No. ___

IN THE

Supreme Court of the United States

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

v.

OHIO ELECTIONS COMMISSION, BRYAN FELMET, JAYME P. SMOOT, DEGEE WILHELM, TERRANCE J. CONROY, LYNN A. GRIMSHAW KIMBERLY G. ALLISON AND HELEN E. BALCOLM,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. 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?

II. 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 may enforce the law manifestly disagree?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs-Appellants below, are COAST Candidates PAC and the Coalition Opposed to Additional Spending and Taxes ("COAST"). No corporation owns 10% or more of the stock of either COAST Candidates PAC or COAST.

Respondents, who were Defendants-Appellees below, are the Ohio Elections Commission and its Commissioners (Bryan Felmet, Jayme P. Smoot, Degee Wilhelm, Terrance J. Conroy, Lynn A. Grimshaw, Kimberly G. Allison and Helen E. Balcolm) in their official capacities.

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The Court of Appeals' opinion (Pet.App.1a) is available at 2013 WL 4829216. The District Court's opinion dismissing the Petitioners' complaint (Pet.App.24a) can be found at 2012 WL 4322517.

JURISDICTION

The Sixth Circuit entered judgment on September 11, 2013, and denied rehearing *en banc* on December 4, 2013. (Pet.App.22a.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appended are: the First Amendment (Pet.App37a) and Ohio Revised Code § 3517.22 (Pet.App.38a).

STATEMENT OF THE CASE

Nearly 70 years ago, Justice Robert Jackson recognized the trust that that the Founding Fathers placed in the wisdom and judgment of the people, as opposed to the state, when it came to judging political speech and debate:

> [t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field, every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.

Thomas v. Collins, 323 U.S. 516, 545-46 (1945)(Jackson, J., concurring). And this faith and reliance in the people and not in the state has repeatedly been ratified by this Court. *See, e.g., McIntyre v. Ohio Elec. Comm'n*, 514 U.S. 334, 348 n.11 (1995) ("Don't underestimate the common man. . . . [I]t is for them to decide what is 'responsible', what is valuable, and what is truth"); *United States v. Alvarez*, 567 U.S. ___, ___, 132 S. Ct. 2537, 2547 (2012)("Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth").

But instead of allowing the marketplace of ideas to work "by entrusting the people to judge what is true and what is false," *Citizens United v. Federal Elec. Comm'n*, 558 U.S. 310, ___ (2010), and giving "adequate 'breathing space' to the freedoms protected by the First Amendment," *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988), the State of Ohio has formed and established the Ohio Elections Commission to serve as a modern-day inquisition so as regulate and adjudicate the truthfulness *vel non* of core political speech. For any person may contend that a political opponent's speech is false and commence adversarial proceedings against that opponent before the Commission (and usually doing so just before the pertinent election). Yet a person or an organization subject to such adversarial proceedings must then divert time, energy and resources away from their political endeavors at a critical period in order to defend and justify the content of their political speech before the Commission – be it at a probable cause hearing, or complying with broad and expansive discovery, or,

ultimately, a final adjudicatory hearing before the Commission.

And the impact of any person contending that a political opponent's speech is false and calling upon the state to adjudicate the truthfulness *vel non* thereof does not end there. For in Ohio, it is also a criminal offense to make a knowingly or recklessly "false" statement about a political candidate or ballot initiative. Petitioners are (i) an advocacy group that regularly takes positions on ballot issues and candidates through various media; and (ii) a political action committee that was wrongfully accused before the Ohio Elections Commission of publishing a false political speech by a political opponent and, thus, had to expend time, energy and resources to defend itself at a hearing before a panel of the Commission.

But those involved in the political process, including Petitioners, can always avoid being subjected to the adversarial process before the Commission and the attendant expenditure of time, energy and resources, as well as the prospect of potential criminal liaibilty: shy from provocative speech that, while not false in the considered opinion of the speaker, might nonetheless be challenged as false by political opponents.

Despite these concrete injuries, the courts below dismissed the lawsuit on jurisdictional grounds, finding neither of the two organizations herein suffered a cognizable injury or harm so as to give them standing or to make their facial challenge ripe because (i) it was not *certain* that the groups would again be subjected to enforcement action if they repeated their speech; (ii) the elections commission

had not reached a *final* determination on whether their speech was unlawful; and (iii) the *groups* maintained that their statements were true. While directly contrary to the approach taken by this Court and the other Circuits, that holding was in accord with the Sixth Circuit's uniquely restrictive approach to pre-enforcement review under the First Amendment.

1. The Electorate of the City Of Cincinnati, Through an Initiative Petition, Sought To Restrain an Ill-Conceived and Financially Unsound Project. For several years, certain so-called leaders of the City of Cincinnati had been attempting to impose upon the taxpayers of the City an ill-conceived and financially unsound project of introducing streetcars within the City of Cincinnati. Despite polls indicating strong public opposition to the plans to proceed with introducing streetcars within the City of Cincinnati, these leaders continued to try to force such streetcars upon an unwilling public.

When these so-called leaders would not respect the wishes of the taxpayers, the people resorted to the one refuge which they retained – an initiative petition to amend the charter of the City of Cincinnati to curtail such wasteful efforts. Thus, in 2011, opponents to the ill-conceived and financially unsound project of streetcars obtained over 7,468 valid signatures of voters in the City of Cincinnati to place on the ballot a proposed charter amendment to block construction of the streetcars in Cincinnati. This issue appeared on the ballot as Issue 48 at the

general election held in November 2011. (Pet.App.4a-5a).

2. COAST Engages In Core Political Speech Regarding Issue 48. During the course of the campaign on Issue 48, COAST posted various "tweets" on its twitter account. These tweets generally involved comments on the financial and political situation within the City of Cincinnati and related to the then on-going campaign on Issue 48. (Pet.App.4a). Specifically, the subject tweets made statements regarding the City of Cincinnati's fire departments' services being browned out or reduced because funding issues related to the streetcar project.

3. A Political Opponent to the Political Speech of COAST Initiates Proceedings With the Ohio Election Commission Against COAST Candidates PAC Over the Tweets. In the closing days of the campaign on Issue 48, an organization entitled Cincinnatians For Progress filed a complaint with the Ohio Elections Commission against COAST Candidates PAC, claiming that the tweets posted on the account of COAST violated Ohio Rev. Code § 3517.22(B)(2). (Pet.App.5a.) That provision makes it a crime "to "[p]ost, 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." The OEC is empowered to investigate complaints under those provisions, which may be filed by "any person"; if the OEC finds

a violation, it "shall refer" it to prosecutors. Ohio Rev. Code §§ 3517.153-3517.157.

Even though the alleged false statements posted on COAST's twitter account occurred as far back as September 8, 2011, and Cincinnatians For Progress received a letter dated October 13, 2011, from the Cincinnati city manager to support its claim, Cincinnatians For Progress did not seek to dispute or refute the tweets through more speech in the marketplace of ideas; instead, Cincinnatians For Progress waited until October 28, 2011 – little more than a week before the election – to file its complaint with the OEC. (Pet.App.4a-5a).

