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* GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, REVIEW AND HERALD PUBLISHING ASSOCIATION, AND PACIFIC PRESS PUBLISHING ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. To challenge a speech-suppressive law, must a party whose speech is arguably proscribed prove that authorities would certainly and successfully prosecute him, as the Sixth Circuit holds, or should the court presume that a credible threat of prosecution exists absent desuetude or a firm commitment by prosecutors not to enforce the law, as seven other Circuits hold?

2. Did the Sixth Circuit err by holding, in direct conflict with the Eighth Circuit, that state laws proscribing "false" political speech are not subject to pre-enforcement First Amendment review so long as the speaker maintains that its speech is true, even if others who enforce the law manifestly disagree?

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INTERESTS OF *AMICI CURIAE* [1]

Amici curiae are religious organizations that follow the "Great Commission," given by Jesus Christ to his followers, to go into all the world and "preach the Gospel." *See* Matthew 28:19-20; Mark 16:15. A principal method by which these organizations follow this evangelistic mandate is through door-to-door visits with potential converts during which church members share their testimonies, discuss religious issues, pray, distribute religious literature and solicit charitable contributions to sustain these missionary activities. These evangelistic efforts, traditionally known as "colporteur" ministries, have a long history in this country. *Amici* sponsor and support some of the nation's oldest and largest colporteur ministries. The Sixth Circuit decision under review here seriously threatens the viability of those ministries.

Amicus General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist church and represents nearly 59,000 congregations with more than eighteen million members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,000 congregations with more than one million members. The General Conference sponsors several missionary programs in which church members travel to various locations to evangelize local residents through door-to-door solicitation.

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[1] The parties have consented to the filing of this brief and that consent is on file with the Clerk of the Court. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than the *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

One of these programs is a student missionary effort known as the "Literature Evangelist" program. These student missionaries regularly encounter local speech-suppressive laws which must be addressed through negotiation or litigation before these missionary activities may occur. A justiciability rule that would restrict challenges to these speech-suppressive laws would effectively foreclose pre-enforcement resolutions, and as a result would effectively eliminate this protected religious speech altogether.

Amici Review and Herald Publishing Association and Pacific Press Publishing Association are the only two publishing houses for the Seventh-day Adventist Church located within the United States. These publishing houses were established in 1849 and 1875, respectively. Both were established for the purpose of printing and distributing Adventist religious literature for use in evangelism and proselytizing, and publish the religious literature that is discussed throughout this brief. Since their founding, they have relied upon, supported and participated in the Adventist Church's Literature Evangelism ministry as an important channel for their publications.

For these reasons, *amici* are strongly interested in and concerned about the outcome of this case.

STATEMENT

Rather than summarizing the procedural history of this case, we present here a brief description of the religious speech that will likely be impacted as heavily by the Sixth Circuit's decision as the political speech at issue here.

Religious proselytizing through face-to-face meetings with potential converts, accompanied by

distribution of religious literature, has a history at least as old as that of this nation. As this Court has recognized, such missionaries have been a "potent force in various religious movements down through the years." *Murdock v. Pennsylvania,* 319 U.S. 105, 108 (1943). The same religious dissenters and nonconformists who fled England and the Act of Uniformity, 14 Car. 2 c. 4 (1662), and the Licensing of the Press Act, 14 Car. 2 c. 33 (1662), later proposed, debated and eventually approved the Bill of Rights, with its protections of religion and religious speech. U.S. Const., Amend. 1. The result has been a uniquely vibrant development and dissemination of religious views in this country. *See generally* Frank S. Mead & Samuel S. Hill, Handbook of Denominations in the United States (Abington Press 8th ed. 1987) (cataloguing more than 225 American denominations).

