No. 13-193

In the Supreme Court of the United States

SUSAN B. ANTHONY LIST and COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,

Petitioners,

v.

STEVEN DRIEHAUS, JOHN MROCZKOWSKI, BRYAN FELMET, JAYME SMOOT, HARVEY SHAPIRO, DEGEE WILHELM, LARRY WOLPERT, PHILIP RICHTER, CHARLES CALVERT, OHIO ELECTIONS COMMISSION, and JON HUSTED,

Respondents.

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

BRIEF OF STATE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a First Amendment challenge to a statute ripe when plaintiffs have alleged only a generalized and subjective chill of their speech and when they have established facts showing neither that they intend to engage in a course of conduct affected by the statute nor that they face any threat of an actual criminal prosecution under the statute by the named defendants?

PARTIES TO THE PROCEEDING

Most Respondents in this Court, defendants-appellees below, are State of Ohio actors: the Ohio Elections Commission; its individual Commissioners, John Mroczkowski, Bryan Felmet, Jayme Smoot, Harvey Shapiro, Degee Wilhelm, Larry Wolpert, and Charles Calvert in their official capacities; Ohio Elections Commission staff attorney Philip Richter in his official capacity; and Ohio Secretary of State Jon Husted in his official capacity.

The sole non-State Respondent, also defendant-appellee below, is Steven Driehaus.

Petitioners, plaintiffs-appellants below, are Susan B. Anthony List ("SBA List") and the Coalition Opposed to Additional Spending and Taxes ("COAST").

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INTRODUCTION

The unreported decision below does not warrant review, as it merely applied the settled law of ripeness to particular facts. The Sixth Circuit, like all other circuits, follows this Court's teachings on First Amendment challenges. With respect to standing, the court finds an adequate Article III injury if a plaintiff shows that it faces a "'credible threat of prosecution'" under a statute. *McGlone v. Bell*, 681 F.3d 718, 729 (6th Cir. 2012) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). With respect to ripeness, the court finds a case sufficiently justiciable if, along with establishing that credible threat, the plaintiff also creates a "record 'sufficient to present the constitutional issues in a clean-cut and concrete form,'" and shows that it would suffer hardship without immediate review. *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 493 (6th Cir. 1995) (quoting *Renne v. Geary*, 501 U.S. 312, 322 (1991)). Here, the court applied the established factors for ripeness and found, in a non-precedential decision, that Petitioners' claims were unripe based on all those factors. Nothing about the court's discussion of the relevant principles, its application of them to these facts, or this case's outcome, is remarkable or warrants further review.

While the Petition's allegations of a massive, lopsided circuit split collapse for many reasons, several turn on understanding the unique nature of the Ohio Elections Commission. Ohio prohibits certain false statements made with actual malice in election campaigns, but only county prosecutors—and none is a party here—may prosecute violations. In a case it did find justiciable, the Sixth Circuit has already held that, as a constitutional matter, the Commis-

sion cannot impose penalties, nor enjoin speech. *See Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 578 (6th Cir. 1991). Instead, its functions have been limited merely to "recommending" cases to prosecutors and to "truth-declaring" by stating opinions. *Id.* at 578-79; *see also* Ohio Rev. Code § 3517.155(D)(2). So even if Petitioners could clear the many hurdles to show that the Commission will someday "prosecute" them—and they cannot—that would not amount to a true "prosecution" anyway, and that renders this case a poor vehicle to establish principles in the other cases that involve actual threats of prosecution.

Once these facts are made clear, all of the Petition's arguments for review fail. *First*, the Sixth Circuit is in line with other circuits in articulating the general legal test for a concrete injury that is necessary under both standing and ripeness doctrines. Petitioners do not deny, nor could they, that the circuit states the same *general* "credible threat of prosecution" test as everyone else. They argue instead that the court's application is so different as to amount to a split in practice. But the Sixth Circuit has repeatedly allowed challenges on different facts, including challenges to the *same* Ohio election laws at issue here. *See Briggs*, 61 F.3d at 491-93; *Pestrak*, 926 F.2d at 576-77. Likewise, other circuits have also rejected some First Amendment challenges, while allowing others, based on the facts of each case. The Sixth Circuit simply relied on narrow facts about this case, including that SBA List never specified how its speech was chilled, and, to the contrary, kept speaking despite the Commission's preliminary proceedings. Many similar factual distinctions explain the

different outcomes in the cases cited in support of the alleged circuit split.

Second, critical factual distinctions show that the decision below does not even conflict with the case that the Petition claims to establish the most "square split." Pet. 23 (discussing *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011)). Unlike Petitioners, the plaintiffs in *281 Care Committee* sued the county prosecutors who could prosecute them, not Minnesota's equivalent of the Ohio Elections Commission. *See* 638 F.3d at 625-26. And the Eighth Circuit found that those plaintiffs *were* reasonably chilled from speaking, whereas the Sixth Circuit here found that SBA List spoke as vigorously as ever and had not been reasonably chilled.

Third, the decision below turned on unique facts, rendering it a poor vehicle for establishing any general guidelines. None of the other cases involved a challenge to an administrative "prosecution" by an agency that does nothing other than investigate, and make its own statements and possibly referrals. Moreover, while the Petition challenges the Sixth Circuit's standards for finding a sufficient likelihood of injury for ripeness, it overlooks the opinion's reliance on ripeness's other factors—including the lack of an adequate record for considered review and the lack of hardship from delay. Thus, the alleged split over what is needed to allege sufficient injury would not even control the outcome on the facts here.

In the end, the Sixth Circuit merely called a strike here, but it used the same strike zone as everyone else. It followed this Court's insistence on a "factual record of an actual or imminent application

of [a challenged statute] sufficient to present the constitutional issues in 'clean-cut and concrete form.'" *Renne*, 501 U.S. at 321-22.

