No. 13-1490

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SARAHJANE BLUM; RYAN SHAPIRO;
LANA LEHR; LAUREN GAZZOLA;
IVER ROBERT JOHNSON, III,
Plaintiff-Appellants,

v.

ERIC H. HOLDER,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BANC

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Plaintiffs-Appellants (hereafter "Plaintiffs"), respectfully petition this Court for rehearing of the opinion and judgment of the panel issued on March 7, 2014 (attached). In the alternative they seek rehearing *en banc* on the grounds that the panel decision incorrectly applies *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138 (2013), in a manner that conflicts with decades of Supreme Court precedent, changes the law of this circuit, and creates conflict with other Courts of Appeals. The panel's opinion cannot be squared with the decisions of other appellate courts that have addressed the question of whether standing exists in pre-enforcement challenges where the parties disagree as to whether a criminal statute applies to plaintiff's intended conduct. For these reasons, consideration by the full Court is necessary to secure and maintain uniformity of this Court's decisions.

ARGUMENT

Plaintiffs fear the Animal Enterprise Terrorism Act (AETA) will allow their prosecution (1) for intentionally causing an animal enterprise to lose profits, (2) for voicing general support of illegal action by others that does not rise to the level of incitement under the *Brandenburg* standard, or (3) for conspiring or attempting to cause "damage or interference" to an animal enterprise, even without intent to damage tangible property or cause fear of injury. The chilling effect the statute has had on their political advocacy for animal rights led them to bring this pre-enforcement challenge to the AETA.

The panel affirmed the District Court's dismissal of Plaintiffs' pre-enforcement challenge for lack of standing, holding *sua sponte* that the Supreme Court's recent decision in *Clapper* "may have adopted a more stringent injury standard for standing than this court has previously employed in pre-enforcement challenges on First Amendment grounds." Slip Opinion (Op.) at 17. Whereas previously this Court found standing where plaintiffs had an "'objectively reasonable' fear of prosecution," *id.*, the panel would demand more in the wake of *Clapper*, *id.* at 21.

The panel opinion is wrong in several respects. First, and most fundamentally, *Clapper* did not involve a challenge to a criminal statute and therefore did not implicate the standard for standing to bring a pre-enforcement challenge. The program challenged in *Clapper* did not restrict or regulate individual behavior; the plaintiffs there feared that a government program would be used to monitor their activities, but not to prohibit any particular conduct. Thus *Clapper* could not have altered well-established Supreme Court precedent allowing standing where a chilling effect is caused by a criminal statute that reasonably appears to prohibit plaintiffs' intended actions. By collapsing two distinct standing doctrines, the panel decision ignores clear Supreme Court precedent, and creates conflict with existing precedent in this circuit and in several other circuits, including post-*Clapper* precedent. A similarly-mistaken ruling is pending review by the Supreme Court.

Second, the panel's analysis places undue weight on the AETA's First Amendment savings clause, counter to well-established precedent holding that lay persons such as Plaintiffs should not be charged with interpreting the proper scope of the First Amendment.

I. *Clapper* does not alter the proper analysis of standing in pre-enforcement challenges to criminal or regulatory laws

Under a long line of Supreme Court cases—*Epperson v. Arkansas,* 393 U.S. 97 (1968), *Doe v. Bolton*, 410 U.S. 179 (1973), *Steffel v. Thompson,* 415 U.S. 452 (1974), *Babbitt v. UFW Nat'l Union*, 442 U.S. 289 (1979), and *Virginia v. American Booksellers Assn.*, 484 U.S. 383 (1988)—the relevant threat in a pre-enforcement challenge to a criminal or regulatory statute is the risk that one's intended conduct would violate it. So long as the statute is not moribund and the plaintiffs reasonably fear that their conduct is prohibited, the Supreme Court has found the threat of prosecution objectively reasonable, and capable of sustaining standing. Plaintiffs in such cases need not show that a prosecution is clearly impending, nor even likely. *See Epperson*, 393 U.S. at 101-02 (pre-enforcement challenge to a law that had not been used in 40 years); *Doe*, 410 U.S. at 188 (doctors had standing to bring pre-enforcement challenge to criminal abortion statute even though none had been prosecuted nor threatened with prosecution). As the panel noted, this Circuit (consistent with the many Supreme Court decisions above) has always required only that plaintiffs have an "'objectively reasonable' fear of prose-

cution" to establish injury in chilling-effect "First Amendment pre-enforcement actions." Op. at 17 (citing six First Circuit cases[1]).

Clapper does not change this inquiry. *Clapper* involved a facial challenge to the FISA Amendments Act of 2008 (FAA), which modified the Foreign Intelligence Surveillance Act to permit judicial approval not just for individualized targeting but rather for whole programs of surveillance (so long as those programs did not intentionally target U.S. persons). *Clapper*, 133 S. Ct. at 1143-45. The plaintiffs in *Clapper* based their claim to standing on two distinct theories. The first, not relevant here but taking up the majority of the opinion, was that there was a "reasonable likelihood" that their communications would *actually* be acquired by FAA surveillance in the future, thus constituting "imminent" future harm. *Id*. at 1143. The second, alternative theory of standing was based on a chilling effect, but not one imposed by the risk of prosecution under a criminal statute. Instead, the *Clapper* plaintiffs "maintain[ed] that the risk of surveillance under [the FAA] is so substantial that they have been forced to take costly and burdensome measures to protect the confidentiality of their international communications; in their view, the costs they have incurred constitute present injury that is fairly traceable to [the

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[1] *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 48 (1st Cir. 2011); *Ramirez v. Ramos*, 438 F.3d 92, 99 (1st Cir. 2006); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003); *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 31 (1st Cir. 1999); *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996).

FAA]." *Id*. at 1146.

The Court rejected both theories on the grounds that "the harm [the *Clapper* plaintiffs] seek to avoid is not certainly impending." *Id*. at 1151. However, the Court cautioned that

> [o]ur cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about. In some instances, we have found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm. ... But to the extent that the 'substantial risk' standard is relevant and is distinct from the 'clearly impending' requirement, respondents fall short of even that standard, in light of the attenuated chain of inferences necessary to find harm here.

Id. at 1150 n.5. Specifically, an Article III judge on the Foreign Intelligence Surveillance Court (FISC) would have to approve of surveillance under the FAA that targeted only foreigners, complied with the Fourth Amendment, and implemented minimization safeguards (all of which the statute expressly requires), while nonetheless ensnaring the communications of the plaintiffs (all of whom were U.S. persons or organizations rather than foreigners, and many of whom were attorneys whose communications were mostly privileged and thus should have been protected by minimization procedures). Moreover, because the primary claim in the *Clapper* complaint was a Fourth Amendment cause of action, plaintiffs' standing depended on the contingency that a FISC judge would decide to approve and authorize surveillance that violated the Fourth Amendment, in the face of the explicit requirement of the statute that the FISC review for Fourth Amendment com-

pliance. *Id.* at 1148-50. On the facts before it, the Court held that the likelihood that the plaintiffs' communications would be subject to FAA surveillance was far too remote, ultimately resting on a "speculative chain of" contingencies that the Court found exceedingly unlikely to happen. *Id*. at 1150.

That different standards should govern pre-enforcement challenges to criminal statutes and chilling-effect challenges to non-criminal statutes such as *Clapper* should not be surprising. When Congress passes a surveillance statute, surveillance may or may not be directed at individuals as the ultimate result. In contrast, when Congress passes a criminal statute, *everyone* is obligated to obey it. For this reason, the chilling effect created by a criminal statute has always been treated more liberally for purposes of standing than the chilling effect created by fear of *contingent* government action like surveillance programs that may or may not actually end up directed at specific individuals, or other programs that do "not regulate, constrain, or compel any action on their part." *Clapper*, 133 S. Ct. at 1153. Nothing in *Clapper* suggests that federal courts should deny standing in every chilling-effect case where the feared future injury is not "literally certain." If that were the case, it would mean that *Clapper* silently overruled all the Supreme Court cases cited above, which permit plaintiffs to bring a pre-enforcement challenge to a criminal statute even where there is no imminent threat of prosecution.

Under settled precedent, the pre-enforcement standard governs challenges to criminal laws even where the reach of the statute is disputed, as it is here. In *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988), a Virginia statute prohibited displaying for sale works depicting nudity, sex, or sadomasochism "which is harmful to juveniles" in a manner available to juveniles. The plaintiff booksellers believed much of their stock might fit the Virginia Code's definition of "harmful to juveniles," which would force them to segregate their displays; the prosecutor disagreed, stating that the "statute's coverage is much narrower than plaintiffs allege or the courts below found." *Id*. at 394. The Supreme Court found standing, noting that where the "danger ... is, in large measure, one of self-censorship[,] a harm that can be realized even without an actual prosecution," the requirement of injury-in-fact is met where "the law is aimed directly at plaintiffs, who, *if their interpretation of the statute is correct*, will have to take significant and costly compliance measures or risk criminal prosecution." *Id*. at 392 (emphasis added) (citing *Craig v. Boren*, 429 U.S. 190, 194 (1976)); *see also Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000) ("while there may be other, perhaps even better [constructions of the disputed statute], [plaintiff's] is reasonable enough that it may legitimately fear that it will face enforcement").