A. Missionary proselytization through door-to-door literature distribution and solicitation has a long tradition.

The missionary tradition predates the founding of our country by millennia, dating at least to the "Great Commission" given by Jesus Christ to his followers to go into all the world and "preach the Gospel." *See* Matthew 28:19-20; Mark 16:15. The specific form of evangelism involving the distribution of printed literature followed closely after Johannes Gutenberg's introduction of movable type for printing in the mid-fifteenth century. *Cf Murdock v. Pennsylvania,* 319 U.S. 105, 108 n. 6 (1943) (collecting examples of this method of evangelism).

In early nineteenth century America, "the organization of individual evangelical activity was [seen as] the universally recognized panacea for the ills and sins of the world." Elizabeth Twaddell, *The American*

Tract Society, 1814-1860, Church History, Vol. 15, No. 2 (Cambridge UP Jun. 1946) pp. 116-132, at p. 116 (available at http://www.jstor.org/stable/3160400) (last viewed on Feb. 27, 2014). As a result, numerous evangelistic associations began missionary activity through the distribution of religious literature. The American Tract Society was instituted in Boston for this purpose in 1814. In 1816, the American Bible Society was established in New York to distribute Bibles and study aids. *See* http://www.americanbible.org/about/history/ (last visited on Feb. 27, 2014). Both organizations have remained, and are still, active in the distribution of religious literature.

Organized in 1830, the Church of Jesus Christ of Latter-day Saints began missionary activities almost immediately thereafter. *See* Mead & Hill, Handbook of Denominations, at 134-141; http://historyofmormonism.com/mormon-history/ (last visited on Feb. 27, 2014). These missionary activities have long included the distribution of religious literature. *Cf* http://library.truman.edu/microforms/pamphlets_in_american_history.asp (last visited Feb. 27, 2014) (catalogue of pamphlets).

During the Civil War era, chaplains and others distributed Bibles and tracts as colporteurs. John William Jones, Christ in the Camp, or Religion in Lee's Army (1887) (available at http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2001.05.0163) (last visited on Feb. 27, 2014).

At approximately this same time, the Seventh-day Adventist Church was recognized and began sponsoring colporteur ministries. *See* Mead & Hill, Handbook of Denominations, at 19-25. Early Adventist Church founder Ellen G. White called for "message-filled books, magazines, and tracts to be

scattered everywhere like the leaves of autumn." Ellen G. White, The Publishing Ministry (1983), at 5. Taking this counsel to heart, the Adventist Church continues to use several methods of missionary activity that involve the distribution of religious literature through face-to-face meetings and door-to-door canvassing. Review and Herald Publishing Association and Pacific Press Publishing Association began publishing religious outreach materials for the Seventh-day Adventist Church in 1849 and 1875, respectively, and these ministries have been active and continue to this day. *Cf. Murdock v. Pennsylvania*, 319 U.S. 105, 109 n. 7 (1943) (noting these missionary efforts).

Once known as "colporteur" ministries, these missionary activities are now known as "Literature Evangelism," and those who participate in them are referred to as "Literature Evangelists." This form of evangelism has been and remains a critical part of the ministry of the Adventist Church.

These ministries were joined in the 1870s by the denomination now known as Jehovah's Witnesses. *See* Mead & Hill, Handbook of Denominations, at 124–27. Jehovah's Witnesses have long focused upon distribution of the written word as part of their evangelistic mission, and almost immediately began distributing *Watchtower* magazine. *See, e.g.,* http://www.mostholyfaith.com/bible/Reprints/ (last visited Feb.. 27, 2014) (collection of back issues). Jehovah's Witnesses also sponsor active missionary efforts of this type. These missionaries are now known as "pioneers."

A similar organization arose in 1894, when American evangelist Dwight L. Moody founded the "Bible Institute Colportage Association" in Chicago to

distribute evangelical Protestant religious tracts and books. Now known as Moody Publishers, it continues to publish and distribute religious materials. http://moodycollective.com/about-moody-collective/ (last visited on Feb. 27, 2014).

As these examples show, American religious groups have a long history of seeking converts though personal appeals coupled with distribution of religious literature. This practice, which is at the heart of the speech protected by the First Amendment, has long been integral to the vitality of American religious life.