For these and other reasons below, the Court should deny the petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 525 F. App'x 415. The decisions of the district court (Pet. App. 21a, Pet. App. 42a) are reported at 805 F. Supp. 2d 412 and 2011 WL 3296174.

JURISDICTION

The Sixth Circuit entered its judgment in this case on May 13, 2013, and denied rehearing en banc on June 26, 2013. The petition for writ of certiorari was filed on August 9, 2013. The Court has jurisdiction under 28 U.S.C. § 1254(1).

COUNTERSTATEMENT

The Sixth Circuit's decision, and the underlying Ohio Elections Commission action leading to this case, can best be understood in light of the nature of the Commission's role and the circuit's prior history of addressing the same Ohio law at issue.

A. The Ohio Elections Commission Investigates False Statements, But Can Only Undertake Narrow Functions

Ohio election law prohibits certain false statements in election campaigns. Such statements are barred if made with intent to affect an election. *See* Ohio Rev. Code § 3517.21(B). And they are barred only if made with at least the "actual malice" intent

like the one described in *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964)—that is, with knowledge that they are false or with reckless disregard as to their falsity. Ohio Rev. Code §§ 3517.21(B), 3517.21(B)(10); *see also McKimm v. Ohio Elections Comm.*, 729 N.E.2d 364, 373-75 (Ohio 2000).

Rather than give complete control to county prosecutors to bring charges under these false-statement provisions, the statute divides their enforcement into several parts. To begin with, any private citizen, or Ohio's Secretary of State, may bring an allegedly false statement to the Ohio Elections Commission's attention. *See* Ohio Rev. Code § 3517.153(A) (authorizing citizen complaints); *id.* § 3501.05(N)(2) (obliging Secretary to report violations known to him).

Once complaints have been filed, the Ohio Elections Commission has limited powers. It may investigate alleged violations, declare whether it finds statements false, and, in some cases, refer its findings to county prosecutors. That is, the Commission's own findings are advisory opinions, and the Commission lacks any substantive enforcement authority of its own. *See id.* §§ 3517.153(D), 3517.155(D)(2).

The law originally empowered the Commission to levy fines and issue cease-and-desist orders with respect to the false-statement provisions at issue here, but the Sixth Circuit invalidated those powers in these circumstances decades ago. *See Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 578 (6th Cir. 1991). *Pestrak* upheld the Commission's remaining functions as applied to allegedly false statements, which it described as "recommending" and "truth-

declaring" functions. *See id.* at 578-79. It compared the referral function to a "private citizen['s]" power to "urg[e] a prosecutor to bring a certain prosecution," and it concluded that "to the extent [the Commission] does nothing more than recommend, then its actions, *per se*, have no official weight and cannot be the cause of deprivation of constitutional rights." *Id.* at 578. The Sixth Circuit found that the Commission's "'truth-declaring' function" did not limit speech either. It merely "determines and proclaims to the electorate the truth of various campaign allegations," and "the statements and findings of the Commission fall exactly within the tenet that 'the usual cure for false speech is more speech.'" *Id.* at 579-80 (citation omitted).

If the Commission refers what it considers to be a violation to a county prosecutor, that prosecutor determines whether to prosecute. Thus, while violations of Ohio Rev. Code § 3517.21(B)(9) and (10) may carry potential criminal penalties, such penalties may arise only after an Ohio prosecutor makes the independent decision that a criminal prosecution is appropriate. *See id.* § 3517.155(D)(2).

Finally, although the Commission can impose no tangible punishment on a party, Ohio law still allows the party to appeal to state court if the Commission finds a possible violation. *Id.* § 3517.157(D). Such appeals are taken. *See, e.g., McKimm,* 729 N.E.2d 364; *Serv. Emp. 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).

B. Private Respondent Driehaus Complained To The Commission About SBA List's Statements, But The Complaint Was Dismissed Before A Merits Hearing

In 2010, Respondent Steven Driehaus served in Congress, and was running for re-election to the House of Representatives. Petitioner Susan B. Anthony List (SBA List), a national pro-life advocacy group, opposed Driehaus's vote for the Affordable Care Act. SBA List sought to advertise a message, including on billboards, stating that the vote was a vote for taxpayer-funded abortion. Pet. App. 3a.

When Driehaus learned of the message that SBA List intended to convey on its billboards, he filed a complaint with the Ohio Elections Commission. *Id.* His complaint alleged that SBA List's claim that he voted for taxpayer-funded abortion was knowingly or recklessly false and that it therefore violated Ohio Rev. Code § 3517.21(B)(9) and (10). Pet. App. 3a-4a.

Driehaus's counsel contacted the advertising company that owned the billboard space on which SBA List wished to display its message. Pet. App. 3a. After that separate contact, the advertising company decided not to display SBA List's message. *Id.*

At the Commission, a three-member panel reviewed Driehaus's complaint and, in a 2-1 vote, determined that the complaint should be referred to the full Commission for further investigation. Pet. App. 4a. The panel scheduled a hearing to take place two weeks after the complaint was referred to the full Commission. *Id.* SBA List and Driehaus eventually agreed to postpone that hearing until after the

election. Pet. App. 5a. Driehaus lost his bid for reelection, and then moved to dismiss his pending complaint. *Id.* SBA List consented to the dismissal, and the complaint was dismissed. *Id.*

C. SBA List And COAST Filed Separate Actions In Federal District Court

After Driehaus's complaint was referred to the full Commission, but before those state proceedings were stayed or dismissed, SBA List sued in federal court. It sued the Commission, all of its members in their official capacities, the Ohio Secretary of State, and Driehaus. It challenged the applicable Ohio laws on First Amendment grounds. Pet. App. 4a-5a. Because of the pending state proceedings, the district court initially stayed the suit on the basis of *Younger v. Harris*, 401 U.S. 37 (1971). Pet. App. 5a.

