No. 13-193

In the Supreme Court of the United States

SUSAN B. ANTHONY LIST, ET AL.,
Petitioners,

v.

STEVEN DRIEHAUS, ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* INSTITUTE FOR JUSTICE AND THE CATO INSTITUTE IN SUPPORT OF PETITIONERS

RICHARD P. BRESS
ANDREW D. PRINS
KATHRYN A. WORTHINGTON
SASCHA M. HELLER
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

Counsel for Amicus Curiae
Institute for Justice

WILLIAM H. MELLOR
PAUL M. SHERMAN
Counsel of Record
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
psherman@ij.org

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-2000

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1991, the Institute for Justice is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of that mission, the Institute routinely files pre-enforcement challenges to laws that chill speech. The Institute is deeply concerned about the effect that the decision below will have on the ability of speakers to seek such pre-enforcement judicial review in federal court, which the Institute believes is vital to the protection of the First Amendment.

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. This case is of central concern to Cato because it relates to the chilling of political speech,

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[1] Pursuant to Supreme Court Rule 37.2(a), *amici* state that they timely informed all parties of their intent to file this brief in support of the petition for certiorari. All parties consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

the protection of which lies at the very core of the First Amendment.

SUMMARY OF THE ARGUMENT

"The First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.'" *Citizens United v. FEC*, 558 U.S. 310, 339-40 (2010) (citation omitted). Such speech "must prevail against laws that would suppress it, whether by design or inadvertence." *Id.* at 340. Yet the Sixth Circuit slammed shut the courthouse door on plaintiffs looking to challenge a criminal law *that is specifically intended to suppress certain types of political speech*.

In this case, that criminal statute had already been invoked against Petitioner Susan B. Anthony List ("SBA List") once, and the Ohio Elections Commission had already found there was "probable cause" to conclude that SBA List's speech violated the statute. In addition, both SBA List and the Coalition Opposed to Additional Spending and Taxes ("Petitioners") alleged they wish to engage in materially the same speech in the future. Yet the Sixth Circuit nonetheless ruled that Petitioners cannot bring a pre-enforcement challenge because, in its view, the likelihood of the statute being enforced against them in the future was still too remote. After all, Petitioners would not admit that they intend to make statements that are "false" and will thereby violate the statute. And, even though the statute permits "any person" to initiate a proceeding, the particular politician who lodged the previous complaint against SBA List had moved to Africa after losing the election, so who can say anyone will invoke the statute in the next election?

The Sixth Circuit's approach departs radically from the First Amendment justiciability principles applied by this Court and federal courts elsewhere in the country, which recognize that pre-enforcement challenges are critical to ensuring vibrant and unobstructed political discourse. This Court and most others appreciate that a First Amendment plaintiff bringing a pre-enforcement challenge to a statute that *arguably* proscribes his speech states a justiciable claim absent a strong indication that the statute will not be enforced, such as disavowal by the government—either actual or implied from the statute having fallen into extreme disuse. But the Sixth Circuit demands far more, requiring a near certainty of future enforcement or a prior definitive determination by the government that the plaintiff previously violated the law. If allowed to stand, the Sixth Circuit's decision will, in the four States it covers, foreclose pre-enforcement challenges that the vast majority of judges and other citizens think ought to at least be *heard*, regardless of how they are ultimately decided on the merits.

The Sixth Circuit also short-changed fundamental political speech protections by shutting its eyes to how the statute operates in the real world. In deciding there was no credible threat that the statute would be enforced against Petitioners, it failed to appreciate the significance of the complaint-driven enforcement mechanism that allows "any person" to initiate mandatory proceedings before a government commission to adjudicate the falsity of a political opponent's speech. Contrary to the Sixth Circuit's reasoning, this mechanism obviously makes it far *more* likely that the statute will be invoked. In fact, statutes like this are frequently used as

weapons in campaign arsenals to silence or distract political opponents in the midst of heated elections. Such practical realities should not be ignored by courts.