B. *Amici's* missionaries are regularly engaged in this traditional religious speech.

Amici have long been involved in this traditional form of missionary activity. And the Adventist Church's experience with its student missionary programs is particularly relevant, not only to the Adventist Church, but to any religious or for that matter non-religious organization doing door-to-door advocacy.

The Adventist Church's program is designed not only to place literature in the home, but also to offer a range of religious services, all designed to promote the Adventist Church's evangelistic message. Students also routinely pray with willing homeowners, offer personal religious testimonies and perform religious counseling.

Another integral feature of these missionary programs is the solicitation of donations to support the program and the Christian education of the student missionaries. Student missionaries are trained to explain that the literature is offered on a purely voluntary donation basis. They suggest a donation

range for any books in which a homeowner might be interested, and describe the manner in which donations are used. This description includes a statement that a portion of any donation will be used for the student missionary's Christian education.

Although money may be involved (if a donation is received), literature is not sold by the missionaries. Missionaries routinely give literature to interested homeowners who do not want or are unable to make a donation. Missionaries are trained to attempt to leave some material, even if only a pamphlet, at every house where someone is willing to accept it. Missionaries also receive donations from persons who do not want any literature but just want to help. A typical donation ranges from $10 to $20, although donations above and below the suggested range frequently occur.

Donations are solicited for reasons beyond the obvious need to support the program and increase its outreach. For example, the Church has learned over the years that people are more likely to read what they value. A book that is simply "forced upon" a person is less likely to be valued than one accompanied by a voluntary financial gift. A contemporaneous donation often creates value for the book in the recipient's mind, and therefore makes it more likely to be read. In addition, a voluntary donation often creates an allegiance or an affinity between the donor and the cause that the donation supports. As a result, the simple act of making a donation is frequently the first step in the conversion of the donor.

In short, *amici's* missionary programs are paradigmatic examples of religious speech in the long tradition of "colporteur" ministries in which evangelists go door-to-door distributing literature and soliciting potential converts.

C. Religious speech by door-to-door missionaries has long been recognized to be at the core of First Amendment protection.

This Court recognized the significance of these ministries almost three quarters of a century ago, in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943):

> The hand distribution of religious tracts is an age-old form of missionary evangelism . . . [and] has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thou-sands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting."

Id. at 108–09. While the name of this ministry may have changed—"colporteurs" are now identified by terms such as missionaries or evangelists—the nature of the speech, and the need to protect that speech, remain the same.

This Court revisited the issue of door-to-door religious ministries in *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150 (2002), which made clear that door-to-door witnessing could not be subjected to municipal licensing restrictions. In reaching this decision, the Court noted that some of the Court's "early cases" which invalidated such speech-restrictive laws "also recognized the interests a town may have in some form of regulation, particularly when the solicitation of money is involved." 536 U.S. at 162. However, after this remark

and a review of *Murdock* and similar cases, the Court made the following definitive statement:

> The rhetoric used in the World War II-era opinions that repeatedly saved [missionaries] from petty prosecutions reflected the Court's evaluation of the First Amendment freedoms that are implicated in this case. The value judgment that then motivated a united democratic people fighting to defend those very freedoms from totalitarian attack is unchanged. It motivates our decision today."

536 U.S. at 169. *Village of Stratton* thus reaffirmed the principle recognized in *Murdock,* namely, that door-to-door canvassing and distributing religious literature is protected First Amendment activity, even if money is involved.[2] Indeed, it is difficult to imagine a more ringing endorsement of the "value judgment" embodied in *Murdock* than this statement in *Village of Stratton*.

