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

REPLY TO BRIEF IN OPPOSITION

DAVID R. LANGDON
LANGDON LAW LLC
8913 Cincinnati-Dayton Rd.
West Chester, OH 45069

CURT C. HARTMAN
THE LAW FIRM OF CURT C. HARTMAN
3749 Fox Point Court
Amelia, OH 45102

ROBERT A. DESTRO
2312 N. Powhatan Street
Arlington, VA 22205

MICHAEL A. CARVIN
Counsel of Record
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

CHRISTOPHER P. FINNEY
FINNEY, STAGNARO, SABA & PATTERSON CO., LPA
2623 Erie Ave.
Cincinnati, OH 45208

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

In *United States v. Alvarez*, 132 S. Ct. 2537 (2012), all Justices agreed that proscribing "false" political speech would pose grave constitutional concerns. Four Justices wrote that "[t]he mere potential for the exercise of that power casts a chill" that "the First Amendment cannot permit." *Id.* at 2548 (plurality). Two warned that, in "the political arena," the "criminal prosecution [of falsity] is particularly dangerous," because it "can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart." *Id.* at 2553, 2556 (Breyer, J., concurring in judgment). And the three dissenters agreed that, as to "matters of public concern," "any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech." *Id.* at 2564 (Alito, J., dissenting).

In Ohio (as in many other states), knowing or reckless false statements about political candidates or ballot initiatives are *criminally* prohibited. Yet under the warped justiciability principles repeatedly applied by the Sixth Circuit, it is *impossible* for a speaker suffering precisely the "chilling" of speech that *Alvarez* warned about to seek judicial review. The Commission openly concedes that Catch-22: Its defenses of the decision below plainly preclude *any* pre-enforcement challenge, no matter how clear that the speaker would face enforcement action, unless it is *undisputed* that the intended speech is knowingly false and thus concededly unlawful. The Sixth Circuit and Commission therefore agree that review may be sought only after the speaker is *actually found guilty* (or confesses). Every Sixth Circuit case the Commission cites fits that pattern.

That is not the law anywhere else. No other Circuit has held that, so long as a *speaker* maintains his innocence, pre-enforcement review is barred, even if *enforcement authorities* will likely prosecute the speech. No other Circuit has held that chill is "subjective" unless it is *certain* that such prosecution would *succeed*, even if the prosecution is objectively likely (or certain). And no other Circuit has held that burdensome enforcement actions are not injury unless a criminal prosecution results. Accordingly, the cases that the Commission cites as purportedly agreeing with the decision below do nothing of the sort. They all involved situations where the speech carried *no* risk of *any* adverse state action—because *there was no dispute at all* that the speech was *lawful*. Here, in stark contrast, the Sixth Circuit precludes challenges even where adverse state action is likely or even certain; allowing them only when *conviction* is certain (either because the speaker has preemptively confessed or because the same speech has been finally resolved to violate the statute). Far from dissolving the conflict of authority, these cases place it into sharp relief.

In short: If intended speech is clearly unlawful, all courts allow review. If it is clearly lawful, all courts bar review. The conflict is over situations of *uncertainty*, where the speaker reasonably fears enforcement. In this case, the Commission found Petitioner's criticism of a Member of Congress's vote for the Affordable Care Act to be "probably" criminal. That would have authorized pre-enforcement review anywhere else, but the Sixth Circuit held that those who wanted to engage in that speech first had to be fined or jailed. That ought to strike anyone familiar with the First Amendment as an outrage, but it will

assure the perpetuation of Ohio's censorious regime (and the clear Circuit split) unless this Court intervenes.

I. THE COMMISSION CONFIRMS THE CATCH-22 CREATED BY THE SIXTH CIRCUIT'S WARPED APPROACH TO JUSTICIABILITY.

As Petitioners have explained, by precluding challenges to speech-suppressive laws unless the plaintiff's speech is *clearly* proscribed or has *already* been found unlawful, the Sixth Circuit creates a Catch-22: If a speaker refrains from engaging in core political speech due to a reasonable fear of facing enforcement proceedings, he cannot challenge the regime chilling his First Amendment conduct. Only if the speaker chooses to run that risk, is subjected to distracting, costly enforcement proceedings during the critical campaign period when the speech has value, *and is ultimately found guilty*, may a challenge be pursued. That untenable approach has resulted in the decades-long perpetuation of Ohio's abusive regime, which even the State's own Attorney General has admitted is unconstitutional (Opp. 32). The Commission's opposition confirms this Catch-22, underscoring the need for this Court's intervention.