ARGUMENT

Petitioners challenged an Ohio law that raises obvious First Amendment concerns because it specifically targets certain types of political speech. The statute criminalizes both (1) making a "'false statement concerning the voting record of a candidate or public official'" "'knowingly and with intent to affect the outcome'" of a campaign and (2) disseminating "'a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate.'" Pet.App.3a-4a (citation omitted). "[A]ny person" is able to file a complaint with the Ohio Elections Commission, and the Commission is then obligated by law to initiate an investigation and other onerous proceedings to ultimately judge the truth of the speech. *See id.* at 4a. Other states within the Sixth Circuit also have false-political-speech laws.[2]

This Court has long recognized that "[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

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[2] Tenn. Code Ann. § 2-19-142; Mich. Comp. Laws § 168.944; *id.* § 168.931(3).

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) (emphasis added) (citation omitted). Such a credible threat is presented by the mere existence of a statute that is "recent and not moribund," *Doe v. Bolton*, 410 U.S. 179, 188 (1973), and that the government has not "disavowed any intention" of enforcing, *Babbitt*, 442 U.S. at 302.

The Sixth Circuit paid lip service to the credible threat of prosecution standard, Pet.App.8a, but applied something else entirely. It held that, for a threat to be "credible," there must have been a previous determination by the government that the plaintiff violated the law—"a final adjudication, a finding of a violation, or [at least] a warning." *Id.* at 11a-12a. But as this Court and other courts have long recognized, government action far less definitive than that will create a credible threat of prosecution that chills speech. In addition, the Sixth Circuit believes it insufficient that a plaintiff's speech *arguably* comes within the scope of the statute; rather, that court requires plaintiffs to allege that they intend to *actually violate the law*, *id.* at 15a, which in this case would mean destroying their credibility by telling the world they are liars as the price to get into court. Of course, very few people would do that, which is why other courts do not require it. Besides, parties engaged in heated political debate often disagree about what is and what is not "false." The Sixth Circuit's erroneous standard eviscerates meaningful pre-enforcement review in many situations where it is obviously warranted and would be permitted without

hesitation in other parts of the country. This Court should not let it stand.

The Sixth Circuit also erred by viewing the credible-threat inquiry in an overly formalistic way. It recognized that the statute's complaint-driven framework "hardly erects an [sic] formidable barrier to enforcement," *id.* at 12a, but then brushed that concern aside and required proof of specific individuals who would file the complaints that would trigger the future application of the statute against Petitioners, *see id.* at 12a-14a. That approach ignores the obvious: In the political context, the temptation to abuse statutes like the one at issue for political gain is great and the consequences minimal. It is extremely likely that statutes like this will be employed against political opponents as a matter of course. This Court should clarify that, in analyzing justiciability, courts cannot ignore the practical realities of the way a statute will operate.

I. THE SIXTH CIRCUIT'S JUSTICIABILITY STANDARD FOR PRE-ENFORCEMENT CHALLENGES TO SPEECH-SUPPRESSING LAWS CONFLICTS WITH THE STANDARD APPLIED BY THIS COURT AND OTHER COURTS OF APPEALS

The First Amendment reaffirms important and highly valued rights that are at the heart of our constitutional tradition. But "First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect of [a] statute." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977). When that happens, "[s]ociety as a whole [is] the loser." *Secretary of Md. v. Joseph H. Munson Co.*, 467 U.S.

947, 956 (1984). Pre-enforcement challenges play a vital role in preventing that from happening by removing impediments to the "'open marketplace' of ideas protected by the First Amendment." *Citizens United v. FEC*, 558 U.S. 310, 354 (2010) (citation omitted).

Threats to First Amendment freedoms necessitating pre-enforcement review arise not just in the high-stakes world of federal politics like in *Citizens United*, but in local politics and in the more mundane goings-on of everyday life. The decision below—which demands certainty of prosecution or a past finding of violation, plus an admission of intent to violate a criminal statute before allowing a pre-enforcement challenge—all but shuts down this crucial avenue of relief across a significant portion of this country. The Sixth Circuit's error is fundamental and has dire implications. If not corrected, it will profoundly limit the free speech rights of ordinary Americans.

Examples of the sort of speakers who will be unable to seek meaningful pre-enforcement protection for their First Amendment rights abound in the Federal Reports, but a handful of examples will suffice to illustrate the problem.