D. Door-to-door missionaries frequently encounter local laws that suppress this protected religious speech.

Unfortunately, many localities throughout the country have failed to heed the "value judgment"

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[2] This latter aspect of *Murdock* was not at issue in *Village of Stratton*, as it had been previously reaffirmed by the Court. *See Meyer v. Grant*, 486 U.S. 414, 422 n.5 (1988) ("charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes" and is fully protected speech) (*quoting Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980)); *accord Riley v. National Fed'n of the Blind,* 487 U.S. 781, 788-89 (1988) (charitable solicitation protected speech).

embodied in *Murdock* and *Village of Stratton*. Indeed, many municipalities have interpreted the Court's observation in *Village of Stratton* that "a town may have [interests] in some form of regulation, particularly when the solicitation of money is involved," 536 U.S. at 162, 164–65, as *carte blanche* authority to apply their local licensing ordinances to all door-to-door missionary activities. These cities also require permits, frequently with an onerous application process, and permit fees—sometimes running into thousands of dollars—before student missionaries may engage in this protected speech. These cities also enforce these ordinances against *amici's* missionaries through criminal prosecutions. Such ordinances therefore impose significant burdens upon *amici's* ability to exercise their core First Amendment right of religious speech.

Even putting aside the "money" question arguably left open in *Village of Stratton*, these ordinances are often blatantly unconstitutional prior restraints under existing precedents of this Court.[3] They also suffer from numerous other constitutional infirmities. For example, such ordinances often:

- exempt certain speakers, viewpoints and/or messages, creating content and viewpoint discrimination, *Larson v. Valente*, 456 U.S. 228, 246-47 (1982); *Consolidated Edison Co. of New York, Inc. v. Public Service Comm'n of New York*, 447 U.S. 530, 537 (1980); *Police Dept. of*

[3] A prior restraint exists when public officials exercise "the power to deny use of a forum in advance of actual expression." *Southeastern Promotions v. Conrad*, 420 U.S. 546, 553 (1975); *Carroll v. President of Princess Anne*, 393 U.S. 175, 181 (1968).

City of Chicago v. Mosley, 408 U.S. 92, 97-99 (1972);

- vest the issuing authority with unfettered discretion to grant or deny the permit, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131, 133 n.10 (1992); *City of Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750, 757–58 (1988);
- sweep too broadly, are not narrowly drawn, and are not the only reasonable alternative which has the least impact on First Amendment freedoms, *Southeastern Promotions v. Conrad*, 420 U.S. 546, 559–60 (1975); *Freedman v. Maryland*, 380 U.S. 51, 58–59 (1965);
- fail to include required procedural safeguards to reduce the danger of prohibiting constitutionally protected speech, *Southeastern Promotions v. Conrad*, 420 U.S. 546, 559–60 (1975); *Freedman v. Maryland*, 380 U.S. 51, 58 –59 (1965);
- contain no time frame in which the permit must be granted or denied, *FW/PBS v. City of Dallas*, 493 U.S. 215, 227–29 (1990);
- impose non-nominal license fees, *Murdock*, 319 U.S. at 113-15;
- require applicants to provide a litany of personal information (including social security numbers in violation of the Privacy Act, Pub. L. 93-579, § 7, *set out as note to* 5 U.S.C. § 552a), as well as detailed information regarding the sponsoring organization, *Village of Stratton*, 536 U.S. at 166–67; *Buckley v. American Const. Law Found., Inc.,* 525 U.S. 182, 198-99 (1999); *McIntyre v. Ohio Elec. Comm'n,* 514 U.S. 334,

341-45 (1995); *Talley v. California*, 362 U.S. 60, 63–64 (1960); *Schultz v. City of Cumberland*, 228 F.3d 831, 852 (7th Cir. 2000);

- allow the issuing authority to ask for any other information she may deem necessary, which (1) repeats the informational burden and (2) introduces additional discretion, *see* cases cited on these two points, *supra*;
- inquire regarding criminal histories and restrict the issuance of licenses to persons with prior convictions, *Schultz v. City of Cumberland*, 228 F.3d 831, 852 (7th Cir. 2000); *Genusa v. City of Peoria,* 619 F.2d 1203, 1218, 1219 n. 40 (7th Cir. 1980); and
- are impermissibly vague, *Marks v. United States*, 430 U.S. 188, 196 (1977).; *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976).