4. COAST and COAST Candidates PAC Sue In Order To Challenge the Constitutionality of the False Political Statement Statute. On November 1, 2011, while the complaint against COAST Candidates PAC was pending before the OEC, both COAST and COAST Candidates PAC filed a federal lawsuit challenging the Ohio law on First Amendment grounds. (Pet.App.6a.) Even though COAST, as an entity separate and distinct from COAST Candidates PAC, was not a party to then on-going OEC proceedings, COAST knew that the tweets were made by it and that Cincinnatians For Progress had simply named the wrong party in its complaint with the OEC. Thus, COAST recognized that once this fact became known, Cincinnatians For Progress would likely file another complaint with the OEC concerning the tweets but naming COAST instead of COAST Candidates PAC.

5. District Court Stays All Proceedings Pursuant to *Younger*. The day following the filing of the federal lawsuit, the District Court conducted a telephone conference with counsel for the parties concerning a motion filed on behalf of both COAST and COAST Candidates PAC seeking a temporary restraining order and preliminary injunction against enforcement of the statute. Even though there were not any then-pending state proceedings against COAST, the District Court accepted the argument and contention posited by OEC that any proceedings in federal court should be stayed pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). (Pet.App.6a). Thus, the District Court denied the request for a temporary restraining order and stayed all further proceedings.

6. Following the OEC's Dismissal of the Complaint Against COAST Candidates PAC, Cincinnatians For Progress Files a New Complaint Against COAST as the Actual Author of the Tweets. A probable cause hearing was held before a panel of the OEC to review the complaint filed by Cincinnatians For Progress against COAST Candidates PAC, together with any evidence contra and argument of counsel for both parties. (Pet.App.5a). Ultimately, this panel dismissed the complaint against COAST Candidates PAC though the indication or statements by one or more members of the panel indicated that the dismissal was based upon the fact that Cincinnatians For Progress had filed the complaint against the wrong party, *i.e.*, that the twitter account at issue was not the account of COAST Candidates PAC but, instead, was the twitter account of COAST.

Cincinnatians For Progress responded to the dismissal with the filing with the OEC of a second complaint concerning the statements made in the tweets. (Pet.App.5a). As COAST recognized when it filed the federal lawsuit, *see supra*, Cincinnatians For Progress, upon learning that it had named the wrong party in the first OEC proceedings, repeated its allegations that the tweets violated the statute but named COAST, as opposed to COAST Candidates PAC, in the second complaint with the OEC.

7. The District Court Lifts the Stay and Dismisses the Lawsuit. Ultimately, a panel of the OEC also dismissed the second complaint that Cincinnatians For Progress had filed over the tweets. As a result thereof, the District Court vacated the stay it has previously entered pursuant to *Younger*. (Pet.App.6a).

Following briefing, the District Court ultimately dismissed the lawsuit which had been filed by both COAST and COAST Candidates PAC. Even though the legal theories and factual situation vis-à-vis COAST and COAST Candidates PAC were distinctly different when the federal law suit was commenced, the District Court treated them as a unitary entity. And relying upon precedent of the Sixth Circuit, the District Court concluded that COAST and COAST Candidates PAC lacked standing because, according to the District Court, "Plaintiffs have failed to demonstrate something 'more' than a subjective allegation of chill in this case" and that "Plaintiffs have not shown that there is a credible threat of prosecution under Section 3517.22(B)(2)." (Pet.App.33a.)

8. The Sixth Circuit Affirms. The Sixth Circuit affirmed. The panel concluded that COAST and COAST Candidates PAC had not suffered any cognizable injury or harm sufficient to give them standing or to make their claims ripe. Specifically, even though a complaint alleging a violation of the statute had already been filed with the OEC and a probable cause hearing was forthcoming (all of which formed the basis for the District Court to invoke *Younger* abstention), the Sixth Circuit concluded, in reliance upon Circuit precedent, that any claimed chill of speech was purely subjective because "neither the Commission nor its members had taken any specific actions suggesting that the plaintiffs' alleged self-censorship was objectively reasonable." (PetApp. 16a (citing *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602 (6th Cir. 2008)). And similarly relying upon the recent Circuit precedent of *Susan B. Anthony List v. Driehaus*, Nos. 11-3894 & 11-3925, 2013 WL 1942821 (6th Cir. May 13, 2013), *cert. granted*, ___ U.S. ___, 134 S.Ct. 895 (2014)(oral argument scheduled for April 22, 2014), the panel similarly concluded that any harm or injury suffered by COAST and COAST Candidates PAC was not sufficient so as to make ripe their facial challenge to the statute. (Pet.App.10a-11a.)

The panel thus ruled that, even though the OEC may call upon a person to defend himself or herself at a probable cause hearing held before a panel of the OEC, being subjected to such a process was irrelevant because the proceedings before the OEC had not progressed to where either COAST or COAST Candidates PAC had actually been "prosecuted for violating section 3517.22(B)(2)."

(Pet.App. 20a-21a.) Again, relying upon its *Driehaus* decision, the panel posited that "a probable cause determination by the Commission 'is not a concrete application of state law that enables [a party] to claim that the law has been enforced against it." (Pet.App. 20a-21a.)

REASONS FOR GRANTING THE PETITION

1. **The Questions Presented Are Already Before the Court.** In *Susan B. Anthony List v. Driehaus*, Case No. 13-193 (oral argument scheduled for April 22, 2014), this Court granted certiorari on the same questions presented herein. Thus, if the Court concludes in that case that the Sixth Circuit erred in its holding concern the injury or harm required to make a pre-enforcement claim under the First Amendment justiciable, then, the Sixth Circuit also erred in similarly holding in this case.

2. **The Sixth Circuit Has Irreconcilably Departed From Seven Other Circuits By Erecting Substantial Hurdles to Review of Speech-Suppressive Laws.** Standing and ripeness in a First Amendment challenge is satisfied if the speaker faces a "credible threat of prosecution." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). The speaker need not "undergo a criminal prosecution" before seeking relief. *Doe v. Bolton*, 410 U.S. 179, 188 (1973). But the Sixth Circuit, although paying lip service to the "credible threat" principle, applies a standard for satisfying it that sharply departs from its sister Circuits. Indeed, that court has effectively converted the standard into one of "*particularized* and *certain* threat of *successful* prosecution."

The precedent of the Sixth Circuit essentially requires that, in order to bring a pre-enforcement challenge to a statute touching upon or regulating speech, a speaker must prove to a *near-certainty* that his proposed speech *actually violates* the statute and that he would be *successfully prosecuted* under that statute. *E.g.*, *Fieger v. Mich. Sup. Ct.*, 553 F.3d 955, 967 (6th Cir. 2009) (attorney must "present evidence" that "Michigan Supreme Court would … impose … sanctions" under "civility" rule); *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 610 (6th Cir. 2008)("The record is silent as to whether the school district … would have punished Morrison for protected speech in violation of its policy."); *Susan B. Anthony List v. Driehaus*, Nos. 11-3894 & 11-3925, 2013 WL 1942821 (6th Cir. May 13, 2013)(in order to establish "an imminent threat of prosecution" to create cognizable injury or harm, plaintiff must establish government enforcers adopted "a 'definitive statement of position' [or] a "definitive ruling or regulation' that establishes an imminent enforcement threat" with respect to specific conduct at issue); c*f. Briggs v. Ohio Elections Comm'n*, 61 F.3d 487 (6th Cir. 1995) (allowing challenge only *after* OEC found speaker guilty under false-statement law); *Berry v. Schmitt*, 688 F.3d 290, 297 (6th Cir. 2012)(credible threat of enforcement existed when bar association sent "[a] warning letter [that] unequivocally stated that [plaintiff's previous statements] had violated the rule and essentially cautioned him not to let it happen again" and plaintiff wanted to engage speech similar to that which prompted the letter).