A. The Commission offers three defenses of the decision below. *First*, Petitioners never admitted that their statements were false, and so purportedly cannot claim to face a threat of prosecution. *Second*, any chill they suffered was allegedly "subjective," since no final determination had been reached on their guilt. *Third*, the Commission can compel speakers to defend their speech in an adjudication and then recommend prosecution, but cannot impose other penalties itself.

We explain below why those grounds are legally erroneous and contradict decisions of other Circuits. But, at the outset, it is important to recognize that they would preclude pre-enforcement review in *any* challenge to Ohio's false-statement law. No speaker would ever preemptively deprive his speech of all persuasive force (and confess a criminal violation) by attesting that he intends to intentionally lie. If the chill here was merely "subjective," notwithstanding the Commission's probable-cause finding about the *same* speech, nothing short of a conviction could ever make chill sufficiently "objective" to be actionable. And the Commission may never impose penalties.

On the Commission's own theory, therefore, a speaker who wants to engage in speech that he believes to be truthful could *never* challenge the false-statement law—no matter how likely it is that his speech would result in complaints, expense, distraction, prosecution, or conviction; and no matter whether those risks indisputably chill his core political speech.

B. Indeed, that conclusion is confirmed by the two cases cited as proof that the Sixth Circuit *does* sometimes review the Commission. (Opp.16-18.) In *Pestrak v. Ohio Elections Commission*, 926 F.2d 573, 576-77 (6th Cir. 1991), the plaintiff was "charged and investigated," and the Commission "recommended his prosecution." In *Briggs v. Ohio Elections Commission*, 61 F.3d 487, 490 (6th Cir. 1995), the Commission "found Briggs guilty of violating the statute." These cases thus prove Petitioners' point: In the Sixth Circuit, a speaker must be found guilty *before* he may seek judicial review.

C. That is entirely untenable. Being dragged before state officials or subjected to criminal prosecution are obviously burdens standing alone and, combined with the risk of criminal penalties, will greatly deter most speakers. The Sixth Circuit's approach thus guarantees that truthful speech will be substantially chilled. Indeed, the Commission affirmatively promotes this chill, boasting on its website that "campaigns and their consultants will continue to hone their messages in an attempt to work carefully around the Commission." *Ohio Elections Commission: History*, http://elc.ohio.gov/History.stm. Moreover, even bold speakers willing to run these risks are often deprived of review, because political opponents quietly drop their complaints after the campaigns, having already harassed their critics and obtained politically valuable probable-cause findings. (Pet.34-35.) Again, the Commission concedes this abuse, admitting that campaigns often "use the Commission as a part of their activities." *Id.*

Absent this Court's intervention, a law that even Ohio's Attorney General believes unconstitutional will thus continue to burden core political speech in a battleground state. That is reason enough to grant review—now, before the 2014 elections.

II. THE SIXTH CIRCUIT APPROACH SQUARELY CONFLICTS WITH OTHER CIRCUITS'.

Given its perverse consequences, it is no surprise that the Sixth Circuit's approach is contrary to that of at least seven other Circuits. The Commission's finding that SBA's speech was probably criminal would have sufficed anywhere else for Petitioners, who wanted to repeat the *same* speech, to pursue their challenge. The Sixth Circuit is a clear outlier.

A. Whether Speakers Maintain Their Innocence Is Irrelevant to Justiciability, and No Other Circuit Has Ever Held Otherwise.

The Commission contends that Petitioners cannot sue because they maintain that their speech "will be *true*." (Opp.23.) But the *speakers'* view is irrelevant to whether they credibly fear prosecution. The latter obviously turns on what *enforcement authorities* think, which is precisely why the correct standard is whether the intended speech "arguably" runs afoul of the law, as the Commission concedes. (Opp.24.) It would be ironic indeed if those who are chilled from engaging in *truthful* speech were barred from the courthouse, even though these laws raise constitutional concerns *precisely because* they chill true speech. *Alvarez*, 132 S. Ct. at 2548 (plurality); *id.* at 2553 (Breyer, J.); *id.* at 2564 (Alito, J.).

The Eighth Circuit flatly rejected this reasoning in *281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. 2011), involving an indistinguishable law. There, "plaintiffs [did] not alleg[e] that they wish to knowingly make false statements of fact." *Id.* at 628. That did not matter: "A First Amendment plaintiff does not always need to allege a subjective intent to violate a law in order to establish a reasonable fear of prosecution." *Id.* at 629. It sufficed that, "in the political-speech arena," determining truth "often proves difficult"; plaintiffs presented a "reasonable worry that state officials … will interpret [their] actions as violating the statute." *Id.* at 629-30. *Accord Mangual v. Rotger-Sabat*, 317 F.3d 45, 58-60 (1st Cir. 2003) (allowing challenge where plaintiff did not intend to commit criminal libel). Thus, there is a clear Circuit split on the *precise* issue presented.