In short, while these ordinances are as diverse as the municipalities that pass them, such ordinances are arguably the area of law most frequently in violation of the First Amendment.

These ordinances fall into three general categories. Occasionally they ban all door-to-door activity—which has long been recognized as unconstitutional. *See Martin v. City of Struthers,* 319 U.S. 141, 146-147 (1943). Many more municipalities attempt to regulate door-to-door activity any time money is involved—both when sales are made and when donations are solicited. At least as frequently, a city will regulate only sales, and will exclude charitable solicitation. Under these latter ordinances, the Church's missionary work should be exempt from regulation. However, some cities take the position that because of the

contemporaneous nature of the two transactions (distribution of literature and solicitation of a donation), the missionary activities are subject to the ordinance even though the language of the ordinance does not support such a broad interpretation.

E. *Amici's* efforts to minimize conflicts between these ordinances and its missionary activities depend upon pre-enforcement negotiations.

Under *amici's* missionary programs, hundreds of college age students and other church members blanket the country each year, visiting hundreds of locales. Each missionary knocks on hundreds, if not thousands of doors, creating the potential for hundreds of thousands of confrontations and conflicts.

Amici are aware, through long experience, of the potential for conflicts, and have actively worked to avoid them. For example, before *amici's* missionaries visit a particular locale, local authorities are informed of the nature of the program and the missionaries' upcoming activities. These efforts are largely successful. Often there is no further communication and these missionary visits are both productive and uneventful. However, each year a significant number of localities attempt to enforce various speech-suppressive ordinances, such as business or solicitation licensing ordinances, against *amici* and their missionaries.

The attempted enforcement of these speech-suppressive ordinances consistently follows one of two patterns. Sometimes local authorities will respond to the program leader's overtures by asserting that the missionaries' activities are subject to regulation under a local ordinance before the missionaries arrive. Often

a city clerk, police administrator, or similar official will provide the city's interpretation of the ordinance and flatly state that it will be enforced against the student missionaries, who will be subject to prosecution if they engage in missionary work in that jurisdiction. These are the most obvious cases in which pre-enforcement negotiation or litigation occurs.

Other times, *amici's* overtures are ignored, the missionaries commence their efforts, and the locality's view becomes evident only when one or more missionaries is stopped or arrested by local police. Such encounters often result in criminal prosecutions under speech-suppressive ordinances that are plainly unconstitutional. Over the past two annual cycles, *amici's* missionaries have been criminally prosecuted under such ordinances in at least a half dozen states, including Alabama, Georgia, Louisiana, New Jersey, Oklahoma, Tennessee, and Texas. Although the issues are obviously different once an arrest has occurred (*e.g., Younger* abstention), these cases have also traditionally been subject to negotiation or litigation that avoids further arrests or prosecutions.

Once the Church becomes aware that the city is threatening to or is enforcing a speech-suppressive ordinance against the missionaries, all its missionary teams are forced to move on to a different community until the issue can be resolved, or else all the missionaries risk individual criminal prosecutions for violating the ordinance. Because a significant number of the missionaries are minors and young adults, the Church simply cannot risk arrest. The Church is acutely aware of the collateral consequences of an arrest or criminal prosecution for these missionaries, even if the charge is eventually dropped or the

missionary is acquitted. In addition to being traumatizing to the students and disruptive to the program, such arrests commonly must be disclosed in college, graduate and law school applications. They are also routinely the subject of inquiry on job applications, background checks, professional licensing reviews (such as for lawyers, accountants and engineers), and immigration and citizenship applications.

The collateral consequences for missionaries who are criminally prosecuted is one of the reasons the Adventist Church has implemented a vigorous program of notice to localities, followed by negotiation and, where necessary, litigation. To be effective, however, all of these efforts must occur pre-enforcement: Once enforcement commences, there is no longer any realistic possibility of civil litigation to test the city's interpretation of its ordinance, or to test the constitutionality of the ordinance or its interpretation, and therefore no realistic possibility of hesitation.