In practice, this means that a speaker may pursue a "*pre-enforcement*" challenge only *post-enforcement* (because authorities do not issue prospective or preemptive "definitive" statements about whether conduct is unlawful). This test is irreconcilable with that recognized and used in seven other Circuits:

- *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996): where a "non-moribund" law arguably proscribes speech, "courts will assume a credible threat of prosecution in the absence of compelling contrary evidence" like disavowal by state authorities. *Id.* at 15. "[A] pre-enforcement facial challenge to a statute's constitutionality is entirely appropriate unless the state can convincingly demonstrate that the statute is moribund or that it simply will not be enforced." *Id.* at 16.
- *Majors v. Abell*, 317 F.3d 719 (7th Cir. 2003): "[a] plaintiff who mounts a pre-enforcement challenge to a statute that he claims violates his freedom of speech need not show that the authorities have threatened to prosecute him; the threat is latent in the existence of the statute." (Citations omitted). *Id.* at 721. If the statute "arguably covers" intended speech, "and so may deter constitutionally protected expression …, there is standing." *Id.*
- *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999): the First Circuit's presumption "is particularly appropriate when the presence of a statute

tends to chill the exercise of First Amendment rights." *Id.* at 710. "A non-moribund statute that 'facially restricts expressive activity by the class to which the plaintiff belongs' presents such a credible threat, and a case or controversy thus exists in the absence of compelling evidence to the contrary." *Id.*

- *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481 (8th Cir. 2006): "[w]hen a statute is challenged by a party who is a target or object of the statute's prohibitions, 'there is ordinarily little question that the [statute] has caused him injury.'" *Id.* at 485 (quoting *Minn. Citizens Concerned for Life v. Fed. Election Comm'n,* 113 F.3d 129, 131 (8th Cir. 1997)). Even though plaintiffs "ha[d] neither violated the Minnesota Statutes nor been threatened by Appellees with prosecution," yet a credible threat existed. *Id.* at 485. The statute in question was not "dormant" and that the state had "not disavowed an intent to enforce" it. *Id.* at 485-86.
- *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003): "if the plaintiff's intended speech arguably falls within the statute's reach," then the speaker may "suffe[r] the constitutionally recognized injury of self-censorship" and bring suit. *Id.* at 1095.
- *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000): even when the State argued that it "has no intention of suing VRLC," so long as there was a

"reasonable enough" construction under which the plaintiff's speech was proscribed, it "may legitimately fear that it will face enforcement of the statute by the State brandishing" it. *Id.* at 383.

- *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995): pre-enforcement suit could proceed even though it was clear that the plaintiffs were "not faced with any present danger of an enforcement proceeding" because the agency was deadlocked. *Id.* at 603. A credible threat still existed because "[n]othing … prevent[ed] the Commission from enforcing its rule at any time with, perhaps, another change of mind [of a Commissioner]." *Id.* at 603-04; *see Seegars v. Gonzales*, 396 F.3d 1248, 1252, 1253 (D.C. Cir. 2005)(in First Amendment cases, it suffices that "plaintiffs' intended behavior is covered by the statute and the law is generally enforced").

In sum, the First, Second, Fourth, Seventh, Eighth, Ninth, and D.C. Circuits all agree that, in the First Amendment context, 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 disavowed by prosecutors.

3. **On Nearly Identical Facts, The Eighth Circuit Allowed a Pre-Enforcement Challenge to a Law Prohibiting False Political Speech.** In *281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. 2011), the Eighth Circuit addressed a challenge to Minnesota's false political speech law, which (like

Ohio's) forbids dissemination of knowingly or recklessly false statements in campaigns. Under the Minnesota law, like the Ohio law, any person may file a complaint alleging violation of the provision; county attorneys may choose to bring criminal charges after administrative proceedings end. *See id.* at 625. The plaintiff in *281 Care Committee* was an organization opposed to a school-funding ballot initiative; a school official told the media that the school district was "investigating" the organization for spreading "false" information about the initiative. *Id.* at 626. The group was thereafter "chilled from … vigorously participating in the debate surrounding school-funding ballot initiatives in Minnesota." *Id.*

In accord with the majority rule, the Eighth Circuit found the plaintiffs suffered a sufficient injury to make its pre-enforcement challenge justiciability: "[t]o establish injury in fact for a First Amendment challenge …, a plaintiff need not have been actually prosecuted or threatened with prosecution." *Id.* at 627. "Rather, the plaintiff needs only to establish that he would like to engage in arguably protected speech, but that he is chilled from doing so by the existence of the statute." *Id.*

Additionally, the Eighth Circuit recognized that it was immaterial that the plaintiffs had "not alleged that they wish to knowingly make false statements." *Id.* The point was that they "*have* alleged that they wish to engage in conduct that could reasonably be interpreted as making false statements"; that was "enough to establish that [their] decision to chill their speech was objectively reasonable." *Id.* Determining political "truth" leaves considerable "room for

mistake and genuine disagreement," and thus for allegations of wrongdoing by "political opponents who are free to file complaints under the statute." *Id.* at 630. And even dismissed complaints impose expenditure of time, energy and resources, including "attorney fees." *Id.*

And similar with respect to ripeness, the Eighth Circuit reasoned that "the issue presented requires no further factual development, is largely a legal question, and chills allegedly protected First Amendment expression." *Id.* at 631. It was therefore ripe. *See id.*

On each of these issues, the decision below directly diverged from *281 Care Committee*. Contrary to the Eighth Circuit, the Sixth essentially held that COAST and COAST Candidates PAC would need to show that they were *actually prosecuted or explicitly threatened with prosecution*, for the precise speech in which they wished to engage and there is no other way by which one can chill one's speech, a position explicitly rejected by the Eighth Circuit, 638 F.3d at 627, even though COAST Candidates PAC was already being subject to enforcement proceedings (for speech which COAST had actually made).

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's final disposition of *Susan B. Anthony List v. Driehaus*, Case No. 13-193, and then disposed of as appropriate.

Respectfully submitted,

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March 4, 2014

APPENDIX

APPENDIX

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Appendix A

COAST CANDIDATES PAC and
COALITION OPPOSED TO ADDITIONAL SPENDING & TAXES,
Plaintiffs-Appellants,
v.
OHIO ELECTIONS COMMISSION, BRIAN FELMET, JAYME P. SMOOT, DEGEE WILHELM, TERRANCE J. CONROY, LYNN A. GRIMSHAW, KIMBERLY G. ALLISON, and HELEN E. BALCOLM,
Defendants-Appellees.

No. 12-4158
United States Court of Appeals, Sixth Circuit
September 11, 2013

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Before: GIBBONS and STRANCH, Circuit Judges; HOOD, District Judge.[*]

JULIA SMITH GIBBONS, Circuit Judge.

