No. 13-1066

In the Supreme Court of the United States

COAST CANDIDATES PAC AND COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,

Petitioners,

v.

OHIO ELECTIONS COMMISSION, WILLIAM L. VASIL, JAYME SMOOT, DEGEE WILHELM, TERRANCE J. CONROY, LYNN A. GRIMSHAW, KIMBERLY G. ALLISON, AND HELEN E. BALCOLM,

Respondents.

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

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do plaintiffs have standing to bring a First Amendment challenge to a statute when they allege only a generalized and subjective chill of their speech and a state agency has twice found no probable cause that the plaintiffs have violated the statute, preventing any prosecution of plaintiffs for that prior speech?

PARTIES TO THE PROCEEDING

Respondents in this Court, Defendants-Appellees below, are the Ohio Elections Commission and its individual Commissioners—William L. Vasil,[1] Jayme Smoot, Degee Wilhelm, Terrance J. Conroy, Lynn A. Grimshaw, Kimberly G. Allison, and Helen E. Balcolm—in their official capacities.

Petitioners, Plaintiffs-Appellants below, are COAST Candidates PAC and the Coalition Opposed to Additional Spending and Taxes ("COAST").

[1] William L. Vasil has been automatically substituted for his official-capacity predecessor pursuant to Supreme Court Rule 35(3).

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INTRODUCTION

The unreported decision below does not warrant review, because, even under their own standard, Petitioners—COAST Candidates PAC and the Coalition Opposed to Additional Spending and Taxes ("COAST")—face no "'credible threat of prosecution'" for their speech. Pet. 10 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). That standard cannot be met where a probable-cause panel of the Ohio Elections Commission found *no* probable cause that either Petitioner violated the challenged statute and thus dismissed the complaints filed against Petitioners. Under Ohio's false-statement laws, Petitioners cannot be prosecuted without a finding of probable cause, so there is no credible threat that Petitioners will be prosecuted for their speech. In that respect, this case is different from *Susan B. Anthony List v. Driehaus*, Case No. 13-193 (oral argument held on April 22, 2014), in which a panel of the Ohio Elections Commission did find probable cause for a full Commission hearing against one Petitioner for previous "substantially similar" speech. For these reasons, the Court should deny the petition for a writ of certiorari.

Alternatively, the Court may wish to hold the petition pending its decision in *Driehaus*. While this case and *Driehaus* involve materially different factual situations, they both involve a federal court's jurisdiction to consider a challenge to Ohio's false-statement laws. Accordingly, Respondents have no objection to Petitioners' request that this Court hold the case pending its decision there and dispose of it consistent with that decision.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is not published in the Federal Reporter, but is reprinted in 543 F. App'x 490. The order of the district court (Pet. App. 24a) is not reported but is available at 2012 WL 4322517.

JURISDICTION

The Sixth Circuit entered its judgment in this case on September 11, 2013, and denied rehearing en banc on December 4, 2013. The petition for writ of certiorari was filed on March 4, 2014. The Court has jurisdiction under 28 U.S.C. § 1254(1).

COUNTERSTATEMENT

A. The Ohio Elections Commission Investigates False Statements In Ballot-Issue Campaigns, But The Full Commission Can Take No Action Without A Preliminary Finding of Probable Cause

This case concerns another Ohio false-statement law like the one currently at issue in *Susan B. Anthony List v. Driehaus*, No. 13-193. Specifically, Ohio law prohibits knowingly or recklessly false statements during certain ballot-issue campaigns:

> No person, during the course of any campaign in advocacy of or in opposition to the adoption of any ballot proposition or issue, by means of campaign material, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, a press release, or otherwise, shall knowingly and with intent to affect the out-

> come of such campaign do any of the following:
> . . .
>
> (2) Post, publish, circulate, distribute, or otherwise disseminate, a false statement, either knowing the same to be false or acting with reckless disregard of whether it was false or not, that is designed to promote the adoption or defeat of any ballot proposition or issue.

Ohio Rev. Code § 3517.22(B).

The same Commission procedures apply to this false-statement law as are at issue in *Driehaus* concerning the law prohibiting knowingly false statements about candidates. *See* Ohio Rev. Code § 3517.21(B)(9)-(10). No one can be prosecuted unless the Commission's proceedings have first been exhausted. And the Commission has no power to initiate its own proceedings. They get triggered only if a third party files a complaint and affidavit. Ohio Rev. Code § 3517.153(A).