1. Julie Towbin was 17 when she was invited to attend a local political event organized by the Palm Beach County Democratic Executive Committee. *Towbin v. Antonacci*, 885 F. Supp. 2d 1274, 1277 (S.D. Fla. 2012). Ms. Towbin was a former Page in the U.S. House of Representative and had a "keen and abiding interest in politics." *Id.* She wanted to attend the event, but was concerned that her purchase of its $150 ticket would run afoul of a provision of Florida law that prohibited, with limited

exceptions, "political contributions by minors of more than $100 to individual candidates or political organizations." *Id*. A single unlawful contribution is a first degree misdemeanor; a second is punishable as a third degree felony. *Id*. (citing Fla. Stat. § 106.08(7)(a)-(b)). When Ms. Towbin reached out to the Florida Elections Commission and State Attorney to ask whether the law applied, they declined to issue an "advisory opinion," and the State's Attorney General noted only that the "statute 'remains applicable'" and carries criminal penalties. *Id*. Ms. Towbin ultimately did not go to the event, but "steadfastly [held] on to a 'definite, and serious, desire and intention to contribute in excess of $100 to a political committee and/or candidates of her choice'" if "not for the criminal penalties she [would] face[]." *Id*. (citation omitted). Rather than allow the statute to squelch her budding interest in political participation, she mounted a pre-enforcement challenge. *Id*. at 1281-83. Thankfully, the district court enjoined the unconstitutional statute, vindicating Ms. Towbin's rights and freeing her to engage in the political process. *Id*. at 1290-02. But that would not have happened in the Sixth Circuit. In Kentucky, Michigan, Ohio, and Tennessee, such a claim would have been dismissed as too speculative, absent more proof that the state would in fact enforce the statute against Ms. Towbin.

2. Steve Cooksey is a North Carolina resident living with Type II diabetes. *Cooksey v. Futrell*, 721 F.3d 226, 229-30 (4th Cir. 2013). He has been able to control his diabetes and lose 78 pounds by maintaining a diet low in carbohydrates but high in fat. *Id*. at 230. Inspired by his lifestyle change and wishing to help others with similar problems, Mr.

Cooksey started a website called "Diabetes Warrior" to talk about his weight loss and diet, distribute meal plans, provide advice to readers, and advertise his fee-based diabetes support and life-coaching services. *Id.* His website stated he was not a licensed medical professional and did not have any formal credentials. *Id.*

In January 2012, shortly after attending a nutritional seminar in which he expressed disagreement with dietary advice given by the director of diabetic services from a nearby hospital, Mr. Cooksey received a call from the Executive Director of the State Board of Dietetics/Nutrition, informing him that he and his website were "under investigation," and that the State Board had the statutory authority to seek an injunction to prevent the unlicensed practice of dietetics. *Id.* at 230-31. Mr. Cooksey was told he should shut down his life-coaching services. *Id.* at 231. He then received a printed red-pen review of his website, depicting the State Board's "areas of concern." *Id.* at 231-32. Worried that the Board would take legal action against him, Mr. Cooksey removed the text to which the State Board objected, and he subsequently received notice that the complaint against him was closed, albeit with the caveat that the Board reserved the right to "monitor this situation." *Id.* at 237.

Mr. Cooksey brought a pre-enforcement First Amendment challenge and was eventually allowed his day in court, but only after the Fourth Circuit reversed a district court that made many of the same errors as the Sixth Circuit here. *Id.* at 234-41.[3] He

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[3] Mr. Cooksey is represented by *amicus* Institute for Justice.

would not have been so lucky had he resided in Ohio instead of North Carolina. After all, the statute was not actually enforced against Mr. Cooksey. The Board's communications pointing out "areas of concern" had expressed some tentativeness about its conclusions, *see id.* at 231, and did not *conclusively* establish that Mr. Cooksey violated the law, or even make an official finding that there was "probable cause" to believe the law was violated. And Mr. Cooksey had not alleged that he intended to engage in speech that definitely violated the law, only that he intended to engage in speech that arguably came within the statute's reach. *Id.* at 238.