Indeed, no court has ever held that the speaker's profession of innocence is dispositive of justiciability. In all the Commission's cited cases, challenges were dismissed because *nobody* thought the intended speech was unlawful. Critically, all of them looked to the *enforcement authorities*' views as to whether the conduct fell within the prohibition—an inquiry that is irrelevant in the Sixth Circuit's view. These cases thus *confirm* the conflict. *See Lopez v. Candaele*, 630 F.3d 775, 786-90 (9th Cir. 2010) ("preliminary efforts to enforce a speech restriction" would be "strong evidence" of "credible threat," but dismissing because sexual harassment policy did not "even arguably appl[y]" to speech criticizing same-sex marriage, and "[n]o [school] official" ever suggested otherwise); *Ramirez v. Sanchez Ramos*, 438 F.3d 92, 99 (1st Cir. 2006) (plaintiff planned peaceful activities not "even arguably within the statute's reach"; she had been prosecuted when she "*used force*," but had "no intention of engaging in similar conduct" again); *Schirmer v. Nagode*, 621 F.3d 581, 586-87 (7th Cir. 2010) (agreeing that "uncertainty is particularly problematic in the realm of free speech, given the danger that vital protected speech will be chilled," but dismissing injunctive claim since plaintiffs were baselessly arrested in an "isolated misuse" of law they plainly did not violate); *PETA v. Rasmussen*, 298 F.3d 1198, 1203 (10th Cir. 2002) (same; defendants agreed they had "misinterpreted" law); *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1192-93 (D.C. Cir. 1992) (question is "how likely it is that the government will attempt to" enforce statute against plaintiffs; and nobody thought it would); *see also Osediacz v. City of Cranston*, 414 F.3d 136, 142 (1st Cir. 2005) (no standing to challenge displays policy

where plaintiff "d[id] not assert that she ha[d] any interest in erecting a display").[1]

Here, the Commission *already found* that Petitioners' speech is probably criminal, providing "strong evidence" of a "credible threat." *Lopez*, 630 F.3d at 786-87. Unlike the cases above, the Sixth Circuit did not say that Petitioners' speech would be lawful—only that *Petitioners* so maintained, and that the Commission had not made a *final* contrary finding. Thus, Petitioners' speech at least "arguably" violated the law, which is the standard in all other Circuits, without any requirement that the speaker confess a violation. Indeed, the very reason for the doctrine is to resolve "uncertainty" that chills speech. *Schirmer*, 621 F.3d at 586. While the Commission absurdly suggests that its "false statement" law establishes a "bright-line rule" (Opp.24), the fundamental problem with penalizing false political speech is, of course, that it forces courts to be arbiters of the impossibly vague, open-ended concept of political "truth." (*E.g.*, Pet.32-33.)

The Commission's cases thus actually confirm the conflict in how courts address justiciability in this substantial category of cases.

---

[1] The Commission also cites cases in which plaintiffs had not even identified specific conduct they intended to engage in; obviously, they could not have reasonably feared prosecution. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000) (en banc); *Marchi v. Bd. of Co-op. Educ. Servs.*, 173 F.3d 469, 478 (2d Cir. 1999).

B. If Speech Is Chilled by a Reasonable Fear of Prosecution, That Is Cognizable Injury, and No Other Circuit Has Ever Held Otherwise.

The Commission also suggests that the decision below can be reconciled with governing law because Petitioners were purportedly not chilled by the false-statement law. That is nonsense.

It is *undisputed* that COAST was chilled by the Commission's probable-cause finding about its intended speech. The lower courts simply held that its chill was insufficient, because it had never been subjected to enforcement proceedings. (Pet.App.18a, 57a; Opp.25.) That makes COAST *identical* to the plaintiffs in *281 Care*, 638 F.3d at 626, as well as the other cases that the Commission seeks to distinguish on this ground. (Opp.25, 27.) Those other Circuits found chill cognizable in those cases because it was reasonable to fear adverse action, even though those plaintiffs (like COAST) had not yet been subject to enforcement. As all other Circuits understand, if the goal is avoiding chill, requiring the speaker to have been previously convicted makes no sense.

SBA was also in an identical situation to COAST once the proceedings against it were dismissed. It wanted to repeat the *same* speech in subsequent elections, but was chilled due to the Commission's past enforcement. (Pet.29 n.1.)

C. Being Haled Before State Officials To Defend Speech Is an Additional, Distinct Injury, and No Other Circuit Has Ever Held Otherwise.

Finally, the Commission contends that because it can force speakers to participate in adjudications to resolve the truth of their political speech, but can ultimately only recommend prosecution, justiciability

analysis is somehow altered. (Opp.11.) But no other court has ever hinted at anything along those lines. That Ohio's regime allows speakers to be not only criminally prosecuted, but also *further* penalized through costly, burdensome enforcement actions, hardly creates *less* of an injury.