Separately, Petitioner Coalition Opposed to Additional Spending and Taxes (COAST) filed its own case in the same federal court. COAST had not at that time been involved in proceedings before the Ohio Elections Commission, but it nevertheless sought to challenge Ohio Rev. Code § 3517.21(B)(9) and (10). Pet. App. 5a-6a. Like SBA List, COAST wished to criticize Driehaus for voting for the Affordable Care Act on the same grounds: that the ACA provides for taxpayer-funded abortion. *Id.* In its complaint, COAST stated that it did not publish its intended message because of the complaint that Driehaus filed against SBA List. Pet. App. 6a. Although COAST's complaint acknowledged that the Commission's opinions are merely advisory (Compl. ¶ 16, ECF #1 PAGEID #4), COAST claimed that it refrained from disseminating its message because it

feared having to defend the truthfulness of that message before a government agency. Pet. App. 48a.

D. The District Court Dismissed On Justiciability Grounds, And The Sixth Circuit Affirmed

The district court consolidated the complaints and granted the defendants' motions to dismiss on standing and ripeness grounds. Pet. App. 6a. The district court dismissed SBA List's complaint because it found that there was "no evidence of imminent or actual harm, beyond SBA List's self-imposed 'chill.'" Pet. App. 34a. The court found COAST's complaint unripe because the alleged injury was based on too attenuated a chain of speculation, Pet. App. 57a, and because COAST was not facing any imminent threat of actual prosecution, Pet. App. 58a.

The Sixth Circuit, in a non-precedential decision, upheld the district court's dismissal of the complaints, finding that neither SBA List's claims nor COAST's claims were ripe for review. Pet. App. 16a, 18a. The court outlined three ripeness factors: "(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." Pet. App. 7a-8a. The court found that all three factors cut against SBA List and COAST.

First, it found "no likelihood of harm" for several reasons, primarily that SBA List did not show a credible fear of future prosecution. Pet. App. 15a-

16a. The court found it not "likely that the Commission will threaten SBA List with prosecution anytime soon." Pet. App. 12a. It explained that the particular past action was no indicator of future action, and that the Commission's past action itself was a mere preliminary step: "While it green-lighted further investigation, the Commission expressed no opinion about the application of Ohio law to SBA List's speech." *Id.* In addition, the Commission cannot initiate an action, but can only respond to complaints. *Id.* Turning to a separate step within the "likelihood of harm" factor, the court found that SBA List did not show that it intended to make false statements and thus to violate the law. Pet. App. 15a. And it found the "risk of a false prosecution" to be speculative rather than credible.

Second, and independent of any credible threat of prosecution, the court found that SBA List failed to meet the second ripeness factor, because the factual record was too undeveloped to allow for intelligent review of the First Amendment question. Pet. App. 16a. The Commission had not found that SBA List violated the law, and no criminal prosecution had occurred after any referral. *Id.* As to future speech, the court said it would need to speculate about every step, including what the future statement would be, whether anyone would complain, and whether the Commission would find a violation. *Id.* It concluded that it could not "decide SBA List's claims on [the] threadbare record without engaging in precisely the kind of conjecture that the ripeness doctrine bars." *Id.*

Third, the court found that no hardship would befall SBA List absent judicial review, as its speech had not been chilled. Pet. App. 17a. To the contrary, the record showed that SBA List "continued to actively communicate its message about Driehaus' voting record" even after he filed his complaint with the Commission. *Id*.

Finally, the court found that COAST's claims were unripe because they were "even more speculative than SBA List's." Pet. App. 18a. COAST had, at that time, never been subject to any Commission process, so its claims were unripe. *Id.* (COAST does have another case pending against the Commission, as noted below in Part II, but the claims in that case are not part of this suit.)

REASONS FOR DENYING THE WRIT

Nothing about the decision below is remarkable or otherwise deserving of review. The decision below was a routine procedural dismissal for lack of ripeness. The Sixth Circuit did not say anything in this case that would immunize the Ohio election laws at issue, Ohio Rev. Code § 3517.21(B)(9)-(10), from further review by an appropriate plaintiff. To the contrary, the Sixth Circuit has *already* found justiciable other challenges to the same or similar Ohio election laws. *See, e.g.*, *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 491-93 (6th Cir. 1995); *Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 576-77 (6th Cir. 1991). The circuit merely found that *this case* is not ripe on *these facts*.

The principal reasons against review are best understood in light of the unique nature of the Ohio

Elections Commission and its role in Ohio's false-statements law. The Commission cannot initiate investigations on the front end, nor can it prosecute or impose penalties on the back end. Instead, it merely stands in the middle, assessing statements and performing what the Sixth Circuit calls the Commission's "recommending" and "truth-declaring" functions. *Pestrak*, 926 F.2d at 578-80. Notably, the Sixth Circuit found that Petitioners did not even establish that the Commission was likely to act against them again, let alone that they faced imminent harm of criminal prosecution. Pet. App. 12a-13a.

These and other distinctions show that the decision below was not just fact-bound, but in line with all the other circuits, including the Eighth Circuit's decision in *281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. 2011). Further, under the totality of the circumstances, the decision was so narrow that it would render the case a poor vehicle for any broader assessment of ripeness in the First Amendment context, and it says nothing at all about standing. Indeed, the Petition takes issue with the ripeness factor considering the "credible threat of prosecution," but largely ignores the Sixth Circuit's analysis on the other two ripeness factors (lack of an adequate record or hardship), illustrating that the question presented would not even control the outcome here.

I. THE COURT SHOULD DENY REVIEW BECAUSE NO CIRCUIT SPLIT EXISTS

This Court's justiciability rules in the First Amendment context are well established. On one hand, a plaintiff need not "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." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Instead, "[w]hen the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)).