If individuals file complaints within certain times before elections, a panel of at least three members (with no party in the majority) "determine[s] whether there is probable cause to refer the matter to the full commission." *Id.* § 3517.156(A), (B)(1). A probable-cause hearing is brief. The panel hears arguments and/or receives evidence only if parties agree or a member requests it. Ohio Admin. Code 3517-1-10(D)(1). The panel may find no probable cause and dismiss the complaint; find probable cause and refer the complaint to the Commission; or request an investigation. Ohio Rev. Code § 3517.156(C). If the panel finds no probable cause, the complaint gets

dismissed without judicial recourse. *State ex rel. Common Cause/Ohio v. Ohio Elections Comm'n*, 806 N.E.2d 1054, 1059 (Ohio Ct. App. 2004). If the panel finds probable cause, the Commission holds a hearing within ten business days, but the parties may agree to a delay. Ohio Rev. Code § 3517.156(C)(2); Ohio Admin. Code 3517-1-06(B)(1).

Before a hearing, parties may seek discovery. Ohio Admin. Code 3517-1-09(C). A party may request subpoenas, Ohio Rev. Code § 3517.153(B), but only if they are not "overly burdensome," Ohio Admin. Code 3517-1-11(B)(3)(a). If the recipient refuses to comply, only a court may impose sanctions in potential contempt proceedings. Ohio Rev. Code § 3517.153(B).

At the full Commission hearing, parties may make opening and closing statements, examine witnesses, and introduce evidence. Ohio Admin. Code 3517-1-11(B)(2). Ultimately, the Commission may dismiss the case; find a violation but determine that good cause exists not to refer the case to a prosecutor; or refer the case. Ohio Rev. Code § 3517.155(A)(1), (D)(2). If the Commission finds a violation, a party may immediately appeal the adverse finding to a state court. *Id.* § 3517.157(D); *see, e.g.*, *McKimm v. Ohio Elections Comm'n*, 729 N.E.2d 364 (Ohio 2000); *Serv. Emps. Int'l Union Dist. 1199 v. Ohio Elections Comm'n*, 822 N.E.2d 424 (Ohio Ct. App. 2004); *Flannery v. Ohio Elections Comm'n*, 804 N.E.2d 1032 (Ohio Ct. App. 2004). And "[t]he ultimate decision on prosecution is clearly made by the prosecuting attorney." *Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 578 (6th Cir. 1991). The

maximum penalty is six months in prison and/or a $5,000 fine. Ohio Rev. Code § 3517.992(V).

B. Cincinnatians For Progress Complained To The Commission About Petitioners' Statements, But A Panel Of The Commission Found No Probable Cause

In 2011, COAST supported a proposed amendment to the City of Cincinnati Charter that would have prevented the city from moving forward with a planned streetcar project. To express its support for the amendment, "COAST posted 'tweets' on its Twitter account"—that is, short, text-based messages available online. Pet. App. 4a. "For example, an October 21, 2011 'tweet' stated: '12.5% of the fire dept. browned out again today to pay for streetcar boondoggle that 62% think is a waste. @CFDHistory YES ON 48 No streetcar.'" Pet. App. 5a.

Based on this series of tweets, a private association, Cincinnatians for Progress, "filed a complaint with the Commission alleging that twenty of the 'tweets' violated Section 3517.22(B)(2) because they falsely stated that the city's fire department services were being 'browned out' or reduced in order to fund the streetcar project." Pet. App. 5a.

Cincinnatians for Progress filed a complaint on October 28, 2011, against COAST Candidates PAC. *Id.* Six days later, at the probable-cause hearing, a panel of the Commission heard arguments that it was COAST, not COAST Candidates PAC, that had issued the "tweets," and that the COAST Candidates PAC believed they were true. *Id.* The panel found no probable cause and dismissed the complaint. *Id.*

"On November 7, 2011, Cincinnatians for Progress filed a complaint against COAST and Mark W. Miller, COAST's treasurer, alleging that the same twenty 'tweets' violated section 3517.22(B)(2). On November 17, 2011, a panel of the Commission held a hearing at which COAST argued that its statements were true. The panel concluded that there was no probable cause to believe that COAST had violated the law and dismissed the complaint." *Id.*

C. COAST And COAST Candidates PAC Sought A Declaratory Judgment That The Ohio Statute Is Unconstitutional

On November 1, 2011, while the initial complaint against COAST Candidates PAC was pending before the Commission, Petitioners sought a declaration in federal district court "that section 3517.22(B)(2) is unconstitutional on its face and as applied to them and asking the court to enjoin its enforcement." Pet. App. 6a. Petitioners argued that they wanted to continue making speech similar to the tweets that were the subject of the complaint, both before and after the 2011 election, but that "they were afraid of being 'dragged' before the Commission." *Id.* The district court denied a motion for a temporary restraining order and stayed the proceedings pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). After the Commission had dismissed both complaints for lack of probable cause, the district court lifted the stay. Pet. App. 6a.

