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 *AMICI CURIAE* INSTITUTE FOR JUSTICE, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1991, the Institute for Justice is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of that mission, the Institute routinely files pre-enforcement challenges to laws that chill speech. The Institute is deeply concerned about the effect that the ruling below will have on the ability of speakers to seek such pre-enforcement judicial review in federal court, which the Institute believes is vital to the protection of the First Amendment.

Reason Foundation is a national, nonpartisan, and nonprofit public-policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies – including free markets, individual liberty, and the rule of law. Reason supports dynamic, market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission

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[1] Pursuant to Supreme Court Rule 37.3(a), *amici* state that all parties have consented to the filing of this brief through the filing of blanket consent letters. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

by publishing Reason magazine, as well as commentary on its websites, www.reason.com and www.reason.org, and by issuing policy-research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

The Individual Rights Foundation was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. IRF is dedicated to supporting free speech, associational rights, and other constitutional protections. To further these goals, IRF attorneys participate in litigation and file *amicus curiae* briefs in cases involving fundamental constitutional issues. IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

SUMMARY OF THE ARGUMENT

The State of Ohio has vested a government agency with the authority to determine the truth or falsity of core political speech and then punish those whose speech it deems false. The mere existence of such a body obviously raises important First Amendment questions. Indeed, it strikes at the very heart of America's constitutional tradition. *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) ("Our constitutional tradition stands against the idea that we need

Oceania's Ministry of Truth."). Accordingly, it is of vital importance that federal courts fulfill their duty to evaluate the constitutionality of laws like Ohio's before those laws do irreparable harm to speakers.

The Sixth Circuit, in concluding that Petitioners lacked standing to challenge Ohio's law, failed to fulfill this duty. Despite the facts that this criminal statute had already been invoked against Petitioner SBA List once, that the Ohio Elections Commission had already found there was "probable cause" to conclude that the SBA List's speech violated the statute, and that both Petitioners alleged they wish to engage in materially the same speech in the future, the Sixth Circuit ruled that Petitioners cannot bring a pre-enforcement challenge. Why? Because Ohio punishes only speech it deems to be false, and Petitioners insist that their speech – the very speech that previously led to them being hauled before Ohio's truth commission – is true.

The Sixth Circuit's ruling is the height of formalism and represents a radical departure from the First Amendment justiciability principles applied by this Court and federal courts elsewhere in the country, which recognize that pre-enforcement challenges are critical to ensuring vibrant and unobstructed political discourse. This Court and most others appreciate that a First Amendment plaintiff bringing a pre-enforcement challenge to a statute that *arguably* proscribes his speech states a justiciable claim absent a strong indication that the statute will not be enforced, such as disavowal by the government – either

actual or implied from the statute having fallen into extreme disuse. But the Sixth Circuit demands far more: It requires either a near certainty of future enforcement or a prior definitive determination by the government that the plaintiff previously violated the law. If ratified by this Court, such a rule would foreclose pre-enforcement challenges that the vast majority of judges and other citizens think ought to at least be *heard*, regardless of how they are ultimately decided on the merits.

The Sixth Circuit's ruling is not only a departure from this Court's precedents, it also ignores the way statutes like Ohio's operate in the real world. In deciding there was no credible threat that Ohio's statute would be enforced against Petitioners, the court below failed to appreciate the significance of Ohio's complaint-driven enforcement mechanism, which allows "any person" to initiate mandatory proceedings before a government commission to adjudicate the truth or falsity of a political opponent's speech. Contrary to the Sixth Circuit's reasoning, this mechanism obviously makes it far *more* likely that the statute will be invoked. In fact, statutes like this are frequently used as weapons in campaign arsenals to silence or distract political opponents in the midst of heated elections.

The ruling below cannot be allowed to stand. This Court should reassert the vital importance of pre-enforcement review to the protection of First Amendment rights, and make clear that standing to bring pre-enforcement challenges under the First

Amendment is a practical inquiry that must take account not only of the literal language of a prohibition on speech, but also of how reasonable people would respond to the procedures surrounding the enforcement of that prohibition.