The panel here gave dispositive weight to "the Government disavowal of any intention to prosecute on the basis of the Government's own interpretation of

the statute and its rejection of plaintiffs' interpretation as unreasonable." Op. at 17-18. That stands in sharp contrast to other federal courts, which have been consistently unwilling to deny standing even where a prosecutor expressly states that on her interpretation of a statute the plaintiffs cannot be prosecuted, because even the Attorney General "does not bind the ... courts[,] ... law enforcement," subsequent attorneys general, or even her own future actions.[2]

The panel decision remakes the standard for pre-enforcement challenges in a fashion that conflicts with precedent in both this and other circuits. As Plaintiffs had set forth at great length in their opening brief (Br. for Appellants at 10-12), it is error to deny standing where plaintiffs have put forth an "objectively reasonable, alb[ei]t *disputed*, interpretation of the statute." *See R.I. Med. Soc'y v. Whitehouse*, 239 F.3d 104, 105 (1st Cir. 2001) (doctors have standing for pre-enforcement challenge where their conventional abortion procedures might or might not fall under the "murk[y]" language of Rhode Island's partial birth abortion ban); *Pacific Capi-*

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[2] *American Booksellers*, 484 U.S. at 395; *Kucharek v. Hanaway*, 902 F.2d 513, 519 (7th Cir. 1990) (interpretation of statute offered by Attorney General is not binding because he may "change his mind [or] may be replaced in office"); *see also Vermont Rt. to Life Comm.*, 221 F.3d at 383 ("there is nothing that prevents the State from changing its mind. It is not forever bound, by estoppel or otherwise, to the view of the law that it asserts in this litigation."); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1192-93 (10th Cir. 2000) ("Throughout this litigation, Colorado has insisted that under the State's construction of [the statute], organizations like [the plaintiffs] will not be prosecuted.... Such representations, however, are insufficient to overcome the chilling effect of the statute's plain language.").

tal Bank v. Connecticut, 542 F.3d 341, 350 (2d Cir. 2008) (finding standing despite state's argument that it is "unknown how [it] will apply" a statute that has never been invoked to date, and citing *Vermont Rt. to Life*, 221 F.3d at 383); *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 661, 664 (5th Cir. 2006) (plaintiffs have standing despite dispute as to statute's reach, and ultimate use of limiting instruction to cabin that reach); *Hoover v. Wagner*, 47 F.3d 845, 847 (7th Cir. 1995) (reversing district court dismissal on standing despite question as to whether the injunction at issue covered the expressive conduct in which plaintiffs desired to engage); *cf. Citizens for Responsible Gov't*, 236 F.3d at 1193 (10th Cir.) (quoting *Vermont Rt. to Life* approvingly). The Second Circuit has cited these sections of both *Pacific Capital Bank* and *Vermont Rt. to Life* approvingly in a standing decision handed down five months after *Clapper* was decided. *See Hedges v. Obama*, 724 F.3d 170, 197-98 (2d Cir. Jul. 17, 2013).

These cases, following the example of the Supreme Court in *American Booksellers*, set forth the proper standard: Even where the reach of the statute is disputed, if plaintiffs have set forth an interpretation that is "reasonable enough that [they] may legitimately fear ... enforcement ... by the [government] brandishing the [interpretation] proffered by" plaintiffs, *id.* at 198 (quoting *Vermont Rt. to Life*, 221 F.3d at 383), they have an "actual and well-founded fear"[3] sufficient to

[3] *American Booksellers*, 484 U.S. at 393.

underlie standing. Plaintiffs here may not have the best or most correct reading of the statute, but that is an issue for the merits, not for the standing inquiry, which only demands that their interpretation be "objectively reasonable"—as the law in this Circuit had demanded prior to the panel opinion here.

Two additional points bear noting. First, the panel made this radical change in the law of the Circuit without the benefit of briefing from the parties. When the panel opinion states that "Plaintiffs argue that *Clapper* has no bearing," Op. at 19, it refers to argument from the podium, since defendants made no argument that *Clapper* altered existing standards for pre-enforcement challenges in their briefs,[4] and plaintiffs accordingly had no reason to address the issue in their papers.

Second, the Supreme Court will hear argument tomorrow, April 22nd, in a case challenging an unpublished Sixth Circuit decision that, like the panel's decision, is also an outlier to the long line of decisions discussed above. *Susan B. Anthony List v. Driehaus*, 525 Fed. Appx. 415 (6th Cir. May 13, 2013), *cert. granted*, 134 S. Ct. 895 (Jan. 10, 2014). The petition presents the following question:

> must a party whose speech is arguably proscribed prove that authorities would certainly and successfully prosecute him, as the Sixth Circuit holds, or should the court presume that a credible threat of prosecution exists absent desuetude or a firm commitment by prosecutors not to enforce the law, as seven other Circuits hold.

[4] The government cited *Clapper* in passing but did not argue that it marked a discontinuity in established standing law. *Cf.* Brief for Appellee at 19-20.

Petition for Certiorari (appended) at i. As the petition notes, *id*. at 11-15, the seven other circuits to decide the issue prior to this case came to the opposite conclusion from the panel here. Though the Sixth Circuit ruling does not rely on *Clapper*, if the panel here was correct to extend *Clapper* to pre-enforcement challenges to criminal statutes, that will surely manifest in the Supreme Court's disposition of *Susan B. Anthony List*. This Court might prudently hold the resolution of this petition for reconsideration pending the outcome of that case.

II. The AETA's First Amendment savings clause cannot replace inquiry into whether the statute on its terms trenches on protected expression

In finding that plaintiffs could not legitimately fear prosecution under three distinct provisions of the AETA for activities protected by the First Amendment, the panel relied in each instance on 18 U.S.C. § 43(e)(1), a general savings clause which states only that the AETA does not reach expressive conduct protected by the First Amendment. *See* Op. at 25 (declining to decide whether plaintiffs' interpretation of the phrase "personal property" in subsection (a)(2)(A) to include lost profits was reasonable, and instead holding that the savings clause "preclude[s] an interpretation according to which protected speech activity resulting in lost profits gives rise to liability"); *id.* at 26 (finding no standing to challenge subsection (a)(2)(B), the provision claimed to criminalize "general support for illegal action by others," because of the savings clause's "specific exemption from liability of" conduct protected by the First Amendment"); *id.* at 29 ("[T]he rules of construction

protecting expressive activity would preclude plaintiffs' broad interpretation" of the conspiracy/attempt subsection, (a)(2)(C)).

The panel specifically declined to interpret the language of the AETA, holding that the presence of a savings clause drawing the line at First Amendment-protected activity was sufficient to find that the statute does not cover constitutionally protected conduct, Op. at 18. This extensive reliance on a savings clause is contradicted by decisions in other circuits. As courts in other circuits have made clear, a "savings clause" is not a substantive provision, and cannot be used as a shortcut to determining the meaning of a statute's substantive prohibitions. *See Fisher v. King*, 232 F.3d 391, 395 (4th Cir. 2000) (savings clause is disregarded as void when it is inconsistent with the body of the statute, citing *Sutherland on Statutory Construction* treatise); *CISPES (Committee in Solidarity with the People of El Salvador) v. FBI*, 770 F.2d 468, 474 (5th Cir. 1985) (First Amendment savings clause "cannot substantively operate to save an otherwise invalid statute"). The panel's blind reliance on "explicit rules of construction protecting First Amendment rights," Op. at 18, cannot take the place of a separate inquiry into whether the statutory text reaches constitutionally-protected speech and conduct.[5]

[5] To the extent the panel also relied on the Government's stated intent to interpret the reach of the AETA narrowly to avoid reaching Plaintiffs' intended conduct, it was also wrong. The irrelevance of prosecutorial disavowal is discussed *supra* at 8 and 8 n.5. Moreover, the panel mistakenly implied that *Clapper* established a "rule of construction" that the surveillance statute must be read to comply

Even if a savings clause may sometimes provide *some* guidance in interpreting a statute, § 43(e)(1) does not, and the panel erred in giving it any weight at all. A savings clause can only be used to cure ambiguity in a statute if the savings clause is not ambiguous itself. But § 43(e)(1) exempts all "expressive conduct ... protected from legal prohibition by the First Amendment," which provides no guidance at all. By setting the boundary at "the First Amendment," the savings clause only reiterates "well-settled constitutional restrictions on the construction of statutory enactments," *CISPES*, 770 F.2d at 474, and is virtually meaningless. Contrary to what the panel held, merely including some key words from the Constitution will not "preclude" the statute from being unconstitutional, Op. at 25, without adding something else to reduce the ambiguity.