SUMMARY OF ARGUMENT

Although this case involves political speech, the standing rules established here will have a dramatic effect not only upon the political speech of entities like the Petitioners who wish to erect political billboards, but also upon the time-honored religious speech of legions of humble missionaries from a wide variety of religious sects and denominations. Although the First Amendment's protection of missionaries who distribute literature and solicit potential converts door-to-door has been clearly established since a series of World War II era decisions by this Court, this right to religious speech remains under constant threat.

As explained above, for example, *amici's* missionaries frequently encounter local laws that suppress their protected religious speech under the guise of regulating and licensing peddlers, hawkers, solicitors, canvassers and the like. And *amici's* missionaries have been subjected to criminal prosecutions in at least a half a dozen states over just the past two years.

Unfortunately, the Sixth Circuit's justiciability standard will significantly hinder any pre-enforcement negotiations and education undertaken by religious bodies seeking to engage in door-to-door missionary activities: That standard will remove any incentive a city would otherwise have to negotiate an advance resolution. And this will dramatically chill protected religious speech. Faced with a threat of prosecution, missionaries such as those deployed by the *amici* will be forced either to self-censor or to engage in protracted litigation. Neither alternative serves the purpose of Article III standing requirements. In fact, both alternatives erode long-established First Amendment protections, and increase the likelihood of protracted litigation without any countervailing benefit. As a result, *amici* urge that the Court reject the Sixth Circuit's overly restrictive standing test.

ARGUMENT

The Sixth Circuit's overly restrictive justiciability standards will dramatically chill not just political speech, but protected religious speech as well.

This Court's First Amendment case law has long made clear that religious speech in the form of door-to-door missionary activity—including personal witnessing, distributing religious literature, and

soliciting support—is at the core of protected First Amendment activity. *E.g., Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150 (2002). By impeding the ability of religious sponsors of such activity to engage in effective pre-enforcement negotiations with municipalities over the application of solicitation ordinances to that protected activity, the Sixth Circuit's decision will seriously erode that First Amendment protection. Two aspects of that decision are particularly troubling: (a) the requirement of a pending prosecution, and (b) the "false prosecution" doctrine.

A. The Sixth Circuit's requirement of a pending prosecution eliminates the pre-enforcement standing that is necessary to protect religious speech.

The test for standing to assert a pre-enforcement challenge to a speech-suppressive law has been settled for years. A speaker merely must face a "credible threat of prosecution" to maintain a pre-enforcement challenge on First Amendment grounds. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

Here, however, the Sixth Circuit adopted a novel and overly restrictive test for what constitutes a credible threat of enforcement of a speech-suppressive law. The Sixth Circuit described the standard as "an imminent threat of future prosecution." Pet. App. 8a–10a. Under this standard, the Sixth Circuit reasoned that a finding of probable cause that Petitioner SBA List's speech violated the challenged law did "not help [Petitioner SBA List] show an imminent threat of *future* prosecution" because it was not a "final adjudication" of liability. Pet. App. 12a (emphasis in

original). The Sixth Circuit also denied standing because SBA List could not identify a specific person who would complain so as to initiate proceedings if SBA List engaged in the protected speech at issue by erecting a future billboard. Pet. App. 12a–14a.

Both of these holdings are extremely disturbing to *amici*. The conclusion that a finding of probable cause does "not help" to demonstrate standing is difficult to comprehend. If applied to *amici's* missionary programs, this heightened standing requirement would sound their death knell. In this case, a finding of probable cause was made regarding the actions of Petitioner SBA List, yet this finding was insufficient to support SBA List's standing to challenge the statute when SBA List intended to repeat the very same activity that had resulted in the probable cause determination. By contrast, as the Sixth Circuit properly observed, Petitioner COAST's standing was more attenuated because the probable cause finding was made against a different entity. Pet. App. 18a.