On the other, "[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." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). And First Amendment suits are not exempt from traditional ripeness rules. In other words, the "credible threat" requirement is a necessary, but not a sufficient, condition for justiciability, because prudential considerations also require a "factual record of an actual or imminent application of [a challenged statute] sufficient to present the constitutional issues in 'clean-cut and concrete form.'" *Renne v. Geary*, 501 U.S. 312, 321-22, 324 (1991) (dismissing case with an "amorphous and ill-defined factual record").

The Petition suggests that the Sixth Circuit stands alone in flouting these justiciability principles, and that its justiciability rules conflict with no fewer than seven other circuits' contrary rules. Pet. 10-25. That is simply not the case. The Sixth Circuit follows the same standards as every other circuit. The courts are merely reaching different re-

sults on different facts. This is shown first by looking at the Sixth Circuit's general cases in this area—many of which do find a justiciable controversy and many of which do not. *See* Part I.A. And it is confirmed by the other circuits' similar cases, whose outcomes are equally divergent and fact-dependent. *See* Part I.B. All of these cases are simply applying well-trodden rules to discrete sets of facts.

A. The Sixth Circuit Follows This Court's General Justiciability Standards For Assessing First Amendment Challenges

Although Petitioners argue that review is required to force the Sixth Circuit to adopt justiciability rules that are consistent with this Court's general "credible threat of prosecution" standard, they overlook one thing: It already has. In claiming otherwise, the Petition disregards Sixth Circuit decisions adopting the very rules that they advocate for in this case. The presence of Sixth Circuit cases on both sides of the issue—some finding a challenge justiciable, and some finding justiciability lacking—shows that Petitioners' arguments turn on issues of fact, not issues of law.

1. As a general matter, the Sixth Circuit has followed, and regularly applies, *Babbitt*'s justiciability rules both in the context of standing (which is not at issue here) and in the context of ripeness. Where the court has found a "credible threat of injury," the court has rejected the notion that a plaintiff must "undergo prosecution in order to obtain relief." *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 582 (6th Cir. 2012). Instead, a plaintiff can establish a case's justiciability merely by alleging "'an inten-

tion to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder . . . .'" *Mich. State Chamber of Commerce v. Austin*, 788 F.2d 1178, 1184 (6th Cir. 1986) (quoting *Babbitt*, 442 U.S. at 298) (finding standing to bring challenge to campaign-finance law where plaintiffs "demonstrated 'a realistic danger of sustaining injury' as a result of the operation and enforcement of the statute"); *see also, e.g.*, *Faith Baptist Church v. Waterford Twp.*, 522 F. App'x 322, 330 (6th Cir. 2013) ("Standing is relaxed in the First Amendment context because of a judicial prediction or assumption that the policy's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." (internal quotation marks omitted)).

A credible threat may exist against the plaintiffs, the Sixth Circuit has noted, "even if [the plaintiffs] have never been prosecuted *or threatened with prosecution*." *McGlone v. Bell*, 681 F.3d 718, 729 (6th Cir. 2012) (emphasis added). Where, for example, a municipality had "not brought an enforcement action against plaintiffs" under an ordinance restricting door-to-door solicitation, the court still found that plaintiffs had "standing to proceed on their as applied challenge" under *Babbitt*'s standards. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 240 F.3d 553, 564 n.7 (6th Cir. 2001), *rev'd on the merits by* 536 U.S. 150 (2002); *see also Berry v. Schmitt*, 688 F.3d 290, 296 (6th Cir. 2012) (finding standing for pre-enforcement First Amendment challenge to rules of the bar); *Amelkin v. McClure*, No. 94-6161, 1996 WL 8112, at *4 (6th Cir. Jan. 9, 1996)

(finding standing based on individual's desire to publish a newsletter even though he had "yet to take any significant steps toward publishing his newsletter . . .").

2. The Sixth Circuit has not only applied this Court's precedents on a credible threat of prosecution, it has also applied those precedents to find justiciable other challenges to the *same* Ohio laws that Petitioners seek to challenge here. For example, the court reached the merits of a challenge to what is now Ohio Rev. Code § 3517.21(B)(10) in *Pestrak*. There, the Commission had found that Plaintiff Pestrak, an unsuccessful political candidate, intentionally made false statements about his opponent. *See* 926 F.2d at 575. The Commission found potential violations and referred its findings to the county prosecutor, but Pestrak lost the election and no other action was taken against him. *Id.* at 576. Pestrak brought suit and the Sixth Circuit found that his claims "easily [met] [the injury] requirement for standing." *Id.* He noted that he "desire[d] to continue his political activities and that he may make other assertions that could make him the subject of action by the Commission." *Id.* at 577. Thus, relying in part on *Steffel* and *Babbitt*, the Sixth Circuit found that Pestrak's challenges to Ohio Rev. Code § 3517.21(B)(10) were justiciable. *Id.*

Indeed, it was in *Pestrak* that the Sixth Circuit invalidated the Commission's power to levy fines and issue cease-and-desist orders, *id.* at 578, while upholding what it called the Commission's "recommending" and "truth-declaring" functions, *id.* at 578-79. The court analogized the Commission's "recom-

mending" function to "a newspaper, Congressman, or private citizen urging a prosecutor to bring a certain prosecution." *Id.* at 578. It thus held that "to the extent [the Commission] does nothing more than recommend, then its actions, *per se*, have no official weight and cannot be the cause of deprivation of constitutional rights." *Id.* The court further found that, as part of its "'truth-declaring' function," the Commission merely "determines and proclaims to the electorate the truth of various campaign allegations," and it held that "the statements and findings of the Commission fall exactly within the tenet that 'the usual cure for false speech is more speech.'" *Id.* at 579-80 (quoting *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1206 n.27 (11th Cir. 1985)).

