agency retains power to restrain First Amendment rights, this Court has refused to "decline to address the issues . . . on grounds of mootness," particularly where the underlying orders are "by nature short-lived." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 547 (1976).

As discussed above, speech particular to a single candidate or election is by its very nature short-lived.

> "There are short timeframes in which speech can have influence …. The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others. A speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit."

*Citizens United*, 558 U.S. at 334. Therefore, when questions about the continuing justiciability of election-related speech claims have arisen, this Court has properly addressed them by flexibly applying the mootness doctrine – and its exceptions – to allegations of chill.

For example, in *Wisconsin Right to Life*, plaintiffs challenged political speech restrictions in a case that spanned three election cycles, during which

their specific campaign messages fell out of date. Rather than find the case moot or unripe, the Court took a pragmatic approach that recognized the difficulty of obtaining full judicial review of speech within the timeframe of a single election:

> [G]roups like WRTL cannot predict what issues will be matters of public concern during a future blackout period. In these cases, WRTL had no way of knowing well in advance that it would want to run ads on judicial filibusters during the BCRA blackout period. In any event, despite BCRA's command that the cases be expedited "to the greatest possible extent," *two* BCRA blackout periods have come and gone during the pendency of this action.

*Wisconsin Right to Life, Inc.,* 551 U.S. at 462 (emphasis in original) (citation omitted). Thus, although the plaintiffs' particular injury ended after the election occurred during the pendency of judicial proceedings, the Court held that challenges to campaign speech regulations "fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review," because the plaintiffs intended to run similar ads in future elections and there was no reason to believe that the FEC would refrain from prosecuting future violations. *Id.* at 463. *See also Davis v. Federal Election Comm'n,* 554 U.S. 724, 735 (2008). The facts here are remarkably similar.

Again unlike the Sixth Circuit, the District Court briefly touched on mootness in the instant case. The court found that "SBA List took affirmative

acts to moot this case" by agreeing to the scheduling and dismissal of the Ohio Elections Commission's review. Pet. App. 35a. *See also* Pet. App. 2a ("Driehaus and SBA List chose to terminate the state proceeding before the Commission adjudicated the dispute."). The lower courts' requirement that plaintiffs expend resources to voluntarily complete the adverse Commission process directly contrasts with this Court's well-established rule that litigants need not subject themselves to prosecution in order to maintain the right to challenge an unconstitutional law. This general rule applies with at least equal force in the election context. *See Davis v. Federal Election Comm'n,* 554 U.S. 724, 735 (2008) (holding that the capable of repetition yet evading review mootness exception applies to campaign speech, even when all election-related enforcement has terminated). This Court has recognized the inherent unfairness of requiring parties to expend considerable resources in futile actions for the sole purpose of preserving the right to have their claims heard. *See Citizens United*, 558 U.S. at 334.[5]

Challenges to restrictions on campaign communications are presumptively capable of repetition, yet evading review. The mootness doctrine therefore has built-in protections to ensure that restraints on core political speech do not repeatedly chill political debate while escaping the eye of the courts. The Sixth Circuit's ripeness analysis was made in error. Application of the mootness doctrine

[5] *Cf. Patsy v. Bd. of Regents of State of Fla*., 457 U.S. 496, 500 (1982) ("[W]e have on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies").

and its prudential exception instead would have led to the proper conclusion that recurrent harms to free speech are fully justiciable.

## CONCLUSION

The judgment below should be reversed.

Respectfully Submitted,

Steven R. Shapiro
*Counsel of Record*
Lee Rowland
Brian M. Hauss
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
sshapiro@aclu.org

Freda J. Levenson
Drew S. Dennis
American Civil Liberties Union of Ohio Foundation
4506 Chester Avenue
Cleveland, Ohio 44103
(216) 472-2220