To apply the Sixth Circuit's reasoning to *amici's* missionary programs, it would be as if a student missionary who is given a citation for violating an ordinance by knocking on the door of the first house on a block lacks standing to challenge the application of that same ordinance to her intended action of knocking on the second door on the block—until she actually knocks on that door and receives a second citation. The same holds true with each successive door on the block. The Sixth Circuit's insistence upon viewing each instance in isolation is simply illogical and has no support in the law.

Additionally, to have standing under the Sixth Circuit's view, a plaintiff must already be under prosecution for violating the challenged law. Pet. App.

17a. Ironically, under this reasoning, any challenge that would be ripe for review would also be subject to abstention under *Younger v. Harris*, 401 U.S. 37 (1971).

In *amici's* experience, if one member of a missionary team is prosecuted under an unconstitutional ordinance, one typical response would be for other members of that missionary team to file suit to enjoin enforcement of the ordinance. However, these other team members, despite all their preparation and despite their presence in the locality, have not themselves been directly threatened with prosecution, so their claims are even more attenuated than those of the missionary who was prosecuted. The claims of these other missionaries are essentially on par with the claims by Petitioner COAST. Thus if the missionary who is prosecuted (the equivalent of SBA List) lacks standing to challenge enforcement of the ordinance, a similar result follows inexorably for these other missionaries, who are more akin to COAST.

The Sixth Circuit decision creates yet another unjustified impediment to pre-enforcement standing: a requirement that a person challenging an unconstitutional law must identify the complainant that will cause enforcement to begin. Pet. App. 17a. Of course, until that enforcement is begun, there is almost by definition no way to know who will commence it. For example, even though *amici's* missionaries may receive responses to their initial overtures indicating that the city will enforce its ordinance through prosecution, and it is a certainty that such prosecutions will occur, there is no way to know ahead of time which citizen will file a complaint, or which police officer will issue the citation that begins the first prosecution.

The ultimate result of the Sixth Circuit's reasoning is that between the new standing limitations it has created and traditional *Younger* abstention, no challenge to an unconstitutional speech-suppressive law is possible until *after* enforcement proceedings have concluded.

The Sixth Circuit's new standing requirements thus mean that pre-enforcement standing is a dead letter, and create a Hobson's choice for *amici's* missionaries. Given the practical realities of a travelling missionary program, the absence of a method to oppose a city's clear intent to enforce an unconstitutional ordinance means that missionaries must either self-censor by leaving the city entirely, or actually subject themselves to criminal prosecution in order assert their First Amendment rights. The practical result of this dilemma is that jurisdictions that enact such speech-restrictive ordinances will effectively insulate themselves from the religious speech that is at the core of First Amendment values.

Unless *amici's* missionaries self-censor by avoiding the city entirely, the alternative is a series of criminal prosecutions of the offending missionaries, followed by a series of lawsuits seeking damages under 42 U.S.C. § 1983 after the unconstitutional charges are dismissed or the missionaries are acquitted. The traditional standing inquiry avoids such a Hobson's choice, since the City's credible pre-enforcement threat to enforce its ordinance permits resolution of the dispute before multiple criminal proceedings are actually initiated.

B. The Sixth Circuit's "false prosecution" doctrine further impedes the pre-enforcement standing that is necessary to protect religious speech.

The second troubling aspect of the Sixth Circuit's standing test is that it grafts a new and unjustified requirement onto the traditional standing inquiry. In what it referred to as a "false prosecution doctrine," the Sixth Circuit reasoned that as long as a speaker claimed to have a valid defense to the prosecution, the charges were "false" and a "false prosecution" would not support standing. Pet. App. 15a. The Sixth Circuit required that, to have standing to raise a First Amendment challenge to an unconstitutional law, the challenging party must abjure other potential defenses and essentially admit a violation of the law. The Sixth Circuit's approach thus requires that, merely in order to be heard, a party wishing to assert a First Amendment claim must make factual allegations that are believed by the challenging party to be false.