The savings clause gives Plaintiffs no sense of where the AETA draws the line between protected conduct and unlawful activity. They already know what the savings clause says—that some expressive conduct is constitutionally protected. But because § 43(e)(1) stops there, it fails to actually clarify what appellants may do without fear of criminal prosecution. Moreover, because the savings clause looks only to "the First Amendment," which is susceptible to a multitude of inter-

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with the Fourth Amendment. Instead, *Clapper* simply found that the primary injury asserted—violation of plaintiffs' Fourth Amendment rights—depended on the assumption that FISC *judges* would violate the Fourth Amendment by approving surveillance of U.S. persons exceeding that permitted by the Amendment. (*See supra* at 5-6.) Nothing in *Clapper* supports the idea that savings clauses should generally be given special weight in denials of standing.

pretations, § 43(e)(1) provides no reassurance that the conduct Plaintiffs *believe* is constitutionally protected will be interpreted by a court or prosecutor as *actually* protected. To know what activity is exempt from criminal prosecution, Plaintiffs would need to become First Amendment experts. The law does not require them to shoulder that burden. *See Nat'l People's Action v. City of Blue Island*, 594 F. Supp. 72, 78 (N.D. Ill. 1984) (general exemption clause would require an individual to have "knowledge of all law [under the First Amendment] applicable to her or his activities").

The panel held that the inclusion of two examples of protected expression in the savings clause—"peaceful picketing or other peaceful demonstration"—erased any uncertainty about what conduct AETA criminalized. Op. at 25. But noting some conduct that clearly falls within the core protection of the First Amendment hardly cures the fundamental deficiency. *See*, *e.g.*, *Rubin v. City of Santa Monica*, 823 F. Supp. 709, 713 (C.D. Cal. 1993) (First Amendment savings clause allowing exception for gatherings such as "rallies, protests, speeches, vigils, prayer meetings, religious services, and the like" was still vague because it did not provide "comprehensible and unambiguous standards" for applying the exception); *see also Blue Island*, 594 F. Supp. at 79 (noting that some First Amendment doctrines "are

not so categorically applicable and clear, but depend upon the various fact situations present in each circumstance.").[6]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court vacate the panel opinion, reverse the district court and remand. In the alternative, Plaintiffs request that the panel vacate its opinion and provide opportunity for supplemental briefing and argument on the issues above, or at minimum hold open this petition pending resolution of *Susan B. Anthony List* by the Supreme Court.

Dated: April 21, 2014

Respectfully submitted,

/s/*Rachel Meeropol*
Rachel Meeropol [1st Cir. Bar No. 1158450]
Shayana Kadidal [1st Cir. Bar No. 102802]
Susan Hu

[6] To take another example, the Supreme Court has held that the First Amendment prohibits permit schemes that require protestors to be financially responsible for costs potentially created by counterdemonstrators not within the permitee's control. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 137 (1992). Similarly, in *Van Arnam v. GSA*, 332 F. Supp. 2d 376, 403 (D. Mass. 2004), the district court concluded that the First Amendment prohibits permits that would require demonstrators to pay for damage to government property caused by "potentially unaffiliated third parties." Plaintiffs may reasonably interpret *Forsyth* and *Van Arnam* to hold that the First Amendment protects them from being punished for property damage committed by others in the course of a peaceful demonstration, yet the text of the AETA would suggest otherwise. 18 U.S.C. §§ 43(a)(2)(A), (C) (holding individuals criminally liable for conduct that "intentionally damages or *causes* the loss of any real or personal property," and financially liable for all resulting economic damage) (emphasis added). That § 43(e)(1) exempts "peaceful demonstrations" from criminal liability does nothing to settle the question of liability in this context.

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CERTIFICATE OF SERVICE

I certify that on this day I caused a true copy of the above document to be served upon attorneys of record listed below via ECF. Parties who are registered as ECF Filers will be served by the CM/ECF system. (All parties are registered ECF filers according to the Service List Report produced by the CM/ECF system.)

/s/Rachel Meeropol
Rachel Meeropol
Attorney for Appellants
Dated: April 21, 2014

Appendix A:
Panel slip opinion, *Blum v. Holder*, No. 13-1490 (1st Cir. Mar. 7, 2014)

United States Court of Appeals
For the First Circuit

No. 13-1490

SARAHJANE BLUM; RYAN SHAPIRO; LANA LEHR; LAUREN GAZZOLA; IVER ROBERT JOHNSON, III,

Plaintiffs, Appellants,

v.

ERIC H. HOLDER, JR., Attorney General,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Joseph L. Tauro, U.S. District Judge]

Before

Lynch, Chief Judge,
Thompson and Kayatta, Circuit Judges.

Rachel Meeropol, with whom Alexis Agathocleous, Center for Constitutional Rights, Alexander A. Reinert, David Milton, and Howard Friedman were on brief, for appellants.

Matthew M. Collette, Attorney, Appellate Staff, Civil Division, with whom Stuart F. Delery, Assistant Attorney General, Carmen M. Ortiz, United States Attorney, and Michael Jay Singer, Attorney, Appellate Staff, Civil Division, were on brief, for appellee.

Odette J. Wilkens, Christine L. Mott, Chair, Committee on Animal Law, Brian J. Kreiswirth, Chair, Committee on Civil Rights, and Kevin L. Barron on brief for The Association of the Bar of the City of New York, amicus curiae in support of appellants.

Matthew R. Segal, Sarah R. Wunsch, David J. Nathanson, and Wood & Nathanson, LLP on brief for American Civil Liberties Union of Massachusetts, American Civil Liberties Union, and National Lawyers Guild, amici curiae in support of appellants.

March 7, 2014

LYNCH, Chief Judge. Sarahjane Blum and four others are committed and experienced animal right activists. Although they have never been prosecuted or threatened with prosecution under the Animal Enterprise Terrorism Act ("AETA" or "Act"), 18 U.S.C. § 43, which criminalizes "force, violence, and threats involving animal enterprises," they sued to obtain declaratory and injunctive relief that the statute is unconstitutional under the First Amendment.

The district court dismissed their complaint under Rule 12(b)(1), finding that these plaintiffs lacked standing because they have suffered no injury in fact as required by Article III. Blum v. Holder, 930 F. Supp. 2d 326, 337 (D. Mass. 2013). The court held that plaintiffs "failed to allege an objectively reasonable chill" on their First Amendment rights and, hence, "failed to establish an injury-in-fact." Id. at 335. We affirm.

I.

In their complaint, plaintiffs allege three constitutional defects in AETA. First, plaintiffs allege that, both on their face and as-applied, subsections (a)(2)(A) and (d) of AETA are substantially overbroad in violation of the First Amendment. Plaintiffs maintain that subsection (a)(2)(A) must be read to prohibit all speech activity with the purpose and effect of causing an animal enterprise to lose profits and that subsection

(d)(3) must be read to impose higher penalties on the basis of such loss.[1]

Second, plaintiffs allege that, both on its face and as-applied, AETA discriminates on the basis of content and viewpoint, again in violation of the First Amendment. Plaintiffs argue that the Act, which conditions liability on acting with "the purpose of damaging or interfering with the operations of an animal enterprise,"[2] 18 U.S.C. § 43(a), discriminates on the basis of content by targeting core political speech that impacts the operation of animal enterprises and on the basis of viewpoint by privileging speech that is supportive of animal enterprises and criminalizing certain speech that is opposed to such enterprises.

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[1] In their complaint, plaintiffs allege also that AETA subsection (a)(2)(C) is overbroad. On appeal, plaintiffs claim only that subsection (a)(2)(C) is void for vagueness.

[2] AETA defines "animal enterprise" as follows:

> (1) the term “animal enterprise” means--
>
> > (A) a commercial or academic enterprise that uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research, or testing;
> >
> > (B) a zoo, aquarium, animal shelter, pet store, breeder, furrier, circus, or rodeo, or other lawful competitive animal event; or
> >
> > (C) any fair or similar event intended to advance agricultural arts and sciences[.]

18 U.S.C. § 43(d)(1).

Third, plaintiffs allege that, both on its face and as-applied, AETA is void for vagueness. Plaintiffs complain that various of the Act's key terms are so imprecise as to prevent a reasonable person from understanding what the statute prohibits, encouraging arbitrary or discriminatory enforcement.