To the contrary, being compelled to participate in this process—the Commission can issue subpoenas, order discovery, and seek contempt to enforce orders, *see* Ohio Rev. Code § 3517.153(B); Ohio Admin. Code § 3517-1-11(B)(3)—presents an *additional* burden on speech, which would suffice as injury even if no criminal penalties were possible. After all, even the Commission's cases agree that "[t]he threatened state action need not necessarily be a prosecution." *Lopez*, 630 F.3d at 786. And the other Circuits hold that exposure to a burdensome proceeding is *itself* injury, whether or not penalties are imposed. *E.g.*, *Mangual*, 317 F.3d at 59 ("credible fear of being haled into court … is enough …, even if it were not likely that [he] would be convicted"); *Am. Library*, 956 F.2d at 1193 (injury if state will "attempt to use" law against plaintiff).

Consequently, the suggestion that Petitioners erred by not suing *prosecutors* is utterly meritless. Enjoining the Commission would prevent it from imposing the above burdens on petitioners—and it would also protect them from criminal charges, because without a recommendation from the Commission, prosecutors cannot proceed. Ohio Rev. Code § 3517.21(C). This case is thus even more clearly justiciable than *281 Care*, where enjoining prosecutors would not have stopped civil suits. *See* 638 F.3d at 631.

D. There Is No Doubt About the Sixth Circuit's Position on the Questions Presented.

Despite the Commission's attempts to muddy the waters on the Sixth Circuit's position, there is no doubt about its approach. Notably, the Commission does not even try to explain the other decisions that Petitioners cited to prove the split. *Fieger v. Mich. Sup. Ct.*, 553 F.3d 955 (6th Cir. 2009); *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602 (6th Cir. 2008); *Norton v. Ashcroft*, 298 F.3d 547 (6th Cir. 2002). That unbroken line of decisions established the relevant principles so firmly that the court did not even publish the decision below. Nor did it publish *COAST Candidates PAC v. Ohio Elections Commission*, No. 12-4158, 2013 WL 4829216 (6th Cir. Sept. 11, 2013), which recently reconfirmed the Circuit's restrictive rules by rejecting yet another challenge to the false-statement law. En banc review was denied there on December 4, 2013. (*Cf.* Opp.32.)

In all the Sixth Circuit cases the Commission cites, the speech was *indisputably* proscribed, either because the law's scope was clear, *e.g.*, *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 582 (6th Cir. 2012); *McGlone v. Bell*, 681 F.3d 718, 730 (6th Cir. 2012); *Mich. State Chamber of Commerce v. Austin*, 788 F.2d 1178, 1184 (6th Cir. 1986), or (as in *Pestrak* and *Briggs*) because the relevant authorities had *already* found that it was illegal, *e.g.*, *Berry v. Schmitt*, 688 F.3d 290, 295-97 (6th Cir. 2012). Again, this *highlights* the conflict: The Sixth Circuit only allows pre-enforcement review if the intended speech is *clearly* proscribed—not, unlike all other courts, when "arguable" proscription causes chill.

III. THIS CASE IS A PERFECT VEHICLE.

The Commission suggests that this case is a poor vehicle because the decision below purportedly also rested on "other ripeness factors." (Opp.31.) But those factors were wholly dependent on the Circuit's meritless notion that only certain conviction creates "objective" chill. The court found no hardship since Petitioners purportedly lacked "objective fear of future enforcement." (Pet.App.17a.) And it held the factual record inadequate because "[t]he Commission has not *found* that [Petitioners] violated the … law." (Pet.App.16a (emphasis added).) Anyway, *281 Care* considered the same factors yet reached the opposite result. 638 F.3d at 631. So even if these factors played a distinct role, there is still a direct split as to their application here.

This case is actually a perfect vehicle, because it vividly illustrates why laws barring "false" speech can nonetheless be politicized, manipulated, and abused, thereby causing profound harm to truthful speakers—and the entire democratic process.

Respectfully submitted,

DAVID R. LANGDON
LANGDON LAW LLC
8913 Cincinnati-Dayton Road
West Chester, OH 45069

CURT C. HARTMAN
THE LAW FIRM OF CURT C. HARTMAN
3749 Fox Point Court
Amelia, OH 45102

ROBERT A. DESTRO
2312 N. Powhatan Street
Arlington, VA 22205

MICHAEL A. CARVIN
Counsel of Record
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

CHRISTOPHER P. FINNEY
FINNEY, STAGNARO, SABA & PATTERSON CO., LPA
2623 Erie Ave.
Cincinnati, OH 45208

December 2013