ARGUMENT

This Court has long recognized that the First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (internal quotation marks omitted). Such speech "must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). This Court has also long recognized that speakers need not run the risk of prosecution before they may challenge laws that suppress speech, but may instead seek pre-enforcement review so long as they have "alleged an intention to engage in a course of conduct *arguably* affected with a constitutional interest, but proscribed by a statute, and there exists a *credible threat of prosecution* thereunder." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (emphasis added) (citation omitted). Such a credible threat is presented by the mere existence of a statute that is "recent and not moribund," *Doe v. Bolton*, 410 U.S. 179, 188 (1973), and that the government has not "disavowed any intention" of enforcing, *Babbitt*, 442 U.S. at 302.

The Sixth Circuit's ruling cannot be reconciled with these principles. As explained in Section I, the ruling below drastically curtails the availability of pre-enforcement review and would, if ratified by this Court, do serious harm to the First Amendment. As explained in Section II, the proper resolution of the justiciability question in this case – and in all pre-enforcement challenges – must take account of the practical realities of how laws like Ohio's operate. Taking those practical realities into account in this case, Petitioners clearly have standing.

I. THIS COURT AND OTHER FEDERAL COURTS HAVE LONG RECOGNIZED THAT PRE-ENFORCEMENT JUDICIAL REVIEW OF SPEECH-SUPPRESSING LAWS IS VITAL TO THE PROTECTION OF THE FIRST AMENDMENT.

The First Amendment reaffirms important and highly valued rights that are at the heart of our constitutional tradition. But "First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect of [a] statute." *Bates v. State Bar*, 433 U.S. 350, 380 (1977). When that happens, "[s]ociety as a whole [is] the loser." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984). Pre-enforcement challenges play a vital role in preventing that from happening by removing impediments to the "'open marketplace' of ideas protected

by the First Amendment." *Citizens United*, 558 U.S. at 354 (citation omitted).

Threats to First Amendment freedoms necessitating pre-enforcement review arise not just in the high-stakes world of federal elections like in *Citizens United*, but in local politics and in the more mundane goings-on of everyday life. The decision below – which demands certainty of prosecution or a past finding of violation, plus an admission of intent to violate a criminal statute before allowing a pre-enforcement challenge – all but shuts down this crucial avenue of relief across a significant portion of this country. If not corrected, the Sixth Circuit's error will profoundly limit the free-speech rights of ordinary Americans.

Examples of the sort of speakers who will be unable to seek meaningful pre-enforcement protection for their First Amendment rights abound in the Federal Reports, but a handful of examples will suffice to illustrate the problem:

1. Julie Towbin was 17 when she was invited to attend a local political event organized by the Palm Beach County Democratic Executive Committee. *Towbin v. Antonacci*, 885 F. Supp. 2d 1274, 1277 (S.D. Fla. 2012). Ms. Towbin was a former Page in the U.S. House of Representatives and had a "keen and abiding interest in politics." *Id.* She wanted to attend the event but was concerned that her purchase of its $150 ticket would run afoul of a provision of Florida law that prohibited, with limited exceptions, "political contributions by minors of more than $100 to

individual candidates or political organizations." *Id.* A single unlawful contribution is a first-degree misdemeanor; a second is punishable as a third-degree felony. *Id.* (citing Fla. Stat. § 106.08(7)(a)-(b)). When Ms. Towbin reached out to the Florida Elections Commission and State Attorney to ask whether the law applied, they declined to issue an "advisory opinion," and the State's Attorney General noted only that the "statute 'remains applicable'" and carries criminal penalties. *Id.* (citation omitted). Ms. Towbin ultimately did not go to the event, but "steadfastly [held] on to a 'definite, and serious, desire and intention to contribute in excess of $100 to a political committee and/or candidates of her choice'" if "not for the criminal penalties she [would] face[]." *Id.* (citation omitted). Rather than allow the statute to squelch her budding interest in political participation, she mounted a pre-enforcement challenge. *Id.* at 1281-83. Fortunately for her, the district court enjoined the unconstitutional statute, vindicating Ms. Towbin's rights and freeing her to engage in the political process. *Id.* at 1290-92. But that would not have happened in the Sixth Circuit. In Kentucky, Michigan, Ohio, and Tennessee, such a claim would have been dismissed as too speculative, absent more proof that the state would in fact enforce the statute against Ms. Towbin.