None of the plaintiffs express any desire or intent to damage or cause loss of tangible property or harm to persons. Plaintiffs do allege both that they have an objectively reasonable fear of future prosecution and that they have presently refrained from engaging in certain activities protected by the First Amendment for fear AETA may be read to cover their activities and so subject them to future prosecution. Both that fear of future harm and that present self-restraint, they say, have already caused them to suffer injury in fact. They do not plead that they have received any information that law enforcement officials have any intention of prosecuting them under AETA. Indeed, the Government has disavowed, before both this court and the district court,[3] any intention to prosecute plaintiffs for what they say they wish to do, characterizing plaintiffs' various AETA interpretations as

[3] In the memorandum in support of its motion to dismiss before the district court, the Government stated flatly, "Plaintiffs have no concrete, actual intent to engage in specific activity at a specific time in the near future that will possibly subject them to the AETA." At oral argument before this court, the Government insisted "there is no intent to prosecute" plaintiffs for their stated intended conduct, which the Government characterized as "essentially peaceful protest."

unreasonable. Plaintiffs do not claim they have engaged in or wish to engage in activities plainly falling within the core of the statute, which is concerned with intentional destruction of property and making true threats of death or serious bodily injury. We describe what they do claim.

Plaintiff Sarahjane Blum alleges that she would like to, but has been deterred from acting to, lawfully investigate conditions at the Au Bon Canard foie gras farm in Minnesota, to create a documentary film, and to publicize the results of her investigation. She would also like to organize letter-writing and protest campaigns to raise public awareness and pressure local restaurants to stop serving foie gras.

Plaintiff Ryan Shapiro alleges that he would like to lawfully document and film animal rights abuses but is deterred from doing so. Shapiro continues to engage in leafleting, public speaking, and campaign work, but fears that these methods of advocacy are less effective than investigating underlying industry conduct.

Plaintiff Lana Lehr alleges that, but for AETA, she would attend lawful, peaceful anti-fur protests, bring rabbits with her to restaurants that serve rabbit meat, and distribute literature at events attended by rabbit breeders. Lehr alleges that, at present, she limits her animal rights advocacy to letter-writing campaigns, petitions, and conferences.

Plaintiff Iver Robert Johnson, III, alleges that he has been unable to engage in effective animal rights advocacy because others are chilled from engaging in protests out of fear of prosecution under AETA. Johnson does not allege that he has refrained from lawful speech activity on the basis of such fear.

Finally, plaintiff Lauren Gazzola alleges that she is chilled from making statements short of incitement in support of illegal conduct. Gazzola was convicted in 2004 under AETA's predecessor statute, the Animal Enterprise Protection Act ("AEPA"), for making true threats against individuals and for planning and executing illegal activities as a member of the United States branch of Stop Huntingdon Animal Cruelty. Her convictions were upheld on appeal. See United States v. Fullmer, 584 F.3d 132, 157 (3d Cir. 2009).

II.

A. Statutory Framework

In 1992, Congress enacted AEPA, which criminalized the use of interstate or foreign commerce for intentional physical disruption of the operations of an animal enterprise. In 2002, Congress amended AEPA, increasing the available penalties. In 2006, in response to "an increase in the number and the severity of criminal acts and intimidation against those engaged in animal enterprises," 152 Cong. Rec. H8590-01 (daily ed. Nov. 13, 2006)

(statement of Rep. Sensenbrenner), Congress amended AEPA again, renaming it AETA.

In contrast to AEPA, AETA does not specifically limit its scope to physical disruption. AETA also criminalizes placing a person in fear of injury or death regardless of economic damage.[4] 18 U.S.C. § 43(a)(2)(B). AETA makes clear that threats of vandalism, harassment, and intimidation against third parties that are related to or associated with animal enterprises are themselves substantive violations of the Act. Id. Finally, AETA makes available increased penalties. Id. § 43(b).

AETA is codified under the title "Force, violence, and threats involving animal enterprises." Id. § 43. The Act consists of five subsections, four of which are relevant here. Subsection (a) of the Act defines "Offense":

> (a) Offense. -- Whoever travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate or foreign commerce --
>
> (1) for the purpose of damaging or interfering with the operations of an animal enterprise; and
>
> (2) in connection with such purpose --
>
> (A) intentionally damages or causes the loss of any real or personal property (including animals or records) used by an

[4] Before enactment of AETA, federal officials utilized, inter alia, the interstate stalking statute, 18 U.S.C. § 2261A, to police such conduct. See Fullmer, 584 F.3d at 138.

> animal enterprise, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise;
>
> (B) intentionally places a person in reasonable fear of the death of, or serious bodily injury to that person, a member of the immediate family (as defined in section 115) of that person, or a spouse or intimate partner of that person by a course of conduct involving threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation; or
>
> (C) conspires or attempts to do so; shall be punished as provided for in subsection (b).

Id. § 43(a).

Subsection (b) sets out the penalties. Of significance here, AETA indexes available penalties to whether and in some instances to what extent the offending conduct results in "economic damage," "bodily injury," "death," or a "reasonable fear of serious bodily injury or death." Id. § 43(b).

Subsection (d) in turn defines various key terms.[5] Most important here, subsection (d) defines "economic damage" as used in the penalties subsection as follows:

(3) the term "economic damage" --

[5] Subsection (c) of the Act establishes a scheme for restitution. 18 U.S.C. § 43(c).

> (A) means the replacement costs of lost or damaged property or records, the costs of repeating an interrupted or invalidated experiment, the loss of profits, or increased costs, including losses and increased costs resulting from threats, acts or vandalism, property damage, trespass, harassment, or intimidation taken against a person or entity on account of that person's or entity's connection to, relationship with, or transactions with the animal enterprise; but
>
> (B) does not include any lawful economic disruption (including a lawful boycott) that results from lawful public, governmental, or business reaction to the disclosure of information about an animal enterprise[.]

Id. § 43(d)(3).

Last, subsection (e) of the Act articulates two relevant rules of construction:

> (e) Rules of construction. -- Nothing in this section shall be construed –-
>
> (1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution; [or]
>
> (2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, regardless of the point of view expressed, or to limit any existing legal remedies for such interference[.]

Id. § 43(e).[6]

B. Procedural History

Plaintiffs filed this action in the Massachusetts District Court on December 15, 2011. On March 9, 2012, the Government filed a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, arguing lack of standing, and under Rule 12(b)(6) for failure to state a claim. The district court on March 18, 2013 granted the Government's motion under Rule 12(b)(1). Blum, 930 F. Supp. 2d at 335. The court held that plaintiffs "failed to allege an objectively reasonable chill" on their First Amendment rights and, hence, "failed to establish an injury-in-fact" as required by Article III. Id.

III.

This court reviews de novo a district court's grant of a motion to dismiss for lack of standing. McInnis-Misenor v. Me. Med. Ctr., 319 F.3d 63, 67 (1st Cir. 2003). For purposes of review, we accept as true all material allegations in the complaint and construe them in plaintiffs' favor. Mangual v. Rotger-Sabat, 317 F.3d 45, 56 (1st Cir. 2003). However, "this tenet does not apply to 'statements in the complaint that merely offer legal

[6] Subsection (3) also articulates a third rule of construction according to which AETA shall not be construed "to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this action, or to preempt State or local laws that may provide such penalties or remedies." 18 U.S.C. § 43(e)(3).

conclusions couched as facts or are threadbare or conclusory,'" Air Sunshine, Inc. v. Carl, 663 F.3d 27, 33 (1st Cir. 2011) (quoting Soto-Torres v. Fraticelli, 654 F.3d 153, 158 (1st Cir. 2011)), or to allegations so "speculative that they fail to cross 'the line between the conclusory and the factual,'" id. (quoting Peñalbert-Rosa v. Fortuño-Burset, 631 F.3d 592, 595 (1st Cir. 2011)).

A. The Law of Standing for First Amendment Pre-Enforcement Suits

"'The party invoking federal jurisdiction bears the burden of establishing' standing." Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1148 (2013) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)).

Article III restricts a federal court's jurisdiction to certain "Cases" and "Controversies." U.S. Const. art. III. "'One element of the case-or-controversy requirement' is that plaintiffs 'must establish that they have standing to sue.'" Clapper, 133 S. Ct. at 1146 (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997)). This requirement "is founded in concern about the proper -- and properly limited -- role of the courts in a democratic society." Summers v. Earth Island Inst., 555 U.S. 488, 492-93 (2009) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

To show standing, plaintiffs must "'allege[] such a personal stake in the outcome of the controversy' as to warrant [their] invocation of federal-court jurisdiction and to justify

exercise of the court's remedial powers on [their] behalf." Warth, 422 U.S. at 498-99 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). As Clapper v. Amnesty Int'l USA, 133 S. Ct. at 1147, notes, in all cases, to establish Article III standing:

> [Plaintiffs must show] an injury [that is] "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." Monsanto Co. v. Geertson Seed Farms, []130 S. Ct. 2743, 2752[] (2010). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes -- that the injury is certainly impending." [Lujan, 504 U.S. at] 565 n.2 (internal quotation marks omitted). Thus, we have repeatedly reiterated that "threatened injury must be certainly impending to constitute injury in fact," and that "[a]llegations of possible future injury" are not sufficient. Whitmore [v. Arkansas], 595 U.S. [149,] 158 [(1990)] (emphasis added; internal quotation marks omitted)[.]