In 2011, the general election ballot for the City of Cincinnati included a proposed amendment to the

city charter that would have blocked the construction of a streetcar system in Cincinnati. During the campaign, the Coalition Opposed to Additional Spending & Taxes ("COAST"), a group that supported the amendment, posted several "tweets" on its Twitter feed about funding for the streetcar system. Cincinnatians for Progress, a group that opposed the amendment, filed complaints with the Ohio Elections Commission ("the Commission") against COAST and COAST Candidates PAC, arguing that the "tweets" violated section 3517.22(B)(2) of the Ohio Revised Code, which prohibits the dissemination of false statements in connection with a ballot proposition or issue. COAST and COAST Candidates PAC filed suit against the Commission and its members in federal district court seeking a declaration that section 3517.22(B)(2) is unconstitutional on its face and as applied to them and asking the court to enjoin its enforcement. The district court granted the defendants' motion to dismiss the complaint, holding that the plaintiffs lack standing to sue. We affirm.

I.

The Commission, an administrative body created under Chapter 3517 of the Ohio Revised Code, is charged with the enforcement of Ohio election laws, including section 3517.22.

Section 3517.22 provides that:

> (B) 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 outcome 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 Ann. § 3517.22 (West 2013).

No person can be prosecuted for violating Section 3517.22 unless a complaint first has been filed with the Commission. *Id.* at § 3517.153(C). A complaint may be filed by the secretary of state, an official at the board of elections, or any person who submits an affidavit based on personal knowledge. *Id.* at § 3517.153(A). If a complaint alleging a violation of Section 3517.22 is filed ninety or fewer days before a general election, a panel of at least three members of the Commission must hold an expedited hearing in order "to determine whether there is probable cause to refer the matter to the full commission for a hearing." *Id.* at § 3517.156(A); *see also* §§ 3517.154(A)(2)(a) & 3517.156(B)(1).

At the expedited hearing, the panel can take one of three actions. It can (1) dismiss the complaint, (2) find that there is probable cause to refer the matter to the full Commission for further consideration, or (3) find that the evidence is insufficient for the panel to make a probable cause determination, in which case it must request that an attorney further investigate the complaint and refer the matter to the full Commission for a hearing. Ohio Rev. Code Ann. § 3517.156(C); Ohio Admin. Code § 3517-1-10(D)(3) (2013). If the matter is referred to the full Commission, it must hold a hearing to "determine whether . . . the violation alleged in the complaint has occurred." Ohio Rev. Code Ann. § 3517.155(A)(1) (West 2013). If the Commission finds that a violation of section 3517.22 has occurred, it must refer the matter to the county prosecutor. *Id.* at § 3517.155(D)(2); Ohio Admin. Code § 3517-1-14(C) (2013). It cannot impose a fine. Ohio Rev. Code Ann. § 3517.155(D)(2) (West 2013). A party may appeal an adverse determination of the Commission to the county's court of common pleas. *Id.* at §§ 119.12 & 3517.157(D).

COAST is an unincorporated association of individuals whose activities are focused in southwest Ohio. COAST Candidates PAC is a political action committee operated by COAST and registered with the Hamilton County Board of Elections. During the 2011 general election campaign, COAST posted "tweets" on its Twitter account in support of "Issue 48," the amendment to the city charter that would have blocked the construction of a streetcar system in

Cincinnati. 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."

On October 28, 2011, 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. Cincinnatians for Progress filed the complaint against COAST Candidates PAC, even though it was COAST that operated the Twitter feed at issue. On November 3, 2011, a panel of the Commission held an expedited hearing on the complaint. COAST Candidates PAC argued that it did not "tweet" the allegedly false comments and that, in any event, the comments were "100 percent true and certainly protected speech under the First Amendment." The panel found that there was no probable cause to believe that COAST Candidates PAC had violated the law and dismissed the complaint.

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.

Meanwhile, on November 1, 2011, COAST and COAST Candidates PAC sued the Commission and its members in federal district court seeking a declaration that section 3517.22(B)(2) is unconstitutional on its face and as applied to them and asking the court to enjoin its enforcement. They argued that their First Amendment rights were harmed because they "desire[d] to continue to disseminate and publish statements concerning Issue 48 in the days leading up the election, " but they refrained from doing so because they were afraid of being "dragged" before the Commission. They further argued that they wished to "disseminate [their] position[s] on various initiative matters appearing on the ballot" after the election but anticipated that they would continue to temper their speech due to their concern about future enforcement actions.

COAST and COAST Candidates PAC filed a motion for a temporary restraining order and preliminary injunction. On November 2, 2011, the district court denied the motion and stayed the proceedings pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). The district court lifted the stay on December 22, 2011. Shortly thereafter, the Commission and its members moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) on mootness, ripeness, and standing grounds.

The district court granted the motion to dismiss, holding that COAST and COAST Candidates PAC cannot satisfy the injury-in-fact requirement for constitutional standing. The district court noted that

COAST and COAST Candidates PAC identify their injury as "chilled speech, " but that subjective chill, without more, does not establish actual or imminent objective harm. Furthermore, the district court observed that COAST and COAST Candidates PAC cannot demonstrate a credible threat of prosecution under section 3517.22(B)(2).

II.

The district court granted the defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Challenges to subject matter jurisdiction are classified as facial or factual attacks. *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 440 (6th Cir. 2012). "A facial attack is a challenge to the sufficiency of the pleading itself." *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994) (emphasis omitted). When evaluating a facial attack, the district court takes the allegations in the complaint as true, and if those allegations establish federal claims, then jurisdiction exists. *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007). A factual attack "is not a challenge to the sufficiency of the pleading's allegations, but a challenge to the factual existence of subject matter jurisdiction." *Ritchie*, 15 F.3d at 598. When a factual dispute arises, "the district court must . . .weigh the conflicting evidence to arrive at the factual predicate that subject matter jurisdiction exists or does not exist." *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). The district court "has wide discretion to allow affidavits, documents and

even a limited evidentiary hearing to resolve disputed jurisdictional facts." *Id.* This court typically reviews *de novo* a district court's decision to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1). *Howard v. Whitbeck*, 382 F.3d 633, 636 (6th Cir. 2004). However, when a Rule 12(b)(1) motion involves a factual attack, this court reviews the district court's factual findings for clear error. *Id.*

The Commission and its members argue that the district court correctly characterized their argument as a factual attack on jurisdiction and, therefore, we should not disturb the district court's factual findings unless they are clearly erroneous. COAST and COAST Candidates PAC point out that the factual issues underlying the jurisdictional question are not in dispute and contend that we should review the legal question of whether they have standing *de novo*. Although the district court characterized the defendants' argument as a factual attack, it held, based on the allegations in the complaint, that COAST and COAST Candidates PAC do not meet the requirements for constitutional standing. Where the district court essentially makes no factual findings in deciding that it lacks jurisdiction, we treat a Rule 12(b)(1) motion as a facial attack and review *de novo*. *Kohl v. United States*, 699 F.3d 935, 939 n.1 (6th Cir. 2012); *see also Howard*, 382 F.3d at 636-37 ("While this is a 'factual' challenge, as the parties submitted exhibits relating to the state-court proceedings, the district court made no factual findings that would require deference.").

III.

A.

The district court dismissed the plaintiffs' complaint on the basis of standing. On appeal, the parties focus primarily on standing. Therefore, we decide the case on this basis. However, we note that our recent decision in *Susan B. Anthony List v. Driehaus*, Nos. 11-3894 & 11-3925, 2013 WL 1942821 (6th Cir. May 13, 2013), another Ohio election law case to which COAST was a party, indicates that the plaintiffs' complaint could also be dismissed based on ripeness.