2. Steve Cooksey is a North Carolina resident living with Type II diabetes. *Cooksey v. Futrell*, 721 F.3d 226, 229-30 (4th Cir. 2013). He has been able to control his diabetes and lose 78 pounds by maintaining

a diet low in carbohydrates but high in fat. *Id.* at 230. Inspired by his lifestyle change and wishing to help others with similar problems, Mr. Cooksey started a website called "Diabetes Warrior" to talk about his weight loss and diet, distribute meal plans, provide advice to readers, and advertise his fee-based diabetes-support and life-coaching services. *Id.* His website stated that he was not a licensed medical professional and did not have any formal credentials. *Id.*

In January 2012, shortly after attending a nutritional seminar in which he expressed disagreement with dietary advice given by the director of diabetic services from a nearby hospital, Mr. Cooksey received a call from the Executive Director of the State Board of Dietetics/Nutrition, informing him that he and his website were "under investigation," and that the State Board had the statutory authority to seek an injunction to prevent the unlicensed practice of dietetics. *Id.* at 230-31. Mr. Cooksey was told he should shut down his life-coaching services. *Id.* at 231. He then received a 19-page red-pen review of his website, indicating on a line-by-line basis what the State Board described as "areas of concern," but which in reality were explicit instructions regarding what he could and could not say. *Id.* at 231-32.

Worried that the Board would take legal action against him, Mr. Cooksey brought a pre-enforcement First Amendment challenge and was eventually allowed his day in court, but only after the Fourth Circuit reversed a district court that made many of the same errors as the Sixth Circuit here. *Id.* at

234-41.[2] Mr. Cooksey would not have been so fortunate had he resided in Ohio instead of North Carolina. By the Sixth Circuit's reasoning, the State Board's communications pointing out "areas of concern" did not *conclusively* establish that Mr. Cooksey violated the law, or even make an official finding that there was "probable cause" to believe the law was violated. And Mr. Cooksey had not alleged that he intended to engage in speech that definitely violated the law, only that he intended to engage in speech that arguably came within the statute's reach. *Id.* at 238. Thus, under the Sixth Circuit's unduly narrow conception of pre-enforcement review, the North Carolina Board's startling act of censorship would have been entirely unreviewable.

3. James Wilson was arrested in El Reno, Oklahoma, after distributing anonymous handbills opposing the election of a candidate for state senate. *Wilson v. Stocker*, 819 F.2d 943, 945, 947 (10th Cir. 1987). Under then-existing Oklahoma law, the handbills were arguably illegal because they did not contain Mr. Wilson's name and address. *Id.* at 947-48 (citing Okla. Stat. tit. 26, § 15-111 (Supp. 1985)). The prosecutor never pursued the charges, but Wilson wished to continue the same conduct that precipitated his prior arrest, and he quite reasonably feared that he might be rearrested. *Id.* at 946. The Tenth Circuit gave Wilson relief, but he would not have had

[2] Mr. Cooksey is represented by *amicus* Institute for Justice.

his day in court in the Sixth Circuit. Under Sixth Circuit doctrine, Wilson's prior arrest for the same conduct would not indicate a credible threat of prosecution in the future. After all, an arrest only establishes that the state has found *probable cause* that the law has been violated, exactly what the Commission panel found as to SBA List below.

If they had been in any of the four states of the Sixth Circuit, Ms. Towbin, Mr. Cooksey, and Mr. Wilson would have had to risk significant civil or criminal consequences to vindicate their constitutional rights. Without the possibility of pre-enforcement review, they likely would have remained silent, and the laws in question would have remained unchallenged, continuing to erode their and others' First Amendment freedoms unless someone with the extraordinary gumption (and means) to risk civil or criminal penalties came along.

That result cannot be reconciled with this Court's precedents. Although the Sixth Circuit persistently demands certainty of prosecution, this Court's repeated holdings demonstrate that all that is required is a credible threat – a threat that is presumed from the very existence of a non-moribund statute that arguably proscribes the plaintiff's speech. *See, e.g., Epperson v. Arkansas*, 393 U.S. 97, 101-02 (1968) (holding that pre-enforcement challenges are proper even without a particularized threat of enforcement, and even if the statute has not been recently enforced); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (holding that when statute was "recent and not moribund,"

plaintiffs "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979) (permitting facial challenge though the pertinent provision of the act had "not yet been applied and may never [have] be[en] applied" when the State had not "disavowed any intention" of enforcing it); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (permitting challenge where state had "not suggested that the newly enacted law will not be enforced" and Court saw "no reason to assume otherwise"). This Court's holdings demonstrate that in such circumstances "the threat is latent in the existence of the statute." *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003).