Id. (sixth alteration in original) (citation omitted).[7]

This court has said that, in challenges to a state statute under the First Amendment:

> [T]wo types of injuries may confer Article III standing without necessitating that the challenger actually undergo a criminal prosecution. The first is when "the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a

[7] To be clear, before Clapper, the Supreme Court had imposed a "certainly impending" standard in the context of a First Amendment pre-enforcement challenge to a criminal statute. See Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979).

> constitutional interest, but proscribed by [the] statute, and there exists a credible threat of prosecution." [Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)]. . . . The second type of injury is when a plaintiff "is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences." N.H. Right to Life [Political Action Comm. v. Gardner], 99 F.3d [8,] 13 [(1st Cir. 1996)][.]

Mangual, 317 F.3d at 56-57 (second alteration in original).

The Supreme Court has long held that as to both sorts of claims of harm, "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." Babbitt, 442 U.S. at 298. "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." Laird v. Tatum, 408 U.S. 1, 13-14 (1972).

Most recently, Clapper emphasized that "[o]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." 133 S. Ct. at 1147 (alteration in original) (quoting Raines, 521 U.S. at 819-20). We apply that standard here.

In Clapper, the Supreme Court addressed the Article III standing requirement for First Amendment and Fourth Amendment challenges to a federal statute. There, the Court addressed a pre-

enforcement challenge under the First Amendment by journalists, attorneys, and others to the new Foreign Intelligence Surveillance Act.[8] Id. at 1146. That Act authorized the Government to seek permission from the Foreign Intelligence Surveillance Court to electronically survey the communications of non-U.S. persons located abroad, without demonstrating probable cause that the target of the surveillance is a foreign power or agent thereof and without specifying the nature and location of each of the facilities or places at which the surveillance will take place. See id. at 1156. The plaintiffs' complaint was not of a threat of enforcement of a criminal statute against them which would lead to a chilling of First Amendment activity, but rather of a more direct chilling of speech and invasion of their First Amendment rights when the Government exercised this new authority. Unlike this case, Clapper also raised threats to the plaintiffs' personal privacy interests.

The Clapper trial court had held the plaintiffs lacked standing; the Second Circuit disagreed; and the Supreme Court reversed. Id. at 1146. The Supreme Court first held that the Second Circuit had erred as a matter of law in holding that the

[8] "Pre-enforcement" is a term used in at least two contexts. In one, as in Clapper, the suit is brought immediately upon enactment of the statute, before there has been an opportunity to enforce. In the other, as here, the law has been on the books for some years, and there have been charges brought under it in other cases, but the plaintiffs have not been prosecuted under it and say they fear prosecution.

plaintiffs could establish the needed injury for standing merely by showing an "objectively reasonable likelihood that the plaintiffs' communications are being or will be monitored under the [Act]." Amnesty Int'l USA v. Clapper, 638 F.3d 118, 134 (2d Cir. 2011). The Court held that the Second Circuit's "objectively reasonable likelihood" standard was inconsistent with "the well-established requirement that threatened injury must be 'certainly impending.'" Clapper, 133 S. Ct. at 1147 (quoting Whitmore, 495 U.S. at 158). It is not enough, the Court held, to allege a subjective fear of injurious government action, even if that subjective fear is "not fanciful, irrational, or clearly unreasonable."[9] Id. at 1151 (quoting Amnesty Int'l USA v. Clapper, 667 F.3d 163, 180 (2d Cir. 2011) (Raggi, J., dissenting from denial of rehearing en banc)).

Clapper also rejected plaintiffs' contention that "present costs and burdens that are based on a fear of surveillance" amounted to a cognizable injury. Id. It reasoned that plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." Id.

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[9] As one treatise has noted, Clapper "signaled a renewed caution about finding injury in fact based on probabilistic injury and the reasonable concerns that flow from it." Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer, & David L. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 9 (6th ed. Supp. 2013). The treatise did not suggest the Clapper injury standard was inapplicable to challenges to criminal statutes.

In rejecting the Second Circuit's "objectively reasonable likelihood" standard, the Supreme Court may have adopted a more stringent injury standard for standing than this court has previously employed in pre-enforcement challenges on First Amendment grounds to state statutes.

Before the decision in Clapper, this circuit applied an "objectively reasonable" fear of prosecution injury standard in First Amendment pre-enforcement actions, at least as to state statutes.[10] See Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 48 (1st Cir. 2011); Ramírez v. Sánchez Ramos, 438 F.3d 92, 99 (1st Cir. 2006); Mangual, 317 F.3d at 57; R.I. Ass'n of Realtors, Inc. v. Whitehouse, 199 F.3d 26, 31 (1st Cir. 1999); N.H. Right to Life, 99 F.3d at 14.

In assessing the risk of prosecution as to particular facts, weight must be given to the lack of a history of enforcement of the challenged statute to like facts, that no enforcement has been threatened as to plaintiffs' proposed activities. Particular weight must be given to the Government disavowal of any intention to prosecute on the basis of the Government's own interpretation of the statute and its rejection of plaintiffs' interpretation as

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[10] In Ramírez v. Sánchez Ramos, 438 F.3d 92, 98 (1st Cir. 2006), we said that to constitute a cognizable injury, both fear of prosecution and chilling "require[] 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."

unreasonable. The Government has affirmatively represented that it does not intend to prosecute such conduct because it does not think it is prohibited by the statute.[11] See Holder v. Humanitarian Law Project ("HLP"), 130 S. Ct. 2705, 2717 (2010) (holding that plaintiffs face a credible threat of prosecution where there is a history of prosecution under the challenged law and "[t]he Government has not argued . . . that plaintiffs will not be prosecuted if they do what they say they wish to do" (emphasis added)); Babbitt, 442 U.S. at 302 ("Moreover, the State has not disavowed any intention of invoking the criminal penalty provision against [entities] that [violate the statute]." (emphasis added)); N.H. Right to Life, 99 F.3d at 17 ("Indeed, the defendants have not only refused to disavow [the statute] but their defense of it indicates that they will some day enforce it."); see also Mangual, 317 F.3d at 58 (actual threat of prosecution).

This Government disavowal is even more potent when the challenged statute contains, as here, explicit rules of construction protecting First Amendment rights, which in themselves would inhibit prosecution of First Amendment activities. In Clapper, the Court credited the specific rules of construction contained in the statute meant to protect Fourth Amendment rights

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[11] We think that Clapper does not call into question the assumption that the state will enforce its own non-moribund criminal laws, absent evidence to the contrary. See N.H. Right to Life, 99 F.3d at 15. That is not the issue here, where the Government itself says the statute does not apply.

in assessing the lack of an impending injury. 133 S. Ct. at 1145 n.3.

In Clapper's analysis of injury, it considered that the fear of monitoring of communication rested on what the Court called a highly speculative set of assumptions. This included an assumption that the Government would use the new surveillance statute rather than other available means to achieve the same ends.[12] Id. Here, as well, plaintiffs' fear of prosecution and purported corresponding reluctance to engage in expressive activity rest on speculation. In fact, prosecution under AETA has been rare and has addressed actions taken that are different from those plaintiffs propose to undertake.[13] For its part, the Government has disavowed any intention to prosecute plaintiffs for their stated intended conduct because, in its view, that conduct is not covered by AETA.

Plaintiffs argue that Clapper has no bearing on injury and standing with respect to this First Amendment pre-enforcement challenge because this challenge is to a criminal statute, and

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[12] For this reason, the Supreme Court held that, in addition to being "too speculative," Clapper, 133 S. Ct. at 1143, plaintiffs' alleged injury was not "fairly traceable" to the challenged law, id. at 1149. We do not reach the fairly traceable ground.

[13] In addition to United States v. Buddenberg ("Buddenberg II"), No. CR-09-00263 RMW, 2010 WL 2735547 (N.D. Cal. July 12, 2010), discussed later, plaintiffs cite in their complaint two AETA prosecutions, both for the unlawful release of farm animals and related vandalism.

Clapper did not involve a criminal statute. Clapper, however, draws no such distinction and is expressly concerned with Article III injury requirements. Plaintiffs' position is inconsistent with footnote 5 of Clapper, in which the Supreme Court held that plaintiffs' claimed injury was too speculative even under the potentially more lenient "substantial risk" of harm standard the Court has applied in some cases. Id. at 1150 n.5 (quoting Monsanto Co., 130 S. Ct. at 2754–55).