"Like standing, ripeness 'is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.'" *Warshak v. United States*, 532 F.3d 521, 525 (6th Cir. 2008) (*en banc*) (quoting *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003)). "[T]he ripeness doctrine poses 'a question of timing' and counsels against resolving a case that is 'anchored in future events that may not occur as anticipated, or at all.'" *Driehaus*, 2013 WL 1942821, at *3 (quoting *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997)). "Three factors guide the ripeness inquiry: '(1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings.'" *Berry v. Schmitt*, 688 F.3d 290, 298

(6th Cir. 2012) (quoting *Grace Cmty. Church v. Lenox Twp.*, 544 F.3d 609, 615 (6th Cir. 2008)).

In *Driehaus*, Susan B. Anthony List ("SBA List") and COAST sued the Commission, challenging the constitutionality of provisions of Ohio's false statement statute dealing with candidates for public office. *Driehaus*, 2013 WL 1942821, at *1. A complaint had been filed with the Commission against SBA List, and a three-member panel determined that there was probable cause to believe that SBA List violated the law, but the complaint was withdrawn before the full Commission could reach a final decision or penalize SBA List. *Id.* at *1-2. We held that SBA List could not demonstrate the requirements for ripeness, including the likelihood that the harm alleged would come to pass. We observed that "the Commission never found that SBA List violated Ohio's false-statement law" and the Commission's past actions did not demonstrate that it was likely to threaten SBA List with prosecution in the future. *Id.* at *5. We explained:

> The Commission's probable-cause determination was not a final adjudication, a finding of a violation, or even a warning that SBA List's conduct violated Ohio law. While it green-lighted further investigation, the Commission expressed no opinion about the application of Ohio law to SBA List's speech. SBA List does not suggest that the probable-cause finding would carry any weight in the future in this hearing or any other. And its contention that a preliminary

> assessment that a violation may have occurred establishes the threat of future harm finds no support in our cases. No sword of Damocles dangles over SBA List to justify its fears.

Id. Thus, we held that SBA List's claims were not ripe for review.[1]

Our reasoning in *Driehaus* applies even more forcefully here, where 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. Because COAST and COAST Candidates PAC cannot satisfy the likelihood of harm requirement for ripeness, their lawsuit could be dismissed based on ripeness alone. However, because the district court based its decision on standing and the parties focus on this issue on appeal, we consider whether COAST and COAST Candidates PAC have standing to sue.

B.

"Article III of the Constitution gives federal courts subject matter jurisdiction over actual cases or controversies, neither of which exists unless a plaintiff establishes his standing to sue." *Murray v. U.S. Dep't of Treasury*, 681 F.3d 744, 748 (6th Cir. 2012). "Because federal courts sit solely to decide on the rights of individuals, standing is the threshold question in every federal case." *Id.* (internal quotation marks, alterations, and citations omitted).

In order to establish Article III standing, a plaintiff must meet three requirements:

> First, the plaintiff must have suffered an injury in fact an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal quotation marks, alterations, and citations omitted). Each element is "an indispensable part of the plaintiff's case" and "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Id.* at 561. A plaintiff's standing to sue is determined "as of the time the complaint is filed." *Cleveland Branch, N.A.A.C.P. v. City of Parma*, 263 F.3d 513, 524 (6th Cir. 2001).

COAST and COAST Candidates PAC bring suit pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, "which provides the mechanism for seeking pre-enforcement review of a statute." *Magaw*, 132 F.3d at 279. "Where a plaintiff alleges that state

action has chilled his speech, 'it is not necessary that [he] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.'" *Berry*, 688 F.3d at 296 (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). However, a plaintiff seeking pre-enforcement review[2] "must still satisfy the injury-in-fact requirement by showing: (1) 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, ' and (2) 'a credible threat of prosecution thereunder.'" *Id.* (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

Section 3517.22(B)(2) prohibits a person from disseminating false statements, either knowing the statements to be false or with reckless disregard for their falsity, in connection with a ballot proposition or issue. COAST and COAST Candidates PAC do not claim that they intend to violate the statute by disseminating false statements, which is not a constitutionally protected activity. *Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 577 (6th Cir. 1991) ("[F]alse speech, even political speech, does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth."). Rather, they claim that they desired to make true statements about Issue 48 prior to the November 2011 election and to disseminate their positions "on various initiative matters appearing on the ballot" after the election. They argue that their First Amendment right to engage in protected political

speech has been harmed because they refrained from and continue to refrain from making true statements on political issues due to their fear of being "dragged" before the Commission. Thus, they allege that their speech both before and after the November 2011 election has been chilled.[3]

"[C]onstitutional violations may arise from the deterrent, or 'chilling, ' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972). In *Laird*, the Supreme Court considered

> whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose.

Id. at 10. The Court held that the plaintiffs could not demonstrate that they had suffered an injury sufficient to confer standing because the alleged chill arose "merely from the [plaintiffs'] knowledge that a governmental agency was engaged in certain activities [and] from the [plaintiffs'] concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to [the plaintiffs]." *Id.*

at 11. The Court observed that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.* at 13-14.

In *Morrison v. Board of Education of Boyd County*, we considered "what 'more' might be required to substantiate an otherwise-subjective allegation of chill, such that a litigant would demonstrate a proper injury-in-fact." 521 F.3d 602, 609 (6th Cir. 2008) (footnote omitted). Surveying sister circuits' precedent, we noted that "[a] non-exhaustive list includes the following: the issuance of a temporary restraining order; an eight-month investigation into the activities and beliefs of the plaintiffs by Department of Housing and Urban Development officials; and numerous alleged seizures of membership lists and other property belonging to the plaintiffs." *Id.* (internal quotation marks and citations omitted). We concluded "that for purposes of standing, subjective chill requires some specific action on the part of the defendant in order for the litigant to demonstrate an injury-in-fact." *Id.*

In *Morrison*, the plaintiff, a high school student, believed that homosexuality is a sin and that he had a responsibility to tell others when their conduct conflicted with his conception of Christian morality. *Id.* at 605. He brought a claim against the school board, arguing that his speech was chilled by a school policy prohibiting students from making stigmatizing or insulting comments about other students' sexual orientation. *Id.* We held that the plaintiff's "choice to chill his own speech based on his perception that he

would be disciplined for speaking" did not constitute an injury in fact where "[t]he record [was] silent as to whether the school district threatened to punish or would have punished Morrison for protected speech in violation of its policy." *Id.* at 610. *Morrison* contrasts with *McGlone v. Bell*, in which we held that the plaintiff, an evangelical Christian who wished to speak on a college campus, could demonstrate that his speech was objectively chilled where school officials told him that he could not speak on campus without first obtaining a permit and, on one occasion, campus police threatened him with arrest if he did not stop speaking and leave campus. 681 F.3d 718, 729-31 (6th Cir. 2012).

COAST and COAST Candidates PAC argue that they have demonstrated more than subjective chill because at the time they filed their lawsuit, a complaint against COAST Candidates PAC was pending before the Commission and a complaint against COAST was imminent. Nonetheless, neither the Commission nor its members had taken any specific actions suggesting that the plaintiffs' alleged self-censorship was objectively reasonable. *See Morrison*, 521 F.3d at 609 (observing that the *defendant* must take a specific action against the litigant to demonstrate an injury in fact). Although Cincinnatians for Progress had filed complaints with the Commission against COAST Candidates PAC and later COAST, the defendants' actions did not indicate that Section 3517.22(B)(2) was likely to be enforced against the plaintiffs, and, in fact, the Commission dismissed the complaints for lack of

probable cause. Thus, here there is only subjective chill.