Pestrak shows that the Sixth Circuit has enacted no barrier to challenging Ohio's false-statement laws. And it shows that the Sixth Circuit is willing and able to consider Ohio's laws on First Amendment grounds in a justiciable controversy.

The Sixth Circuit allowed another challenge to Ohio's election law to proceed in *Briggs*. There, the court reviewed Ohio Rev. Code § 3527.21(B)(1) (which, at the time, was codified at 3599.091(B)(1)). The court expressly tested justiciability as a threshold, stating that "[w]hen considering Briggs's standing to bring a First Amendment challenge, however, we note that Briggs does not bear a heavy burden to 'demonstrate a claim of specific present objective harm or a threat of specific future harm.'" *Briggs*, 61 F.3d at 492 (quoting *Meese v. Keene*, 481 U.S. 465, 472 (1987)). And, citing *Steffel*, it noted that that "the reasonable threat of prosecution for conduct the

plaintiff alleges is protected by the Constitution will give rise to a sufficiently ripe controversy." *Briggs*, 61 F.3d at 493.

In sum, *Pestrak* and *Briggs*—along with many cases involving laws other than Ohio's election law—show that the Sixth Circuit follows this Court's justiciability jurisprudence, and its divergent outcomes reflect the different facts in the different cases. In other words, the Sixth Circuit has *not,* contrary to Petitioners' claim, "adopted a uniquely restrictive approach to pre-enforcement review under the First Amendment." Pet. 1-2.

B. Other Circuits Follow The Same General Test When Deciding The Justiciability Of First Amendment Challenges

Not surprisingly, other circuits, like the Sixth, apply the same tests for standing and ripeness, and, also not surprisingly, they reach decisions for and against justiciability on different facts. Given the quantity of such cases testing such procedural grounds, it is not hard to manufacture a first-blush "split." That merely reflects how fact-bound this area is. "Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures . . . ." *Poe v. Ullman*, 367 U.S. 497, 508-09 (1961); *see also, e.g.*, *Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010) (noting that courts look to "a number of factors" when determining whether "'pre-enforcement plaintiffs'" can bring suit); *McCollester v. City of Keene*, 668 F.2d 617, 619 (1st Cir. 1982) (noting that "'the maturity of such disputes for resolution before a prosecution begins is decided on a

case-by-case basis'" (citation omitted)). Just as the Sixth Circuit has found justiciability in many other cases (as shown above), the other circuits have rejected justiciability in many other cases (as shown below). Taken together, those outcomes prove that Petitioners' claimed seven-to-one circuit split is illusory, both as to the general conflict, and as to the alleged specific conflict with the Eighth Circuit and its decision in *281 Care Committee*.

1. The alleged general "conflict" is no conflict at all

The circuits that allegedly conflict with the Sixth do the same as it does: apply the same Supreme Court case law, and reach different results in different cases based on different facts.

a. The Petition begins with the First Circuit. Pet. 13. But, as noted, the First Circuit has "[t]ak[en] a 'case-by-case' approach." *McCollester*, 668 F.2d at 620. So, for example, in *Ramirez v. Sanches Ramos*, 438 F.3d 92 (1st Cir. 2006), the First Circuit rejected standing claims on similar grounds. There, the challenged statute prohibited disturbing the peace with the use of force. *Id.* at 98-99. The court noted that standing "requires a credible threat—as opposed to a hypothetical possibility—that the challenged statute will be enforced to the plaintiff's detriment if she exercises her First Amendment rights." *Id.* at 98. And the plaintiff, while she had been charged with a prior violation, failed to meet this standard because she did not adequately allege that her *future* speech would fall within the law, which required the use of force. *Id.* at 98-99; *see also Osediacz v. City of Cranston*, 414 F.3d

136, 141 (1st Cir. 2005) (noting that plaintiffs in other cases that successfully asserted standing "at the very least desired or intended to undertake activity within the compass of the challenged statute").

The Sixth Circuit engaged in the same analysis when rejecting Petitioners' claims in this case. Like the plaintiff in *Ramirez*, SBA List failed to allege that its future expressive activity would disobey the Ohio election law. That law—while it did not have a force element—still required *false* statements to meet a demanding *actual-malice* test. Pet. 14a-15a. And SBA List "insist[ed] that the statement it made and plans to repeat . . . is *factually true*." Pet. App. 15a (emphasis added). So SBA List did not allege an intention to violate the statute under even an arguable interpretation of it.

The Petition next turns to the Seventh Circuit. Pet. 13. It, too, has cases in conformity with the Sixth Circuit's approach here. In *Schirmer v. Nagode*, 621 F.3d 581 (7th Cir. 2010), for example, the court distinguished two lines of cases. On the one hand, citing the Petition's cases, it noted that "when an *ambiguous* statute *arguably* prohibits certain protected speech, a reasonable fear of prosecution can provide standing for a First Amendment challenge." *Id.* at 586 (emphases added) (citing *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003); *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 687 (7th Cir. 1998)). On the other, it held that "a plaintiff lacks standing to bring a pre-enforcement challenge if the plaintiff's 'conduct was clearly outside the statute's scope.'" *Id.* at 587 (citation omitted). The court found that this

second situation applied on the complaint's allegations. Even though the government officers had previously found plaintiffs' same conduct to violate the statute, "[s]uch a clear misuse of a law does not provide a basis for a federal court to explore that law's facial constitutionality." *Id.* at 588. Here again, the Sixth Circuit noted that SBA List *insisted strongly* that its speech would be true—and thus *not* subject to the false-statement law. Pet. App. 15a.