Clapper acknowledged that the Court's "cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about." 133 S. Ct. at 1150 n.5. Involving a challenge to a decision of "the political branches in the fields of intelligence gathering and foreign affairs," id. at 1147, Clapper left open the question whether the previously-applied "substantial risk" standard is materially different from the "clearing impending" requirement. Id. As one example, the Court cited Babbitt, which involved a First Amendment, pre-enforcement challenge to a criminal statute. Id. Babbitt, unlike this case, involved a realistic threat of enforcement where the state had not disavowed any intention to prosecute. 442 U.S. at 302; see also HLP, 130 S. Ct. at 2717; Virginia v. Am. Book Sellers Ass'n, Inc., 484 U.S. 383, 393 (1988).

We reject plaintiffs' arguments that Clapper has no application here.[14] As Clapper helps make clear, plaintiffs' alleged injuries are "too speculative for Article III purposes" and no prosecution is even close to impending. 133 S. Ct. at 1147 (quoting Lujan, 504 U.S. at 565 n.2).

B. Plaintiffs' Proffered Statutory Interpretation Does Not Make Out the Needed Injury

In addition, we find that plaintiffs have not established the needed degree of injury to establish standing based on their proffered interpretations of the provisions of the statute. This is so even under the potentially more lenient "substantial risk" standard or even the "objectively reasonable" standard. See Ramírez, 438 F.3d at 98-99 (holding that plaintiff's fear was not "objectively reasonable" when she "never stated an intention to engage in any activity that could reasonably be construed to fall within the confines of the [challenged law]"). The United States argues that "the statue simply does not prohibit the actions

[14] To the extent plaintiffs may intend to engage in clearly proscribed conduct, they lack standing to assert a vagueness claim. See HLP, 130 S. Ct. at 2718-19 ("We consider whether a statute is vague as applied to the particular facts at issue, for '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" (alteration in original) (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982))); Whiting v. Town of Westerly, 942 F.2d 18, 22 (1st Cir. 1991) (no standing where plaintiff's proposed conduct is clearly proscribed); Eicher v. United States, 774 F.2d 27, 29 (1st Cir. 1985) (same).

plaintiffs intend to take," so they can have no legitimate fear of prosecution.

Plaintiffs argue the district court erred 1) in holding that their expansive interpretation of subsection (a)(2)(A), the destruction of property subsection, was unreasonable and, hence, that their fear of prosecution under that subsection was unreasonable as well; 2) in failing to recognize plaintiff Lauren Gazzola's standing to challenge subsection (a)(2)(B) on the basis of her would-be intention to advocate but not incite illegal conduct; and 3) in failing to credit their claim that subsection (a)(2)(C), the conspiracy subsection, could reasonably be interpreted as criminalizing any attempt to interfere with the operations of an animal enterprise. We address each argument in turn.

1. Subsection (a)(2)(A)

Plaintiffs argue that subsection (a)(2)(A) of the Act is substantially overbroad because it must be interpreted as criminalizing any expressive activity that intentionally results in the loss of profits to an animal enterprise, even in the absence of damage to or loss of property used, and will be so prosecuted. The United States disavows that reading.

Subsection (a)(2)(A) prohibits the use of interstate or foreign commerce for the purpose of damaging or interfering with

the operations of an animal enterprise where, in connection with that purpose, one:

> [I]ntentionally damages or causes the loss of any real or personal property (including animals or records) used by an animal enterprise, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise.

18 U.S.C. § 43(a)(2)(A). Plaintiffs argue that a) "personal property" includes lost profits, and therefore b) the Act makes unlawful all speech, including peaceful demonstrations, with the purpose and effect of causing an animal enterprise to lose profits.[15]

The United States replies, relying on the plain text, rules of construction, and legislative intent shown in legislative history, that because subsection (a)(2)(A) prohibits only intentional destruction of personal property "used by an animal enterprise," id. § 43(a)(2)(A) (emphasis added), the use of "personal property" cannot reasonably lead to prosecutions based merely on expressive activity causing lost profits.

The Government says Congress intended expressive conduct to be protected against prosecution by AETA's rules of construction. Further, if more is needed as to congressional

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[15] The district court held that "personal property" as used in subsection (a)(2)(A) must be read to encompass only "[]tangible" things, reasoning that subsection (a)(2)(A) provides as illustrations of "personal property" two "[]tangible[s]," namely "animals" and "records." Blum, 930 F. Supp. 2d at 336-37.

intent, AETA's legislative history shows the Act was passed to combat "violent acts" such as "arson, pouring acid on cars, mailing razor blades, and defacing victims' homes." 152 Cong. Rec. H8590-01 (daily ed. Nov. 12, 2006) (statement of Rep. Sensenbrenner); see also id. (statement of Rep. Scott) ("While we must protect those engaged in animal enterprises, we must also protect the right of those engaged in [F]irst [A]mendment freedoms of expression regarding such enterprises. It goes without saying that first amendment freedoms of expression cannot be defeated by statute. However, to reassure anyone concerned with the intent of this legislation, we have added in the bill assurances that it is not intended as a restraint on freedoms of expression such as lawful boycotting, picketing or otherwise engaging in lawful advocacy for animals."); 152 Cong. Rec. S9254-01 (daily ed. Sept. 8, 2006) (statement of Sen. Feinstein) ("[T]his legislation confronts these terrorist threats in [a] manner that gives due protections under the First Amendment. I fully recognize that peaceful picketing and public demonstrations against animal testing should be recognized as part of our valuable and sacred right to free expression.").

This court need not decide in the abstract whether "personal property . . . used by an animal enterprise" could ever be reasonably interpreted to include intangibles such as profits.[16]

[16] We note that under Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), any fact that increases a maximum available criminal sentence must be found by a jury beyond a reasonable doubt.

We are satisfied that AETA includes safeguards in the form of its expression-protecting rules of construction, which preclude an interpretation according to which protected speech activity resulting in lost profits gives rise to liability under subsection (a)(2)(A).

Plaintiffs insist that AETA's rules of construction cannot save an otherwise unlawful statute and so are irrelevant. Our focus is on the congressional intent stated in the statute as to what conduct is covered. Congress has made it clear that prosecutions under the statute should not be brought against "any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. § 43(e)(1). We have no reason to think prosecutors will ignore these plain expressions of limiting intent.

2. Subsection (a)(2)(B)

Plaintiffs argue next that plaintiff Lauren Gazzola has a reasonable fear of prosecution under AETA subsection (a)(2)(B), which prohibits "intentionally plac[ing] a person in reasonable fear of . . . death . . . or serious bodily injury . . . by a course of conduct involving threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation." Id. § 43(a)(2)(B). Gazzola alleges a desire to voice general support for illegal action by others and to participate in lawful protests.

Gazzola alleges further that she is chilled from engaging in such general advocacy for fear that it might fall under subsection (a)(2)(B).

Gazzola alleges no intention to engage in "vandalism, property damage, criminal trespass, harassment, or intimidation." Nor does she allege an intention to act in a way that would give rise to a "reasonable fear of . . . death . . . or serious bodily injury." Indeed, Gazzola specifically disavows any intention to engage in advocacy that rises to the level of incitement. See Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002) ("The government may suppress speech for advocating the use of force or a violation of law only if 'such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'" (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam))).[17]

Taking her disavowal in combination with AETA's specific exemption from liability of "any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment," 18 U.S.C. § 43(e)(1),

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[17] Plaintiffs complain that, in the wake of Virginia v. Black, 538 U.S. 343 (2003), it is unclear whether "true threats" require subjective intent. See United States v. Clemens, 738 F.3d 1, 2-3 (1st Cir. 2013) (noting circuit split on issue, finding no reason to depart from this circuit's objective test). However, as this court has explained, "[i]t is rare that a jury would find that a reasonable speaker would have intended a threat under the particular facts of a case but that a competent defendant did not." Id. at 12. The argument does not advance Gazzola's cause.

Gazzola's fear of prosecution for the lawful activities she describes under subsection (a)(2)(B) is unreasonable.

That Gazzola previously engaged in and was convicted under AEPA for plainly illegal conduct does not help her claim that she would be prosecuted for legal expressive activities. Gazzola's previous actions went well beyond expressing general support for illegal action by others. The Third Circuit found that Gazzola and her co-defendants "coordinated and controlled SHAC's [illegal] activities," engaged in "[d]irect action" and "intimidation and harassment," and "participated in illegal protests, in addition to orchestrating the illegal acts of others." Fullmer, 584 F.3d at 155-56.