Furthermore, COAST and COAST Candidates PAC cannot demonstrate a likelihood that Section 3517.22(B)(2) will be enforced against them in the future. "A threatened injury must be certainly impending to constitute injury in fact." *White v. United States*, 601 F.3d 545, 553 (6th Cir. 2010) (internal quotation marks and citation omitted). Previous sanctions against a plaintiff "might be 'evidence bearing on whether there is a real and immediate threat of repeated injury, '" but "where the threat of repeated injury is speculative or tenuous, there is no standing to seek injunctive relief." *Grendell v. Ohio Supreme Court*, 252 F.3d 828, 833 (6th Cir. 2001) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)).

For example, in *Fieger v. Michigan Supreme Court*, the plaintiff, a Michigan attorney who twice had been charged with violating the "courtesy and civility" provisions of the Michigan Rules of Professional Conduct ("MRPC"), challenged the constitutionality of the provisions on their face. 553 F.3d 955, 957 (6th Cir. 2009). We held that the plaintiff could not demonstrate a reasonable threat of future sanction. *Id.* at 967. We observed that in order to demonstrate a palpable threat of future injury, plaintiffs challenging the disciplinary provisions would have to establish:

> (1) that they are now, or highly likely to be, speaking about a pending case; (2) that

> such speech will concern participants in that case and be vulgar, crude, or personally abusive, exposing them to sanctions under MRPC 3.5(c) or MRPC 6.5(a); (3) that the Michigan Supreme Court would, in its discretion, impose such sanctions; and (4) that the imposition of those sanctions would violate plaintiffs' First Amendment rights.

Id. We concluded "that such a chain of events is simply too attenuated to establish the injury in fact required to confer standing." *Id.*

Similarly, the chain of events upon which COAST's and COAST Candidates PAC's future prosecution depends is far too attenuated to confer standing. The district court observed that:

> the Commission itself cannot initiate any proceeding or investigate any person or entity on its own initiative. Instead, a complaint must be "by affidavit of any person, on personal knowledge, and subject to the penalties for perjury, or upon the filing of a complaint made by the secretary of state or an official at the board of elections." That means that Plaintiffs would need to make some statement in the future, then Cincinnatians for Progress, or some other group or individual, would need to file a groundless complaint against Plaintiffs, and Defendants would then fail to follow the provisions in Section 3517.22.[4]

(DE 26, Order, Page ID 371) Even if the Commission found that there was probable cause to believe that COAST or COAST Candidates PAC had violated section 3517.22(B)(2), the Commission could only make a recommendation to a county prosecutor, who would have discretion as to whether to proceed with prosecution. *See* Ohio Rev. Code Ann. § 3517.155(D)(2) (West 2013); Ohio Admin. Code § 3517-1-14(C) (2013). Thus, the threat of COAST's and COAST Candidates PAC's future injury "is highly conjectural, resting on a string of actions the occurrence of which is merely speculative." *Grendell*, 252 F.3d at 833.

Because COAST and COAST Candidates PAC cannot demonstrate "(1) an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and (2) a credible threat of prosecution thereunder, " they cannot establish an injury in fact sufficient to provide them with standing to bring their pre-enforcement challenge to Section 3517.22(B)(2). *See Berry*, 688 F.3d at 296 (internal quotation marks and citation omitted).

VI.

COAST and COAST Candidates PAC lack standing to bring their claims. Alternatively, their claims are not ripe for review. Therefore, we affirm the district court's dismissal of the plaintiffs' complaint. We also deny their motion[5] for the court to take judicial notice of a proposed *amicus* brief submitted to the district court by Ohio Attorney

General Michael DeWine because we find that the issues in this case can be decided without reference to the brief or the material contained therein.

Notes:

[*] The Honorable Denise Page Hood, United States District Judge for the Eastern District of Michigan, sitting by designation.

[1] We also held that COAST's claims, which " stemm[ed] from the mere possibility that Ohio law will be pressed against it" were "even more speculative than SBA List's, " because COAST had never been involved in a Commission proceeding and no individual had enforced or threatened to enforce the challenged laws against it. *Driehaus*, 2013 WL 1942821, at *8.

[2] The plaintiffs characterize COAST's claim as a pre-enforcement challenge. However, they argue that the complaint against COAST Candidates PAC was pending before the Commission at the time they filed suit and, therefore, the Commission enforced Section 3517.22(B)(2) against COAST Candidates PAC. This is incorrect. As previously discussed, the Commission took no action against COAST or COAST Candidates PAC either before or after they filed suit in district court and instead dismissed the complaints against them for lack of probable cause. Neither plaintiff was prosecuted for violating section 3517.22(B)(2), so both plaintiffs' claims are best characterized as pre-enforcement challenges. *See*

Driehaus, 2013 WL 1942821, at *5 (observing that a probable cause determination by the Commission "is not a concrete application of state law that enables [a party] to claim that the law has been enforced against it") (internal quotation marks and citation omitted).

[3] For purposes of standing analysis, "any distinction between claims of past and future (i.e., forward-looking) chill lacks purpose, " and, therefore, we decline to make such a distinction. *Morrison v. Bd. of Educ.*, 521 F.3d 602, 609 n.7. (6th Cir. 2008).

[4] That is, the Commission would have to punish COAST and COAST Candidates PAC for true, protected speech instead of the false, unprotected speech prohibited by section 3517.22.

[5] On March 27, 2013, COAST and COAST Candidates PAC filed a motion for the court to take judicial notice a proposed *amicus* brief submitted to the district court by Ohio Attorney General Michael DeWine. The brief, which was filed in support of neither party, expresses "serious concerns about the constitutionality of Ohio's generalized 'false statement' law subsections." We deferred a ruling until after the case was heard on the merits.

Appendix B

COAST CANDIDATES PAC and
COALITION OPPOSED TO ADDITIONAL SPENDING & TAXES,
Plaintiffs-Appellants,
v.
OHIO ELECTIONS COMMISSION, BRIAN FELMET, JAYME P. SMOOT, DEGEE WILHELM, TERRANCE J. CONROY, LYNN A. GRIMSHAW, KIMBERLY G. ALLISON, and HELEN E. BALCOLM,
Defendants-Appellees.

No. 12-4158
United States Court of Appeals, Sixth Circuit
December 4, 2013

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Before: GIBBONS and STRANCH, Circuit Judges; HOOD, District Judge.[*]

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court,[**] and no judge of this court having requested a vote on the

suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

Notes:

[*] Hon. Denise Page Hood, United States District Judge for the Eastern District of Michigan, sitting by designation.

[**] Judge Cook recused herself from participation in this ruling.

Appendix C

Coast Candidates PAC, *et al.*, Plaintiffs,
v.
Ohio Elections Commission, *et al.*, Defendants.

No. 1:11cv775

United States District Court, S.D. Ohio,
Western Division.
September 20, 2012

ORDER

MICHAEL R. BARRETT, District Judge.

This matter is before the Court upon Defendants' Motion to Dismiss. (Doc. 17.) Plaintiffs have filed a Response in Opposition (Doc. 21) and Defendants have filed a Reply (Doc. 24).