3. James Wilson was arrested in El Reno, Oklahoma after distributing anonymous handbills opposing the election of a candidate for state senate. *Wilson v. Stocker*, 819 F.2d 943, 945, 947 (10th Cir. 1987). Under then-existing Oklahoma law, the handbills were arguably illegal because they did not contain Mr. Wilson's name and address. *Id.* at 247-48 (citing Okla. Stat. tit. 26, § 15-111 (Supp. 1985)). The prosecutor never pursued the charges, but Wilson wished to continue the same conduct that precipitated his prior arrest, and he quite reasonably feared that he might be rearrested. *Id.* at 246. The Tenth Circuit gave Wilson relief, but he would not have had his day in court in the Sixth Circuit. Under Sixth Circuit doctrine, Wilson's prior arrest for the same conduct would not indicate a credible threat of prosecution in the future. After all, an arrest only establishes that the state has found *probable cause* that the law has been violated, exactly what the Commission panel found as to SBA List below.

If they had been in any of the four States of the Sixth Circuit, Ms. Towbin, Mr. Cooksey, and Mr. Wilson would have had to risk significant civil or criminal consequences to vindicate their constitutional rights. Without the possibility of pre-enforcement review, they likely would have remained silent, and the laws in question would have remained unchallenged, continuing to erode their and others' First Amendment freedoms unless someone with the extraordinary gumption (and means) to risk civil or criminal penalties came along.

That is not the law in most of the country. As Petitioners ably demonstrate, the Sixth Circuit has departed radically from this Court's precedents. The Sixth Circuit persistently demands certainty of prosecution, in conflict with this Court's repeated holdings that all that is required is a credible threat—a threat that is presumed from the very existence of a non-moribund statute which arguably proscribes the plaintiff's speech. *See, e.g., Epperson v. Arkansas*, 393 U.S. 97, 101-02 (1968) (pre-enforcement challenges proper even without a particularized threat of enforcement, and even if the statute has not been recently enforced); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (when statute was "recent and not moribund," plaintiffs "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, 302 (1979) (permitting facial challenge though the pertinent provision of the act had "not yet been applied and may never [have] be[en] applied" when the State had not "disavowed any intention" of enforcing it); *Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 393 (1988) (permitting challenge where

state had "not suggested that the newly enacted law will not be enforced" and Court saw "no reason to assume otherwise"). This Court's holdings demonstrate that in such circumstances "the threat is latent in the existence of the statute." *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003).

The Sixth Circuit's approach also starkly conflicts with the approach taken by its sister circuits, which presume a credible threat of prosecution absent strong evidence that the statute will not be enforced.[4] *See, e.g., New Hampshire Right to Life Political Action Comm. v. Gardner,* 99

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[4] The Sixth Circuit's extreme hostility to pre-enforcement challenges stands alone among the circuits. But it reflects a broader confusion in the lower courts about how to classify an injury in a "chilling" case in light of this Court's decisions in *Laird v. Tatum*, 408 U.S. 1 (1972), and *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), holding that a "subjective chill" is insufficient to confer standing. Some courts, like the one below, interpret those decisions as foreclosing recognition of any chilling-based injury, and instead look only to the harm flowing from the possible future exercise of government power. *See* Pet.App.9a-10a; *Adult Video Ass'n v. United States Dep't of Justice*, 71 F.3d 563, 566 (6th Cir. 1995); *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378-79 (D.C. Cir. 1984). Viewing the injury as a possible *future* one encourages the application of additional ripeness scrutiny to ensure the harm is not speculative. Other courts recognize that objectively reasonable self-censorship (as opposed to a "subjective chill") is itself a cognizable *present* injury that has already occurred, and thus take a less restrictive approach to ripeness. *See*, *e.g.*, *281 Care Comm. v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 61 (2013); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 60 (1st Cir. 2003); *see also Cooksey*, 721 F.3d at 239-40. This confusion adds to the need for this Court's intervention.

F.3d 8, 15 (1st Cir. 1996); *St. Paul Area Chamber of Commerce v. Gaertner,* 439 F.3d 481, 484-86 (8th Cir. 2006); *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n,* 149 F.3d 679, 687 (7th Cir. 1998); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 382-84 (2d Cir. 2000). The decision also conflicts with other circuits because the Sixth Circuit requires First Amendment plaintiffs to tarnish their own reputation by admitting they intend to engage in illegal conduct in order to get into court, Pet.App.15a, whereas other circuits recognize that such a requirement would itself chill speech and therefore only require plaintiffs to demonstrate they intend to engage in conduct that *arguably* comes within the law's reach. *E.g.*, *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 61 (2013); *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003); *Majors*, 317 F.3d at 721; *New Hampshire Right to Life Political Action Comm.*, 99 F.3d at 14.