The other circuits in the alleged split (*see* Pet 13-15) have similar cases dismissing pre-enforcement First Amendment suits on similar grounds. When dismissing one such suit, for example, the Ninth Circuit noted that its case law stood for the proposition "that pre-enforcement plaintiffs who failed to allege a concrete intent to violate the challenged law could not establish a credible threat of enforcement." *Lopez*, 630 F.3d at 787. So it dismissed a plaintiff's claim that a school district's sexual-harassment policy violated his right to speak in support of traditional marriage because the policy did not apply to that speech. *Id.* at 790-92; *see also Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1141 (9th Cir. 2000) (holding that "any threat of enforcement or prosecution against the [plaintiffs] in this case—though theoretically possible—is not reasonable or imminent").

Indeed, the Second Circuit has even rejected pre-enforcement challenges when it was unclear whether a plaintiff's intended conduct was covered by the challenged policy. *See Marchi v. Bd. of Cooperative Educ. Servs. of Albany*, 173 F.3d 469, 477-79 (2nd Cir. 1999). In *Marchi*, the court considered, among

other things, a teacher's argument that a school board's policy limiting the teacher's religious speech to students while off-campus violated his free-speech rights. *Id.* at 477-78. The court found the claim unripe because it was unclear how or even whether the policy would apply in that context. *Id.* at 478.

Finally, the D.C. Circuit—the last circuit in the alleged general split (Pet. 15)—has stated that "'chill' alone will not suffice to confer standing on a litigant bringing a pre-enforcement facial challenge to a statute allegedly infringing on the freedom of speech." *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1194 (D.C. Cir. 1992). And it has dismissed a pre-enforcement challenge as non-justiciable because there was "nothing in the complaint or in plaintiffs' affidavits to indicate why [the challenged] provisions will be applied to them in the foreseeable future." *Id.* at 1196-97.

As all of these countervailing cases show, whether a pre-enforcement challenge is proper depends on the specific facts of each case. That these circuits have reached different outcomes from the cases cited in the Petition is not evidence of a large intra-circuit split in each circuit, but merely evidence of different facts resolving different cases.

b. Against this backdrop, a close examination of Petitioners' cases shows that those cases, too, are distinct from this one, confirming that the "conflict" is illusory. Several major factual differences, in varying combinations, explain the outcome differences between this case and those.

First, in most of the Petition's cases, the relevant statutes contained bright-line rules and the plaintiffs expressed an unambiguous desire to cross those rules. *See, e.g.*, *Az. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1004 (9th Cir. 2003) (challenging law unambiguously requiring advance notice before distributing political literature); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 379 (2nd Cir. 2000) (challenging unambiguous campaign-finance requirements); *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 34 (1st Cir. 1999) (challenging law prohibiting "an activity plainly proscribed by the text"); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999) (challenging law whose "plain language" prohibited speech); *Commodity Trend*, 149 F.3d at 687 (challenging law whose "broad sweep" covered the trading advice at issue); *see also Seegars v. Gonzales*, 396 F.3d 1248, 1252 (D.C. Cir. 2005) (stating that a credible threat requires that "plaintiffs' intended behavior [be] *covered by the statute* . . ." (emphasis added)).

That is simply not alleged here. Petitioners indicate that their future speech will be *true* and will not fall within Ohio Rev. Code § 3517.21(B). They stated their unambiguous intent to make truthful statements about a candidate's voting record, but that is not prohibited by Ohio law—not even "arguably" so. *See* Pet. App. 15a. Ohio law bars only campaign-related statements that are *false* and only when made with *actual malice*. *See* Ohio Rev. Code § 3517.21(B); *see also McKimm*, 729 N.E.2d 373-75. As such, unlike in these other cases, Petitioners have simply not expressed a desire to engage in speech that violates the law. *See* Pet. App. 14a-15a.

Second, Petitioners cannot overcome this clear distinction by pointing to cases applying the "arguably" standard, and saying that their speech here would "arguably" fall within the Ohio law. *See, e.g.*, *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 16 (1st Cir. 1996) (finding that intended speech "arguably fall[s] within" the statute); *Cal. Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1095 (9th Cir. 2003) (finding intended speech "arguably subject" to the statute's reach"). The "arguably" standard rests on the notion that a statute's *vague* language might make it *unclear* whether the statute prohibits a plaintiff's proposed speech. *Schirmer*, 621 F.3d at 586 (noting that a reasonable fear of prosecution might exist "when an *ambiguous* statute *arguably* prohibits certain protected speech" (emphasis added)). Here, by contrast, Petitioners fail to identify any ambiguity in the laws. None of Petitioners' *allegedly true* speech could "reasonably be construed" to be covered by a statute covering *false* speech. *Ramirez*, 438 F.3d at 99.

Instead, Petitioners glide from the "arguably" standard to a very different one—that the Commission will find them in violation under a "false prosecution," Pet. App. 15a, *i.e.*, that the Commission will investigate their statements even though the statements fall *outside* the statute. No circuit has ever adopted that standard, allowing justiciability based on some showing that an agency will prosecute beyond the bounds of law. Indeed, the Seventh Circuit has expressly rejected it. *See Schirmer*, 621 F.3d at 587-88; *see also Glenn v. Holder*, 690 F.3d 417, 422 (6th Cir. 2012); *PETA v. Rasmussen*, 298 F.3d 1198, 1203 (10th Cir. 2002). Nor would that standard

make sense for challenging a statute *facially*—as compared to challenging the agency's application of it *as applied*. The problem in such a scenario would not be the *law*, even in its "arguable" reach, but an agency's *actions* outside the law. Thus, Petitioners here, since they do not claim that their speech falls "arguably" under a vague statute, are not similar to those plaintiffs in other circuits whose speech did so.