The Sixth Circuit's approach also starkly conflicts with the approach taken by its sister circuits, which presume a credible threat of prosecution absent strong evidence that the statute will not be enforced. *See, e.g., St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 484-86 (8th Cir. 2006); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999); *Commodity Trend Serv., Inc. v. CFTC*, 149 F.3d 679, 687 (7th Cir. 1998); *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 15-17 (1st Cir. 1996). And unlike other circuits, the Sixth Circuit requires First Amendment plaintiffs to tarnish their own reputation by admitting they intend to engage in illegal conduct in order to get into court, Pet.App.15a, whereas other

circuits recognize that such a requirement would itself chill speech and therefore only require plaintiffs to demonstrate they intend to engage in conduct that *arguably* comes within the law's reach. *E.g., 281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 61 (2013); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003); *Majors*, 317 F.3d at 721; *N.H. Right to Life Political Action Comm.*, 99 F.3d at 14.

If this Court were to ratify the Sixth Circuit's ruling, it would not only be turning its back on decades of precedent, it would seriously endanger the rights of speakers throughout the country. Accordingly, because the Sixth Circuit's ruling cannot be reconciled either with this Court's precedents or the vast weight of authority from other circuits, it should be reversed.

II. THIS COURT SHOULD CLARIFY THAT DETERMINING THE EXISTENCE OF HARM ARISING FROM A CREDIBLE THREAT OF PROSECUTION IS A PRACTICAL, NOT FORMALISTIC, INQUIRY.

As demonstrated above, the Sixth Circuit's ruling cannot be squared with this Court's precedent and should be reversed. But to prevent such rulings from happening in the future, this Court should clarify that the standing inquiry in pre-enforcement challenges is a practical, not formalistic, inquiry. That

inquiry must take account of the way that laws like Ohio's operate in the real world.

Ohio's law places enormous power in the hands of unelected, unaccountable complainants to initiate costly and time-consuming proceedings against political speakers. Under the challenged Ohio statute, upon receipt of a complaint by "any person" alleging a violation of the false-speech laws, the Commission *must* initiate proceedings. Ohio Rev. Code Ann. § 3517.153(A). And if the complaint is filed shortly before an election, a Commission panel *must* convene an expedited hearing to determine whether there is probable cause for the full Commission to hear the case and determine whether there has been a violation. *Id.* §§ 3517.154(A)(1), 3517.156(A)-(B). Absent all parties' agreement, the respondent has no right to argue, testify, or submit evidence to the panel to contest the charges. Ohio Admin. Code 3517-1-10(D)(1). If probable cause is found, full Commission proceedings begin. Ohio Rev. Code Ann. §§ 3517.155(A)(1), 3517.156(A). In that event, the Commission conducts a full administrative trial, including discovery, Ohio Admin. Code 3517-1-09, direct and cross examination of witnesses, *id.* 3517-1-11(B)(2)(d), and questioning by members of the Commission, *id.*

Although the court below recognized that Ohio's statute expressly allows "any person" to initiate a Commission proceeding, the court dismissed this concern, asking rhetorically, "[w]ho is likely to bring a complaint to set the wheels of the Commission in

motion?" Pet.App.4a, 12a. *Amici* respectfully submit, as did Petitioners below, *see id.*, that the answer is obvious: *a political opponent*.

Indeed, experience suggests that complaint-driven statutes like Ohio's are frequently used as strategic weapons to silence political speech in the final hours of political campaigns – when it is most valuable – precisely because they are so easy to invoke. For example, *amicus* Institute for Justice recently litigated in the Eleventh Circuit a challenge to certain Florida's campaign-finance laws that permit citizens to file a sworn complaint with the Florida Elections Commission alleging a violation. In that case, the investigations manager for the Commission and the Commission's Rule 30(b)(6) designee admitted under oath that approximately *98%* of the complaints it receives are "politically motivated," and that "many times" complaints are filed by individuals seeking to "punish their political opponent" or to "harass that person or otherwise divert their attention from their campaign." Dep. Tr. of David Flagg at 16:16-25, 18:1-2, 19:6-15, *Worley v. Roberts*, 749 F. Supp. 2d 1321 (N.D. Fla. 2010) (No. 4:10-cv-00423), ECF No. 40-26.