Americans' ability to contest laws that chill core political speech should not depend on the circuit in which they reside. This Court should grant certiorari to resolve this conflict and correct the Sixth Circuit's persistent and fundamental misunderstanding of the important justiciability principles at stake in pre-enforcement First Amendment challenges.

II. THIS COURT SHOULD CLARIFY THAT THE EXISTENCE OF HARM ARISING FROM A CREDIBLE THREAT OF PROSECUTION IS A PRACTICAL, NOT FORMALISTIC, INQUIRY

The Sixth Circuit also erred in another important way, by viewing Petitioners' claims in a formalistic way that ignored the practical realities of the complaint-driven nature of the statute at issue. Recognizing that the statute expressly allows "any person" to initiate a Commission proceeding, the court asked "[w]ho is likely to bring a complaint to set the wheels of the Commission in motion?" Pet.App.4a, 12a. *Amici* respectfully submit, as did Petitioners below, *see id.*, that the answer is obvious: *a political opponent*. This Court should clarify that courts must take a practical view and consider how a challenged statute operates in practice when determining whether there is a credible threat, as most other courts already do.

Under the challenged Ohio statute, upon receipt of a complaint by "any person" alleging a violation of the false speech laws, the Commission *must* initiate proceedings. Ohio Rev. Code Ann. § 3517.153(A). And if the complaint is filed shortly before an election, a Commission panel *must* convene an expedited hearing to determine whether there is probable cause for the full Commission to hear the case and determine whether there has been a violation. *Id.* §§ 3517.154(A)(1), 3517.156(A). Absent all parties' agreement, the respondent has no right to argue, testify, or submit evidence to the panel to contest the charges. Ohio Admin. Code 3517-1-10. If probable cause is found, full Commission proceedings

begin. Ohio Rev. Code Ann. §§ 3517.155(A)(1), 3517.156(A). In that event, the Commission conducts a full administrative trial, including discovery, Ohio Admin. Code 3517-1-09, direct and cross examination of witnesses, *id.* 3517-1-11(B)(2)(d), and questioning by members of the Commission, *id.*

In the real world, the risk of being dragged through that burdensome process is a formidable deterrent to political speech. Wholly aside from the indignity, expense, and potential consequences, the process will inevitably distract the speaker's attention and resources away from getting out his message. This is especially so when expedited proceedings are initiated on the eve of an election.[5]

Election-related speech reforms of the sort at issue here are plagued with unintended consequences. Through simple inertia, incumbents generally benefit from curtailed speech and therefore have a significant incentive to attempt to suppress it. *Cf. McConnell v. FEC*, 540 U.S. 93, 306 (2003) (Kennedy, J., concurring in judgment in part and dissenting in part) (recognizing that reform operated as an "an incumbency protection plan"), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). And complaint-driven statutes like this one are frequently used as strategic weapons to

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[5] Being haled before the Commission is even more burdensome than being sued in court for libel, where the extreme unlikelihood of obtaining any sort of preliminary injunctive relief will generally ensure that proceedings unfold at a reasonable pace that allows the speaker to continue to give some attention to getting out his message.

silence political speech in the final hours when it is most valuable, precisely because they are so easy to invoke. For example, *amicus* Institute for Justice is currently litigating in the Eleventh Circuit a challenge to certain of Florida's campaign-finance laws that permit citizens to file a sworn complaint with the Florida Elections Commission alleging a violation. In that case, the investigations manager for the Commission and the Commission's Rule 30(b)(6) designee admitted under oath that *approximately* ***98%*** of the complaints it receives are "politically motivated," and that "many times" complaints are filed by individuals seeking to "punish their political opponent" or to "harass that person or otherwise divert their attention from their campaign." Dep. Tr. of David Flagg at 16:16-25, 18:1-2, 19:6-15, *Worley v. Detzner*, No. 4:10-cv-00423 (N.D. Fla.), ECF No. 40-26.