3. Facial Attack on Subsection (a)(2)(C)

Last, plaintiffs argue that the structure of the conspiracy subsection of the Act could reasonably be interpreted to criminalize any conspiracy (or attempt) to damage or interfere with the operations of an animal enterprise, even when there is no intent to or accomplishing of any damage or destruction of property or causing fear of serious bodily injury or death. Under AETA, liability exists where an individual uses interstate or foreign commerce "for the purpose of damaging or interfering with the operations of an animal enterprise," 18 U.S.C. § 43(a)(1), and, in connection with such purpose, intentionally damages or destroys property, id. § 43(a)(2)(A), intentionally places a person in fear

of serious bodily injury or death, id. § 43(a)(2)(B), or "conspires or attempts to do so," id. § 43(a)(2)(C).

The dispute here is to what "so" in subsection (a)(2)(C) refers. The Government maintains that the "so" can only be read to refer to the activities described in subsections (a)(2)(A)-(B), that is, intentionally harming property or placing a person in reasonable fear of serious bodily injury or death. See id. § 43(a)(2)(A) (conditioning liability on "intentionally damag[ing] or caus[ing] the loss of any real or personal property," etc.); id. § 43(a)(2)(B) (conditioning liability on "intentionally plac[ing] a person in reasonable fear of . . . death . . . or serious bodily injury," etc.).

Plaintiffs, by contrast, argue that "so" might refer to the activity described in subsection (a)(1), that is, using interstate or foreign commerce "for the purpose of damaging or interfering with the operations of an animal enterprise." Id. § 43(a)(1). Plaintiffs' interpretation depends on the somewhat awkward syntax of the provision. While Congress might have written more clearly, plaintiffs' reading is not what Congress intended. That interpretation cannot be squared with the clear expressions of legislative intent in both the plain text of the Act and the legislative history. Plaintiffs' interpretation is inconsistent with AETA's title as codified, "Force, violence, and threats involving animal enterprises." 18 U.S.C. § 43 (emphasis added);

see also Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 47 (2008) (relying in part on subchapter's title to reject respondent's interpretation of that subchapter). Plaintiffs' interpretation would also render subsection (a)(2)(C) redundant since every time subsection (a)(1) is satisfied so too would be the "attempt" branch of subsection (a)(2)(C). Avoidance of redundancy is a basic principle of statutory interpretation. O'Connell v. Shalala, 79 F.3d 170, 179 (1st Cir. 1996).

Further, the rules of construction protecting expressive activity would preclude plaintiffs' broad interpretation. In addition, plaintiffs' interpretation contradicts the legislative history, already recited, and which also shows that AETA targets "heinous acts" such as "firebomb[ing]." 152 Cong. Rec. S9254-01 (daily ed. Sept. 8, 2006) (statement of Sen. Feinstein). One other court as well has rejected this interpretation. See United States v. Buddenberg ("Buddenberg I"), No. CR-09-00263 RMW, 2009 WL 3485937, at *12 (N.D. Cal. Oct. 28, 2009).[18]

IV.

In sum, "[plaintiffs] in the present case present no concrete evidence to substantiate their fears, but instead rest on mere conjecture about possible governmental actions." Clapper, 133 S. Ct. at 1154. In particular, plaintiffs' fear of prosecution

[18] Further, at oral argument, the Government insisted that "no prosecutor is going to bring a case saying you've conspired to have a purpose."

under AETA is based on speculation that the Government will enforce the Act pursuant to interpretations it has never adopted and now explicitly rejects.[19] Such unsubstantiated and speculative fear is not a basis for standing under Article III.[20]

If plaintiffs do choose to engage in conduct which causes them to be prosecuted under AETA, they are free to raise whatever defenses they have in that context.

We affirm the dismissal of this action for lack of standing. So ordered.

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[19] The Association of the Bar of the City of New York, acting as amicus in support of plaintiffs, cites Buddenberg II as an example of unreasonable prosecution under AETA. In that case, the United States filed a criminal complaint under AETA and under 18 U.S.C. § 371 for conspiracy to violate AETA, alleging that defendants participated in a series of threatening demonstrations at the homes of a number of UC Berkeley and UC Santa Cruz biomedical researchers whose work involved the use of animals. Buddenberg II, 2010 WL 2735547, at *1. The district court dismissed the indictment without prejudice on the ground that the indictment failed to allege the facts of the crimes charged with sufficient specificity. Id. at *10. From the fact that an indictment lacked specificity, it does not follow that the interpretation of AETA underlying the indictment was as plaintiffs argue or that it was unreasonably expansive. The availability and use of a bill of particulars by defendants and the dismissal of the case further undercut any need to give pre-enforcement standing.

[20] Individual plaintiff Iver Robert Johnson, III, did not allege that he has even a "subjective 'chill,'" Laird, 408 U.S. at 13, and so he has failed to establish a cognizable injury. In addition, his claims fail to meet causation and redressability requirements. See Blum, 930 F. Supp. 2d at 337 n.91.

United States Court of Appeals
For the First Circuit

No. 13-1490

SARAHJANE BLUM; RYAN SHAPIRO; LANA LEHR; LAUREN GAZZOLA; IVER ROBERT JOHNSON, III,

Plaintiffs, Appellants,

v.

ERIC H. HOLDER, JR., Attorney General,

Defendant, Appellee.

ERRATA SHEET

The opinion of this Court issued on March 7, 2014 is amended as follows:

On page 21, line 17, "statue" is replaced with "statute".

On page 24, lines 8-9, "first amendment" is replaced with "[F]irst [A]mendment".

Appendix B:
Petition for Certiorari,
Susan B. Anthony List v. Driehaus, No. 13-193 (filed Aug. 9, 2013)

No. 13-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. To challenge a speech-suppressive law, must a party whose speech is arguably proscribed prove that authorities would *certainly* and *successfully* prosecute him, as the Sixth Circuit holds, or should the court presume that a credible threat of prosecution exists absent desuetude or a firm commitment by prosecutors not to enforce the law, as seven other Circuits hold?

II. Did the Sixth Circuit err by holding, in direct conflict with the Eighth Circuit, that state laws proscribing "false" political speech are not subject to pre-enforcement First Amendment review so long as the speaker maintains that its speech is true, even if others who enforce the law manifestly disagree?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

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

Respondents, who were Defendants-Appellees below, are the Ohio Elections Commission, its Commissioners (John Mroczkowski, Bryan Felmet, Jayme Smoot, Harvey Shapiro, Degee Wilhelm, Larry Wolpert, and Charles Calvert) in their official capacities, its staff attorney (Philip Richter) in his official capacity, the Ohio Secretary of State (Jon Husted) in his official capacity, and Steven Driehaus.

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OPINIONS BELOW

The Court of Appeals' opinion (Pet.App.1a) is available at 2013 WL 1942821. The District Court's opinions dismissing the petitioners' complaints (Pet.App.21a, Pet.App.42a) can be found at 805 F. Supp. 2d 412 and 2011 WL 3296174.

JURISDICTION

The Sixth Circuit entered judgment on May 13, 2013, and denied rehearing en banc on June 26, 2013. Pet.App.64a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Believe it or not, it is a criminal offense in Ohio to make a knowingly or recklessly "false" statement about a political candidate or ballot initiative. Petitioners are advocacy groups that sought to challenge that law under the First Amendment: One group criticized a Congressman's support for the Affordable Care Act and was haled before the state elections commission, which found probable cause to pursue charges against it. The other group wanted to repeat the same message, but refrained from doing so because of that enforcement action.

Despite these concrete injuries, the courts below dismissed both lawsuits on jurisdictional grounds, finding the First Amendment claims unripe because (i) it was not *certain* that the groups would again be subjected to enforcement action if they repeated their speech; (ii) the elections commission had not reached a *final* determination on whether their speech was unlawful; and (iii) the *groups* maintained that their statements were true. That holding, consistent with the Sixth Circuit's uniquely restrictive approach to

pre-enforcement review under the First Amendment, effectively insulates this patently unconstitutional regime from *any* federal judicial review.

1. Susan B. Anthony List Criticizes Rep. Steve Driehaus for Supporting the Affordable Care Act. Susan B. Anthony List ("SBA") is a national pro-life advocacy group. During the 2010 elections, SBA criticized Members of Congress—including Steven Driehaus (D-OH)—who voted for the Affordable Care Act ("ACA"). Among other things, SBA planned to erect billboards in Rep. Driehaus' district, stating: "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion." Pet.App.3a.

2. Rep. Driehaus Hales SBA Before the Ohio Elections Commission. After SBA's billboards were reported in the news, Driehaus filed a complaint with the Ohio Elections Commission ("OEC"), alleging that SBA's speech violated Ohio Rev. Code § 3517.21(B)(10). Pet.App.3a. That provision makes it a crime to "[p]ost, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard for whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate." A parallel provision proscribes false statements "designed to promote the adoption or defeat of any ballot proposition or issue." *Id.* § 3517.22(B)(2).