I. BACKGROUND

Plaintiffs are the Coalition Opposed to Additional Spending & Taxes ("COAST") and COAST Candidates PAC. COAST is an unincorporated association of individuals, and COAST Candidates PAC is a political action committee registered with the Hamilton County Board of Elections. (Doc. 1, ¶¶ 9-10.) Defendants are the Ohio Elections Commission ("Commission") and its individually named members. The Commission is an administrative body created under Chapter 3517 of the Ohio Revised Code and charged with enforcement of various Ohio election

laws, including Section 3517.22(B)(2) of the Ohio Revised Code. (*Id.,* ¶ 11)

In its Complaint, COAST seeks a declaration that Section 3517.22(B)(2) is unconstitutional on its face and as applied to COAST, and an injunction enjoining the Commission from enforcing the statute against COAST. Section 3517.22 provides as follows:

> (B) 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 outcome 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).

When a complaint alleging a violation of Section 3517.22 is filed within ninety days of a general election, the Commission must convene a

three-member panel to hold an expedited hearing and "determine whether there is probable cause to refer the matter to the full commission for a hearing." Ohio Rev. Code §§ 3517.154(B), 3517.156. At the expedited hearing, the panel will make one the following determinations: (1) there is no probable cause and dismiss the complaint; (2) there is probable cause and refer the complaint to the full Commission; or (3) further investigation is necessary and request an investigator to investigate the complaint. Ohio Rev. Code § 3517.156(C).

If the panel determines there is probable cause, the Commission must hold a hearing within ten days after the complaint is referred to the full Commission. Ohio Rev. Code § 3517.156(C)(2). A party adversely affected by a final determination of the Commission may appeal the determination to a county court of common pleas under Section 119.12 of the Ohio Revised Code. Ohio Rev. Code § 3517.157(D).

In 2011, the general election ballot in Cincinnati included a proposed charter amendment ("Issue 48"), which would block construction of streetcars in Cincinnati. (Doc. 1, ¶¶ 19-20.) COAST "tweeted" comments on its Twitter account in support of Issue 48. (Id. ¶¶ 21-23.) For example, one tweet stated: "12.% of fire dept. browned out again today to pay for streetcar boondoggle that 62% think is a ways @CFGHistory YES ON 48 = No streetcar." (Doc. 1, Ex. A ¶ 28.)

On October 28, 2011, an organization opposed to Issue 48, Cincinnatians for Progress, filed a

complaint against COAST Candidates PAC before the Ohio Elections Commission. (Doc. 1-1.) The complaint stated that COAST Candidates PAC violated Section 3517.22(B) by making false statements in twenty of its "tweets." On November 4, 2011, a probable cause review panel of the Commission determined that there was no probable cause and dismissed the complaint against COAST Candidates PAC. (Doc. 17-1, Richter Aff., Ex. C-1.)

On November 7, 2011, Cincinnatians for Progress filed a second complaint with the Commission, naming COAST instead of COAST Candidates PAC, but alleging that the same twenty tweets violated Section 3517.22(B)(2). (*Id.,* Ex.D-1.) On November 17, 2011, the Commission determined that there was no probable cause and dismissed the second complaint. (*Id.,* Ex. G-1.)

On November 1, 2011, Plaintiffs filed their Complaint: (1) claiming a violation of their First Amendment rights based on the existence of Section 3517.22(B)(2) and the on-going threat of being hauled before the Ohio Elections Commission based upon the claim of someone that a statement concerning a ballot issue was false; and (2) seeking a declaration that Section 3517.22(B)(2) is facially unconstitutional, as well as applied to Plaintiffs. (Doc. 1.)[1]

II. ANALYSIS

A. Standard of Review

Defendants argue that Plaintiffs' claims should be dismissed based on ripeness, standing and

mootness. All of these issues are a question of subject matter jurisdiction, and therefore are properly analyzed under Federal Rule 12(b)(1). *Bigelow v. Michigan Dept. of Natural Res.,* 970 F.2d 154, 157 (6th Cir. 1992) ("If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed."); *Susan B. Anthony List v. Driehaus,* 805 F.Supp.2d 412, 419 (S.D. Ohio 2011) ("A motion to dismiss for lack of standing is properly analyzed under Rule 12(b)(1), since standing is thought of as a jurisdictional' matter, and a plaintiff's lack of standing is said to deprive a court of jurisdiction.'") (quoting *Ward v. Alt. Health Delivery Sys.* , 261 F.3d 624, 626 (6th Cir. 2001)); *League of Women Voters of Ohio v. Brunner,* 548 F.3d 463, 473 (6th Cir. 2008) (explaining that mootness implicates Article III's "case or controversy" requirement and is a jurisdictional requirement).

A motion pursuant to Federal Rule of Civil Procedure 12(b)(1) "can either attack the claim of jurisdiction on its face, in which case all allegations of the plaintiff must be considered as true, or it can attack the factual basis for jurisdiction, in which case the trial court must weigh the evidence and the plaintiff bears the burden of proving that jurisdiction exists." *DLX, Inc. v. Kentucky,* 381 F.3d 511, 516 (6th Cir. 2004). In this instance, Defendants attack the factual basis for jurisdiction. In deciding a challenge to the factual basis for jurisdiction, "a trial court has wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts." *Ohio Nat. Life*

Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990).

A. Mootness

"While standing restricts a party's capacity to bring a lawsuit at the time the complaint is filed, mootness restricts a party's capacity to bring a lawsuit throughout the course of the litigation." *Midwest Media Prop., L.L.C. v. Symmes Twp., Ohio,* 503 F.3d 456, 460 (6th Cir. 2007) (citing *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396-97 (1980)). Defendants argue that to the extent that Plaintiffs' claims are based upon the complaints which were previously filed against Plaintiffs, those claims are moot because those complaints were dismissed. The Court would agree, but Plaintiffs maintain that they are not bringing their claims as an as-applied challenge based on the past enforcement of Section 3517.22(B)(2). Instead, Plaintiffs have limited their claims to a preenforcement challenge and a facial challenge to Section 3517.22(B)(2). (See Doc. 21, at 19-20.)

With regards to Plaintiffs' pre-enforcement and facial challenge, the Supreme Court has "recognized that the capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are as applied' challenges as well as in the more typical case involving only facial attacks.'" *Federal Election Comm'n v. Wisconsin Right To Life, Inc.,* 551 U.S. 449, 463 (2007)(quoting *Storer v. Brown* , 415 U.S. 724, 737, n.8 (1974)). This exception to mootness "applies where (1) the

challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Id.* at 462 (quoting *Spencer v. Kemna* , 523 U.S. 1, 17 (1998)).

The Court finds that the first prong is satisfied because this is a legal dispute involving an election. *See Libertarian Party of Ohio v. Blackwell,* 462 F.3d 579, 584 (6th Cir. 2006) ("The first prong of this test is easily satisfied. Legal disputes involving election laws almost always take more time to resolve than the election cycle permits.").

As to the second prong, the Supreme Court has instructed that "the same controversy sufficiently likely to recur when a party has a reasonable expectation that it will again be subjected to the alleged illegality or will be subject to the threat of prosecution under the challenged law." 551 U.S. at 463 (quotations and citations omitted). Plaintiffs have alleged that they desire to continue to disseminate their position on various initiative matters appearing on the ballot; but that the existence of Section 3517.22(B)(2) and the threat of being brought before the Ohio Elections Commission will temper their speech. (Doc. 1, ¶¶ 43-46.) Therefore, the Court finds that Plaintiffs' claims, as plead in the Complaint, are not moot, and Defendants' Motion to Dismiss is DENIED on this basis.