And Florida law is not an isolated problem. In another case litigated by the Institute for Justice, *Sampson v. Buescher*, 625 F.3d 1247, 1253 (10th Cir. 2010), which involved a particularly oppressive use of a complaint-driven private-enforcement provision in Colorado's campaign laws, *two* of the Colorado Secretary of State's experts admitted under oath that

private-enforcement provisions are often used to silence speech or to gain political advantage. One, a Colorado political pollster and strategist, testified that political opponents use the private-enforcement provision as a strategic tool during campaigns. Dep. Tr. of Floyd Ciruli at 37:19-39:1, *Sampson v. Coffman*, No. 1:06-cv-01858, 2008 WL 4305921 (D. Colo. 2008), ECF No. 30-40. The other, a lawyer who worked for the California Secretary of State and was general counsel to the California Fair Political Practices Commission, testified that most of the private complaints filed under California's private-enforcement provision were either baseless or brought for publicity purposes in order to give one competitor in an election an advantage. Dep. Tr. of Robert Stern at 27:21-28:9, 36:4-37:11, *Sampson v. Coffman*, No. 1:06-cv-01858, 2008 WL 4305921 (D. Colo. 2008), ECF No. 30-41. Consistent with these experiences, the district court in *Sampson* concluded that "[t]here can be no doubt that [complainants] used the private enforcement provisions to attempt to silence the plaintiffs by the filing of the complaint." *Sampson v. Coffman*, No. 06-cv-01858-RPM, 2008 WL 4305921, at *20 (D. Colo. Sept. 18, 2008), *aff'd in part, rev'd in part sub nom. Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010).

These examples illustrate that, in the real world, the risk of being dragged through the burdensome process of responding to investigations initiated by one's political adversaries is a formidable deterrent to political speech. Wholly aside from the indignity,

expense, and potential consequences, the process will inevitably distract the speaker's attention and resources away from getting out his message. This is especially so when expedited proceedings are initiated on the eve of an election.

This Court's precedents do not require courts to turn a blind eye to the destructive realities imposed by enforcement processes themselves. To the contrary, this Court long ago recognized that these harms are not eliminated by "the improbability of successful prosecution." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). "The chilling effect upon the exercise of First Amendment rights may derive *from the fact of the prosecution, unaffected by the prospects of its success or failure*." *Id.* (emphasis added); *cf. Citizens United*, 558 U.S. at 335 (looking to practical concerns to determine whether regulatory scheme acted as a prior restraint).

Unlike the Sixth Circuit here, other courts recognize the importance of the practical concerns raised by complaint-driven enforcement mechanisms when evaluating justiciability. In *Chamber of Commerce v. FEC*, for example, the D.C. Circuit addressed a First Amendment pre-enforcement challenge to an FEC rule that seemed to restrict certain political communications to the plaintiff organizations' members. 69 F.3d 600, 601 (D.C. Cir. 1995). There was no imminent threat of enforcement proceedings because the FEC was publicly deadlocked on whether and how to enforce the rule, and a majority vote of the commission was necessary to institute enforcement

proceedings. *Id.* at 603. Nonetheless, the court found standing, because the unusual nature of the enabling statute permitted a "political competitor" to "challenge the FEC's decision *not* to enforce" and therefore subject the speaker to litigation "even without a Commission enforcement decision." *Id.*

The First Circuit addressed a similar issue in *Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir. 2003). That case involved a criminal libel statute that, because of the operation of Puerto Rico law, permitted individuals to file a complaint with the police or pro se to initiate a criminal libel action; it was only after a probable-cause hearing that the prosecutors would become involved. *Id.* at 58-59. The court correctly recognized that standing would exist even if the prosecutors had "disavow[ed] any intention to prosecute" because they exercised no control over whether proceedings would be initiated. *Id.* at 59. It held that "[t]he plaintiff 's credible fear of being haled into court on a criminal charge is enough for the purposes of standing, even if it were not likely that [he] would be convicted." *Id.*

Had the Sixth Circuit taken a more practical view of Ohio's false-political-speech law, as this Court and other circuit courts have done, it would have recognized that there was a credible threat of prosecution inherent in the design of Ohio's law. The court's failure to take these practical realities into account was error and must not be allowed to stand.

CONCLUSION

For the reasons stated above, the Sixth Circuit's ruling should be reversed.

Respectfully submitted,

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