1. This is particularly troubling to *amici* because the laws with which their missionaries are typically threatened (*i.e.,* ordinances that are applicable only to sales) are subject to at least two defenses: (1) that the ordinance does not apply to *amici's* missionaries; and (2) that if the ordinance is applied to *amici's* missionaries, the ordinance is unconstitutional. The Sixth Circuit's "false prosecution" doctrine effectively forecloses any pre-enforcement challenge to even the most clearly unconstitutional law unless the affected parties affirmatively plead facts they believe to be false. For example, *amici* and their student missionaries would be required to plead that they were

selling books—rather than merely receiving voluntary donations—a fact they believe to be false.

This new "false prosecution" doctrine turns normal pleading requirements on their head. The more strained a city's interpretation of its ordinance is, the more likely the plaintiff is to prevail on the merits. At the same time, the more strained a city's interpretation of its ordinance is, the more difficult it becomes for the affected speaker to plead standing for a First Amendment challenge. That is because Rule 11 requires that, by signing a complaint or other pleading, the signing party (whether a party or a party's attorney) certifies that the factual allegations contained in the pleading are supported by evidence. Fed. R. Civ. P. 11(b)(3). Equally important, this new pleading requirement requires litigants (and their counsel) to violate the Ninth Commandment, which prohibits "false witness." Exodus 20:16, Deuteronomy 5:20.

While it has long been true that statutes and ordinances should be interpreted to avoid constitutional difficulties where possible, *see Frisby v. Schultz*, 487 U.S. 474, 483 (1988), the Sixth Circuit's novel approach dramatically expands this principle, transforming it from its traditional role in resolving the merits of a case into a precondition for a party to be heard. Under that approach, merely to initiate a challenge to a speech-restrictive law under which a speaker has been threatened with prosecution, that speaker must effectively (and falsely) concede the merits of the threatened charge. And where courts might previously have decided a case on the merits by limiting the scope of a challenged ordinance (in order to avoid a constitutional issue), the Sixth Circuit's standing rule changes this from a rule of decision to a

rule of standing. This is an important transformation because, as a rule of decision, a limiting construction of a challenged ordinance permits the speech at issue to occur. However, as a rule of standing, it has the opposite effect—the speaker cannot have her challenge heard on the merits, and the chilling effect of the challenged ordinance continues.

2. As previously explained, *amici* consistently seek to engage local officials in a discussion designed to reach an accommodation that allows a locality to protect its legitimate interests, while at the same time preserving the First Amendment rights of their missionaries. However, cities are often reluctant to examine or even discuss these ordinances, viewing them as popular with the electorate despite any constitutional defects. It is typically only after the specific constitutional defects of the ordinances are explained in detail by counsel for the Church to the city attorney or municipal prosecutor that the parties are able to work out an agreement. Under these agreements, the parties essentially settle a hypothetical 42 U.S.C. § 1983 lawsuit before it is filed. Years of experience have demonstrated to the Church that a credible threat of litigation is almost always required to reach such a negotiated resolution. Absent such a threat, municipalities simply have no incentive to negotiate.

By erecting these two new standing requirements, the Sixth Circuit has eliminated any credible threat of pre-enforcement litigation. While at first glance this might seem to reduce litigation, it actually has the opposite effect. The Sixth Circuit's new standing rules have the perverse effect of encouraging more litigation by limiting the pre-enforcement standing that is a precondition for pre-enforcement negotiation. Instead

of such negotiations (or the occasional single lawsuit to enjoin the enforcement of an unconstitutional speech-suppressive ordinance), the restriction upon pre-enforcement standing will force *amici* either to self-censor to avoid threatened prosecutions, or to litigate these constitutional issues in a protracted series of criminal prosecutions and subsequent Section 1983 damages cases.

Such a standing rule undermines First Amendment rights and makes no sense as a matter of judicial administration. It should be rejected.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to reject the Sixth Circuit's aberrant and unduly restrictive limitations of standing, and to reaffirm the longstanding principle that permits standing for pre-enforcement challenges to speech-suppressive laws without the additional limitations imposed by the Sixth Circuit.

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