Third, in many if not most of the Petition's cases, the plaintiffs alleged that they changed their speech because it objectively fell within the four corners of the statute. *See, e.g.*, *Az. Right to Life*, 320 F.3d at 1004 (plaintiff "was forced to modify its speech and behavior to comply with the statute"); *N.C. Right to Life*, 168 F.3d at 711 (one plaintiff "discontinued distributing its voter guide and [another] . . . stopped soliciting without providing a disclaimer"); *R.I. Ass'n*, 199 F.3d at 34 (plaintiff "refrained from carrying forward its plan"). In this case, by contrast, SBA List never established that it suffered any such harm. Pet. App. 9a-10a. The SBA List proceedings before the Commission were dismissed, Pet. App. 5a, and the billboard rejection resulted from an independent third party; it was not attributable to any state statute, Pet. App. 10a. As the court below found, SBA List was not "deterred from engaging in the very conduct that it claims is encumbered." Pet. App. 18a. As for COAST, any alleged changed speech resulted from a subjective chill, not an objective one, since it had never even been involved in any commission proceedings. *Id.*

Fourth, in all of the Petition's cases, the plaintiffs brought suit against those who imposed the threat of

prosecution of the challenged law. *See, e.g.*, *Cal. Pro-Life Council,* 328 F.3d at 1092 (plaintiff seeking that state agency "be enjoined from enforcing the alleged unconstitutional provisions"); *N.C. Right to Life*, 168 F.3d at 709 (plaintiff suing county prosecutor). Here, however, Petitioners did not—and could not—face a credible threat of prosecution from the *named defendants*. The Sixth Circuit found that even the threat of future commission action was not concrete. Pet. App. 8a-14a. But even if commission action had been likely, that would not amount to a "prosecution," or even to a coercive civil action for fines or penalties. The Commission has no prosecutorial power, no power to impose fines, and no power to issue cease-and-desist orders. *See Pestrak*, 926 F.2d at 578-80; Ohio Rev. Code § 3517.153; Ohio Rev. Code § 3517.155(D)(2). Instead, the Commission may only investigate and refer cases. But since Petitioners seek to prevent enforcement of the *substantive provisions* of Ohio Rev. Code § 3517.21(B), not the Ohio Elections Commission's *procedures*—they challenge the wrong parties.

2. The Eighth Circuit's decision in *281 Care Committee* relied on facts distinct from this case

The Petition cites Eighth Circuit cases—and in particular its decision in *281 Care Committee*—as the centerpiece of its alleged "split," charging that this decision reaches a different outcome "on nearly identical facts." Pet. 23. Not so.

As a general matter, many decisions from both circuits, including the decision below and *281 Care Committee*, cite the same standards. The Sixth Cir-

cuit, for example, relied almost entirely on *United Food & Commercial Workers International Union v. IBP, Inc.*, 857 F.2d 422, 428 (8th Cir. 1988), when holding that particular plaintiffs had standing to challenge campaign-finance laws. *See Frank v. City of Akron*, 290 F.3d 813, 816 (6th Cir. 2002). The Sixth Circuit noted that "where 'plaintiffs allege an intention to engage in a course of conduct arguably affected by [a] statute, courts have found standing to challenge the statute even absent a specific threat of enforcement.'" *Id.* (quoting *United Food*, 857 F.2d at 428). That same Eighth Circuit case figures prominently in *281 Care Committee*. *See* 638 F.3d at 628, 630. Such overlapping citations emphasize that these circuits are in accord on matters of law.

As a specific matter, *281 Care Committee* and this case diverge based on the specific conclusions in each case. For one thing, the Eighth Circuit found that the plaintiffs in *281 Care Committee* "have been chilled from, and continue to be chilled from, vigorously participating in" a particular debate. 638 F.3d at 626. In this case, by contrast, the Sixth Circuit noted that "SBA List's conduct after Driehaus filed the complaint in 2010 suggests that its speech has *not* been chilled." Pet. App. 17a (emphasis added). As noted, the *only* form of speech that was limited was the cancelled billboard—which happened because of private actors—and SBA List otherwise "continued to actively communicate its message about Driehaus' voting record." *Id.* Indeed, the Sixth Circuit quoted SBA List's president's commitment to "double down" on more speech and to "make sure that our message floods [Driehaus's] district,"

and it concluded that "[t]his is not the sound of chilled speech or a silenced speaker." *Id.*

For another, the Eighth Circuit noted that the plaintiffs in *281 Care Committee* "*have* alleged that they wish to engage in conduct that could reasonably be interpreted as making false statements with reckless disregard for the truth of those statements." 638 F.3d at 628; *see id.* at 630 (noting that plaintiffs alleged that they wanted "to make arguments that are not grounded in facts"). In this case, by contrast, the Sixth Circuit held that similar allegations were lacking, noting that "SBA List [did] *not* say that it plans to lie or recklessly disregard the veracity of its speech." Pet. App. 15a (emphasis added).

The test here requires a showing both that the plaintiff has been reasonably chilled and that plaintiff's conduct would arguably violate the law. The Sixth Circuit found both factors lacking, whereas the Eighth Circuit found both factors met. Petitioners might disagree with the soundness of the Sixth Circuit's conclusion in these regards, but that desire for fact-bound error-correction does not mean that the Eighth and the Sixth Circuits conflict on the law. These different outcomes based on different facts do not create a split.

Aside from these specific facts, this case is distinguishable from *281 Care Committee* on the same grounds that the Eighth Circuit itself has relied on to distinguish its cases. *See Eckles v. City of Corydon,* 341 F.3d 762, 768-69 (2003). In *Eckles*, the court found no credible threat of prosecution by a county even though its attorneys had sent letters suggesting that the plaintiff's conduct "*could*" result in enforce-

ment action under city or state ordinances. The court found that these alleged "threats were not concrete nor particularized, not actual nor imminent, but merely conjectural or hypothetical." *Id.* In particular, there was no evidence that the county defendants "possessed the authority to *enforce the City or State ordinances*." *Id.* at 769 (emphasis added). On that basis, the court concluded that the plaintiff could not "establish that [he] was threatened with harm" *by the defendants*. *Id.*; *see St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485 n.4 (8th Cir. 2006) (distinguishing *Eckles* on ground that the present plaintiffs "brought suit *against those with the authority to enforce* [the challenged statutes]" (emphasis added)).