And Florida law is not an isolated problem. In another case litigated by the Institute for Justice, *Sampson v. Buescher*, 625 F.3d 1247, 1259-61 (10th Cir. 2010), which involved a particularly oppressive use of a complaint-driven private enforcement provision in Colorado's campaign laws, *two* of the Colorado Secretary of State's experts admitted under oath that private enforcement provisions are often used to silence speech or to gain political advantage. One, a Colorado political pollster and strategist, testified that political opponents use the private enforcement provision as a strategic tool during campaigns. Dep. Tr. of Floyd Ciruli at 37:19–39:1, *Sampson v. Coffman*, No. 1:06-cv-01858 (D. Colo.), ECF No. 30-40. The other, a lawyer who worked for the California Secretary of State and was general counsel to the California Fair Political Practices

Commission, testified that most of the private complaints filed under California's private enforcement provision were either baseless or brought for publicity purposes in order to give one competitor in an election an advantage. Dep. Tr. of Robert Stern at 27:21-28:9, 36:4-37:11, *Sampson v. Coffman*, No. 1:06-cv-01858 (D. Colo.), ECF No. 30-41. Consistent with these experiences, the district court in *Sampson* concluded that "[t]here can be no doubt that [complainants] used the private enforcement provisions to attempt to silence the plaintiffs by the filing of the complaint." *Sampson v. Coffman*, No. 06-cv-01858-RPM, 2008 WL 4305921, at *20 (D. Colo. Sept. 18, 2008), *aff'd in part, rev'd in part by Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010).

This Court's precedents do not require courts to turn a blind eye to the destructive realities imposed by enforcement processes themselves. To the contrary, this Court long ago recognized that these harms are not eliminated by "the improbability of successful prosecution." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). "The chilling effect upon the exercise of First Amendment rights may derive *from the fact of the prosecution, unaffected by the prospects of its success or failure*." *Id.* (emphasis added)*; cf. Citizens United*, 558 U.S. at 335 (looking to practical concerns to determine whether regulatory scheme acted as a prior restraint).

Unlike the Sixth Circuit here, other courts recognize the importance of practical concerns raised by complaint-driven or private enforcement mechanisms when evaluating justiciability. In *Chamber of Commerce of the United States v. FEC,*

for example, the D.C. Circuit addressed a First Amendment pre-enforcement challenge to an FEC rule that seemed to restrict certain political communications to the plaintiff organizations' members. 69 F.3d 600, 601 (D.C. Cir. 1995). There was no imminent threat of enforcement proceedings because the FEC was publicly deadlocked on whether and how to enforce the rule, and a majority vote of the commission was necessary to institute enforcement proceedings. *Id.* at 603. Nonetheless, the court found standing, because the unusual nature of the enabling statute permitted a "political competitor" to "challenge the FEC's decision *not* to enforce" and therefore subject the speaker to litigation "even without a Commission enforcement decision." *Id.*

The First Circuit tackled a similar issue in *Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir. 2003). That case involved a criminal libel statute that, because of the operation of Puerto Rico law, permitted individuals to file a complaint with the police or pro se to initiate a criminal libel action; it was only after a probable cause hearing that the prosecutors would become involved. *Id.* at 58-59. The court correctly recognized that standing would exist even if the prosecutors had "disavow[ed] any intention to prosecute" because they exercised no control over whether proceedings would be initiated. *Id.* at 59. It held that "[t]he plaintiff's credible fear of being haled into court on a criminal charge is enough for the purposes of standing, even if it were not likely that [he] would be convicted." *Id.* So too here for those engaging in speech in the midst of an election who are haled before a Commission to justify their speech.

Had the Sixth Circuit taken a more practical view of the statute, it would have recognized that there was a credible threat of prosecution inherent in its design.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD P. BRESS
ANDREW D. PRINS
KATHRYN A. WORTHINGTON
SASCHA M. HELLER
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

Counsel for Amicus Curiae
Institute for Justice

WILLIAM H. MELLOR
PAUL M. SHERMAN
Counsel of Record
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
psherman@ij.org

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-2000

September 12, 2013