D. The District Court Dismissed Petitioners' Complaint, And The Sixth Circuit Affirmed

The district court granted the Commission's motion to dismiss for lack of subject-matter jurisdiction. Pet. App. 6a. It held that COAST and COAST Candidates PAC lacked standing because "subjective chill, without more, does not establish actual or imminent objective harm," and because Petitioners faced no credible threat of prosecution. Pet. App. 7a.

The Sixth Circuit, in a non-precedential decision, affirmed the district court's dismissal of the complaints, finding that dismissal was proper on both ripeness and standing grounds. Pet. App. 19a. With respect to ripeness, the Sixth Circuit relied on its earlier case in *Susan B. Anthony List v. Driehaus*, 525 F. App'x 415 (6th Cir. 2013), which remains pending in this Court. Pet. App. 10a-11a. The court noted that this case was easier than *Driehaus* because "the initial panels did not even refer the complaints against COAST and COAST Candidates PAC to the full Commission but, rather, dismissed the complaints outright for lack of probable cause." Pet. App. 11a. The court thus held that "COAST and COAST Candidates PAC cannot satisfy the likelihood of harm requirement for ripeness . . . ." *Id.*

With respect to standing, the Sixth Circuit held that Petitioners could not demonstrate more than a subjective chill because "neither the Commission nor its members had taken any specific actions suggesting that the plaintiffs' alleged self-censorship was objectively reasonable." Pet. App. 16a. That the panel dismissed the complaints against COAST and

COAST Candidates PAC made "the chain of events upon which . . . future prosecution depends . . . far too attenuated to confer standing." Pet. App. 18a.

REASONS FOR DENYING THE WRIT

The Court should deny this petition notwithstanding the pendency of *Driehaus* for a simple reason: Here, the Commission found *no* probable cause that Petitioners' alleged speech violated the law, whereas there the Commission found probable cause with respect to the speech at issue and referred the case to the full Commission. The Commission believes that neither case is justiciable. But the finding of no probable cause here further weakens Petitioners' effort to invoke federal court jurisdiction. Given that difference, the Court could conclude that holding the petition for *Driehaus* is not warranted. In the alternative, Respondents have no objection to holding the petition pending this Court's decision in *Driehaus*.

I. BECAUSE THE PANEL FOUND NO PROBABLE CAUSE, ANY POSSIBLE FUTURE PROSECUTION IS PURELY SPECULATIVE

Even under Petitioners' own standard, the fact that the panel found no probable cause is fatal to their argument. Petitioners argue that to bring a challenge, they must demonstrate a "credible threat of prosecution." Pet. 10; *see Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). They further argue that "a pre-enforcement challenge is proper so long as (i) the plaintiff's speech is at least arguably proscribed by the law; and (ii) the law has neither fallen into desuetude nor been bindingly dis-

avowed by prosecutors." Pet. 14. The Commission disputes the correctness of those arguments, but, even assuming Petitioners' test, they have not established a justiciable case. That is because the prior probable-cause panels *dismissed* the complaints against Petitioners, preventing any further Commission proceedings or subsequent prosecution based on that speech. And Petitioners identify no reason why a similar complaint based on the same speech would not be dismissed just as the complaints were here.

Petitioners here thus have an even worse case for federal court review than the Petitioners in *Driehaus*, where the Commission did find probable cause based on previous "substantially similar" speech. Here, a panel of the Commission determined that there is no probable cause that Petitioners' past speech violated Ohio law. That fact makes it entirely speculative—indeed, makes it *less* likely—that anyone will file a complaint, that a panel will find probable cause, that the Commission will find the law to have been violated, or that a prosecutor will decide to prosecute. Each step is speculative, and therefore cannot form the basis for the "concrete and particularized and . . . actual or imminent" future injury that standing requires. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted).

II. ALTERNATIVELY, THE COURT MAY WISH TO HOLD THE PETITION PENDING ITS DECISION IN *DRIEHAUS*

Nevertheless, this Court's decision in *Driehaus* likely will provide additional guidance on the justiciability standards for bringing a pre-enforcement suit

challenging a law on constitutional grounds. Accordingly, Respondents have no objection to Petitioners' request that this case be held pending the outcome of *Driehaus* and disposed of as appropriate after that decision.

CONCLUSION

For the above reasons, the Court should deny the petition for certiorari. In the alternative, Respondents do not object to Petitioners' request that the Court hold this case for decision in *Susan B. Anthony List v. Driehaus*, Case No. 13-193, and dispose of it consistent with that decision.

Respectfully submitted,

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