This case is distinguishable from *281 Care Committee* on the same basis. The plaintiffs there sued the *actual prosecutors* with authority to bring actions against them under the Minnesota law. *See* 638 F.3d at 625. Minnesota has an administrative agency, the Office of Administrative Hearings, that first hears civil claims regarding that law. *Id.* Then, "county attorneys have discretion to determine whether to bring criminal charges after civil proceedings are complete." *Id.* The plaintiffs sued those attorneys, and did not even bother to sue the Minnesota administrative agency. While the Eighth Circuit did not discuss this distinction, it had no need to do so because the suit against the prosecutors eliminated any such justiciability concerns. But had the plaintiffs sued only individuals with *no* enforcement power, the outcome could easily have been different, as shown by *Eckles* and *St. Paul Area Chamber*.

The importance of this distinction is heightened by the Sixth Circuit's own analysis, which repeatedly *highlighted* the Ohio Elections Commission's limited role. *See* Pet. App. 4a ("A word about the Commission's procedures is critical to understanding what happened next."); *id.* (outlining different steps by complainants, the Commission, and prosecutors); Pet. App. 16a ("The Commission has not found that SBA List violated the false-statement law. And no prosecutor has taken any action upon any Commission referral."). It is also illustrated by another Respondent in this case—*private* Respondent Driehaus. Just as the Commission can only refer to actual prosecutors, he could only complain to the Commission and is one further step removed from any prosecution. Surely a claim challenging the enforcement of a state statute against only a *private* party is not justiciable. And once the lack of a case against Driehaus is clear, the lack of a case against the Commission follows, for, in the end, it merely refers prosecutors the case, leaving it to them to enforce the statute challenged here. *See Eckles*, 341 F.3d at 768.

II. THIS CASE IS A POOR VEHICLE TO CONSIDER THE ISSUES PRESENTED

The Court should lastly deny review because this case presents a poor vehicle for considering any broad justiciability principles. *First*, at bottom, the Petition raises the question of what must be proved to illustrate a credible threat of prosecution. Pet. 10. But this is a ripeness case. The Sixth Circuit did not simply rely on its finding that Petitioners could not "demonstrate[] an imminent threat of prosecution" under the likelihood-of-harm factor. Pet. App. 15a.

It also found that the other ripeness factors were not met—namely, that there was an inadequate factual record to resolve any challenge and that Petitioners had failed to establish any hardship. *Id.* at 16a-18a. Many of the justiciability cases in this area, by contrast, are resolved as a matter of standing—turning largely on the credible-threat factor alone and not on ripeness's more discretionary factors. *See, e.g.*, *Vt. Right to Life Comm.*, 221 F.3d at 381-84 (considering only standing question whether plaintiff "face[d] a 'credible threat' . . . of being penalized for its speech" (citation omitted)). Thus, to the extent the Court wants to weigh in on the question presented, it should wait for a standing case that raises it in a more concrete and outcome-dispositive way.

Second, the Ohio Elections Commission's limited role—declaring its own assessment of statements and making referrals—makes this case unlike any other case cited in the Petition. While other cases explain that the "fear of civil penalties can be as inhibiting of speech as can trepidation in the face of threatened criminal prosecution," *id.* at 382, no case involves a "prosecution" that includes no civil penalties or other criminal enforcement, but merely a "recommendation" and an opinion on the truth of the party's statements. The Commission's limited role in enforcing the statute, therefore, also makes this case a unique one, and further illustrates that the case provides a bad vehicle for resolving any potential disagreement in the courts on the question of what qualifies as a credible threat of prosecution.

Third, the unique nature of Petitioners' claims also shows that this case is not suitable to resolve any

general issues. As noted, they allege that the Commission might falsely prosecute them by going plainly beyond the statute's scope, as opposed to claiming that their future speech would legitimately be in the statute's "arguable" scope. *See* Pet. App. 15a. These allegations, too, render this case unique, and thus a poor vehicle to address a category of cases or provide guidance of value beyond this one.

Fourth, as explained above, the Sixth Circuit has already adopted all of the legal tests that Petitioners urge, and the circuit has done so in reported cases, so an alleged application error in this unreported decision does not even bind the Sixth Circuit. If anything, the Petition alleges an intra-circuit problem, which is best addressed en banc. Indeed, COAST has an en banc request pending in a separate case also challenging the same Ohio election law—because a different panel in that case rejected justiciability for lack of standing. *See Coast Candidates PAC v. Ohio Elections Comm'n*, __ F. App'x. __, 2013 WL 4829216, at *8 (6th Cir. Sept. 11, 2013). While proceeding on standing rather than ripeness, the court's reasoning on the credible-threat factor was somewhat similar to the decision below, and the en banc request provides an opportunity for the Sixth Circuit to clarify its view if it thinks there is any conflict between these unpublished decisions and broader justiciability principles. (In the interest of disclosure, it should be noted that, in that case, the Attorney General of Ohio submitted in the district court an independent *amicus* brief questioning, on the merits, the constitutionality of the generalized false-statements subsections of Ohio's election law. *Id.* at

*8 n.5. But that brief did not take a position on the procedural issue there.)

All of these reasons show that this was, again, a fact-bound application of settled law, and this case's unique context makes it a poor vehicle to review any broader justiciability principles.

CONCLUSION

For the above reasons, the Court should deny the petition for certiorari.

Respectfully submitted,

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