B. Constitutional standing

"A plaintiff has constitutional standing if he: (1) shows a concrete and actual or imminent injury in fact; (2) demonstrates that the defendant's conduct caused the injury; and (3) shows that it is likely, as opposed to merely speculative, that a favorable decision will redress the injury." *Miller v. City of Cincinnati,* 622 F.3d 524, 531-32 (6th Cir. 2010), *cert. denied,* 131 S.Ct. 2875 (2011) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Constitutional standing is tested by the facts as they existed when the action was brought. *Cleveland Branch, N.A.A.C.P. v. City of Parma, OH,* 263 F.3d 513, 524 (6th Cir. 2001)(citing *Smith v. Sperling* , 354 U.S. 91, 93 n. 1 (1957)). Plaintiffs have identified their injury as their "chilled speech" which is caused by the existence of Section 3517.22(B)(2) and the threat of being brought before the Ohio Elections Commission.

"Where a plaintiff alleges that state action has chilled his speech, it is not necessary that [he] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.'" *Berry v. Schmitt,* 688 F.3d 290, 296 (6th Cir. 2012)(quoting *Steffel v. Thompson* , 415 U.S. 452, 459 (1974)). "However, a plaintiff must still satisfy the injury-in-fact requirement by showing: (1) an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute' and (2) a credible threat of prosecution thereunder.'"

Id. (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

At the outset, the Court notes that there is no argument that the political speech in this case is not "arguably affected with a constitutional interest." However, Defendants argue that Plaintiffs' speech was not proscribed by Section 3517.22(B)(2) because the statute only prohibits false speech, and Plaintiffs have not stated any intention to engage in false speech.[2] Plaintiffs respond that while they do not intend to engage in false speech, their speech has been chilled out of fear that any provocative statements might be challenged as false by political opponents. (See Doc. 22, Mark Miller Decl., ¶ 20.) However, as the Sixth Circuit has explained:

> With respect to the standing of First Amendment litigants, the Supreme Court is emphatic: "Allegations of a subjective chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird,* 408 U.S. at 13-14, 92 S.Ct. 2318; *see also Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (requiring a harm to be "distinct and palpable" for standing purposes). In *Laird,* the Court confronted the question of "whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, *without more,* of a governmental investigative and data-

> gathering activity." 408 U.S. at 10, 92 S.Ct. 2318 (emphasis added).

Morrison v. Bd. of Educ. of Boyd County, 21 F.3d 602, 608 (6th Cir. 2008). The Sixth Circuit has provided examples of what would be necessary to substantiate an otherwise-subjective allegation of chill: (1) issuance of a temporary restraining order; (2) an eight-month investigation in the activities and beliefs of the plaintiffs by Department of Housing and Urban Development officials; (3) and numerous alleged seizures of membership lists and other property belonging to the plaintiffs. *Id.* at 609. The court explained that "[e]ven this abbreviated list confirms that for purposes of standing, subjective chill requires some specific action on the part of the defendant in order for the litigant to demonstrate an injury-in-fact." *Id.*

Plaintiffs have failed to demonstrate something "more" than a subjective allegation of chill in this case. "[A]bsent proof of a concrete harm, where a First Amendment plaintiff only alleges inhibition of speech, the federal courts routinely hold that no standing exists." *Morrison,* 521 F.3d at 609; *see, e.g., All Children Matter v. Brunner,* No. 2:08-cv-1036, 2011 WL 665356, at *4 (S.D. Ohio Feb. 11, 2011) (dismissing complaint where plaintiff offered "no showing of imminent or actual harm beyond its self-imposed chill"); *Susan B. Anthony List v. Driehaus,* 805 F.Supp.2d at 422 (dismissing COAST's nearly identical claims because COAST's allegations of chilled protected speech did not demonstrate injury-in-fact). "Even when a party has been unlawfully

sanctioned in the past,... exposure to illegal conduct does not in itself show a present case or controversy. While previous sanctions might, of course, be evidence bearing on whether there is a real and immediate threat of repeated injury... where the threat of repeated injury is speculative or tenuous, there is no standing to seek injunctive relief." *Fieger v. Michigan Supreme Court,* 553 F.3d 955, 966 (6th Cir. 2009) (internal citations omitted).

Moreover, Plaintiffs have not shown that there is a credible threat of prosecution under Section 3517.22(B)(2). As Defendants point out, the Commission itself cannot initiate any proceeding or investigate any person or entity on its own initiative. Instead, a complaint must be "by affidavit of any person, on personal knowledge, and subject to the penalties for perjury, or upon the filing of a complaint made by the secretary of state or an official at the board of elections." Ohio Rev. Code § 3517.153(A). That means that Plaintiffs would need to make some statement in the future, then Cincinnatians for Progress, or some other group or individual, would need to file a groundless complaint against Plaintiffs, and Defendants would then fail to follow the provisions in Section 3517.22. This scenario is far too speculative. As the Sixth Circuit has instructed, standing does not exist where "the chain of events necessary for the plaintiffs.. to suffer false prosecution veers into the area of speculation and conjecture.'" *White v. United States,* 601 F.3d 545, 554 (6th Cir. 2010) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974)); *cf. Berry,* 688 F.3d at 297

(concluding that plaintiff has shown a credible threat of enforcement where he received warning letter from the Kentucky Bar Association's Inquiry Commission which stated that he had violated a Rule of Professional Conduct and cautioned him to "not let it happen again."). Accordingly, Plaintiffs do not have standing to bring their claims, and Defendants' Motion to Dismiss is GRANTED on this basis.[3]

III. CONCLUSION

Based on the foregoing, Defendants' Motion to Dismiss (Doc. 17) is GRANTED. This matter shall be CLOSED and TERMINATED from the active docket of this Court.

IT IS SO ORDERED.

Notes:

[1] In an earlier case, COAST brought the same claims based upon a different set of facts and Section 3517.21, which applies to unfair political campaign activities and parallels Section 3517.22. *See Coalition Opposed To Additional Spending & Taxes v. Ohio Elections Commission, et al.,* Case No. 1:10cv754.

[2] Defendants point out that the Sixth Circuit has held that Section 3517.21(B)(10), which parallels Section 3517.22(B)(2), does not reach any constitutionally-protected speech. *See Pestrak v. Ohio Elections Commission,* 926 F.2d 573, 579 (6th Cir. 1991) ("false speech, even political speech, does

not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth... Thus, on its face, the statute [R.C. 3517.21(B)10)] is directed against, and Pestrak was charged with issuing, speech that is not constitutionally protected.").

[3] Because the Court has answered the question of "whether the plaintiff has standing-whether he is the proper party to request an adjudication of a particular issue, because he has suffered a concrete injury-in-fact" in the negative, the Court finds it unnecessary to answer the question of "whether a particular challenge is brought at the proper time and is ripe for pre-enforcement review." *See Nat'l Rifle Ass'n of Am. v. Magaw,* 132 F.3d 272, 280 (6th Cir. 1997).

Appendix E
Relevant Constitutional Provision Involved

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances

Appendix E
Relevant Statutory Provision Involved

Ohio Rev. Code Ann. § 3517.22:

> (B) 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 outcome 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.