The OEC is empowered to investigate complaints under those provisions, which may be filed by "any person"; if the OEC finds a violation, it "shall refer" it to prosecutors. *Id.* §§ 3517.153-157. An individual who is twice convicted of violating the elections code "shall be disfranchised." *Id.* § 3599.39.

Driehaus alleged that the Affordable Care Act does not appropriate federal funds for abortions, and that SBA's statements were thus false. The dispute arises, *inter alia*, from the Act's creation of a subsidy for lower-income individuals to help pay insurance premiums; the money is sent directly from the federal treasury to the insurer. ACA, §§ 1401, 1412(c)(2)(A). Under the Act, federal dollars *may* be used to subsidize abortion-inclusive coverage, but insurers *cannot* use the specific federal dollars to pay for most abortions. ACA, § 1303(b)(2). Rather, the abortions must be paid for out of a separate account funded solely by enrollees. *See id.*

For some people, like Driehaus, that segregation rule was sufficient to "refute" the claim that the Act finances abortion. For others, like SBA, it was a mere accounting gimmick, with fungible federal funds still being used to buy abortion-inclusive coverage, thereby indirectly funding abortion.

3. The OEC Complaint Succeeds in Suppressing SBA's Speech. SBA's billboard "never went up because the advertising company that owned the billboard space refused to put up the advertisement after Driehaus's counsel threatened legal action against it" under the Ohio law. Pet.App.3a.

4. The Commission Finds Probable Cause. As a result of Driehaus' complaint, SBA was forced to divert its time and resources—in close proximity to the election on which it wanted to focus—to hire legal counsel to defend itself before the OEC.

An OEC panel held a hearing on Driehaus' complaint and voted 2–1, with the sole Republican dissenting, to find probable cause that SBA violated the law, and thus to allow the charges to proceed to

the full Commission. Driehaus thereafter issued voluminous discovery requests to SBA and third parties. Pet.App.4a. Ultimately, however, Driehaus lost reelection and moved to withdraw his complaint; the OEC granted the motion. Pet.App.5a.

5. SBA Sues, and Alleges Intent To Repeat Its Message. While Driehaus' complaint was pending, SBA filed a federal suit challenging the Ohio law on First Amendment grounds. Pet.App.4a-5a. The district court stayed the suit under *Younger v. Harris*, 401 U.S. 37 (1971), due to the pending state proceedings. After Driehaus' complaint was dismissed, the court lifted the stay; SBA then amended its complaint to allege that it wanted to engage in similar speech in the future, as to other candidates in Ohio, but was chilled from doing so. Pet.App.5a. Driehaus, in turn, filed a counterclaim against SBA, alleging defamation based on the abortion-funding "falsehood."

6. Coalition Opposed to Additional Spending and Taxes Is Chilled and Also Files Suit. Petitioner Coalition Opposed to Additional Spending and Taxes ("COAST") agreed with SBA's criticism of Driehaus, and wanted to disseminate the following statement: "Despite denials, Driehaus did vote to fund abortions with tax dollars." Pet.App.5a. But, due to the then-ongoing action against SBA, it was afraid to do so. Pet.App.6a. Instead, while that action was still pending, it also filed a federal lawsuit challenging the Ohio law under the First Amendment. *Id.*

7. The District Court Dismisses Both Suits. After consolidating the suits, the court dismissed. As to COAST, it reasoned that any injury was "far too attenuated," and any chill of its speech was just

"subjective," because prosecution was "speculati[ve]." Pet.App.57a. "[N]o complaint against COAST has been or is pending." Pet.App.58a. Moreover, since COAST maintained that its speech was true, it "has not even alleged any intention not to comply" with the law. Pet.App.56a. Similarly, as to SBA, the court found that it had not proved that the law "will be immediately enforced against it." Pet.App.34a. As such, the undisputed "chill" of SBA's speech was not cognizable injury. Pet.App.33a. The court added that, while SBA had been subject to enforcement action, its challenge was still unripe because the OEC had not reached a final merits determination. "Without enforcement action pending at any stage, a case or controversy does not exist." Pet.App.29a.

The court also denied summary judgment on Driehaus' defamation counterclaim, holding that SBA's statements were false because the ACA did not directly appropriate federal funds for abortions. *Susan B. Anthony List v. Driehaus*, 805 F. Supp. 2d 423, 435-36 (S.D. Ohio 2011).

8. The Sixth Circuit Affirms. The Sixth Circuit affirmed the dismissals, relying on Circuit precedent holding that neither past enforcement of a speech-suppressive rule, nor chill arising therefrom, suffices to prove "an imminent threat of *future* prosecution." Pet.App.8a-10a (citing *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)).

The panel thus ruled that the OEC's finding of probable cause was irrelevant, because it was not a "final adjudication" of liability. Pet.App.12a. And, although anybody could file a complaint before the

OEC and thereby "set the wheels" of enforcement in motion, it was "speculative" that any such complaint would be filed in the future. *Id.* This was because Driehaus' future candidacy was uncertain, and, although SBA had alleged an intent to make the same criticisms about other Ohio candidates who had supported the ACA, SBA could not identify a specific person who would complain if it did. Pet.App.12a-14a. Moreover, because SBA "does not say that it plans to lie or recklessly disregard the veracity of its speech," instead maintaining the truth of its position, it had not "sufficiently alleged an intention to disobey the statute." Pet.App.15a.

The panel observed that COAST's position was "somewhat different" from SBA's, but its conclusion was the same. *See* Pet.App.18a. COAST moved for rehearing en banc, which was denied. Pet.App.64a.

REASONS FOR GRANTING THE PETITION

Two terms ago, this Court held that even false statements are protected by the First Amendment. *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012). Even the dissenters agreed that laws proscribing false statements about "matters of public concern" would create a "potential for abuse of power" "simply too great" for the First Amendment to tolerate. *Id.* at 2564 (Alito, J., dissenting). As all of the Justices correctly recognized, allowing the government to serve as arbiter of political truth cannot be squared with basic free-speech principles.

Yet nearly one-third of the states still have statutes prohibiting "false" statements made during political campaigns—often, as in Ohio, with criminal sanctions attached. *See infra* n.2. These laws do exactly what *Alvarez* warned against, inserting state

bureaucrats and judges into political debates and charging them with separating truth from oft-alleged campaign "lies." Such statutes are almost certainly unconstitutional, yet they play a troubling, harassing role in every political campaign in those states.

Under the decision below, they will continue to do so. The Sixth Circuit has created a paradigmatic Catch-22, whereby a speech-restrictive law cannot be challenged before, during, or after prosecution—only once the speaker has been successfully convicted. *Younger* precludes challenges *while* enforcement is pending. Under the decision below, a challenge *prior* to enforcement is "speculative," even if enforcement proceedings are pending against another speaker based on the same speech (COAST). And even *after* a commission finds "probable cause" that a criminal statute has been violated, there is purportedly still no "credible threat of prosecution," even against the *same* speaker for the *same* speech—unless, perhaps, he concedes that his speech is "false" (SBA). But, of course, speakers threatened by these laws do not and will not admit that their statements are false; their concern is that their political opponents will contend otherwise, imposing litigation costs and political burdens as a penalty for the speech.

Thus, under the decision below, judicial review—not only of this law, but of any speech-suppressive statute—can in practice only be had once a party is actually convicted. But as this Court has long recognized, the inevitable consequence of such a regime, whereby the speaker must suffer indignities, expenses, and penalties before he may adjudicate his constitutional rights, is self-censorship, degrading robust political debate. This is particularly true and

troublesome here, because the opinion below provides a clear blueprint for coercing censorship of core political speech during electoral campaigns—when the need for uninhibited speech is at its zenith. All that political opponents need do, as they have routinely done in Ohio (*see* p.34, *infra*), is complain about controversial speech and obtain politically valuable "probable cause" findings *before* the election, and then drop the complaints *after*, once the damage has been done and the speech can no longer influence important electoral decisions. The statute is thereby shielded from any judicial review.

All of this is very wrong, and very much at odds with the precedent of this Court and other Circuits. This Court has repeatedly found a "credible threat of prosecution," entitling a speaker to pre-enforcement review, based on just the existence of the suppressive law and the party's intent to take action that arguably violates it. Absent an express commitment by prosecutors *not* to enforce the law, such a party has a plain basis to fear prosecution. The resulting "chill" of its speech is therefore not subjective or irrational, but an objective injury-in-fact that must receive federal judicial attention if freedom of speech is to have practical meaning. Seven other Courts of Appeals understand that, and so have adopted a clear presumption: A credible threat of prosecution will be found if a party's intended speech *arguably* runs afoul of a law on the books, absent desuetude or a prosecutorial commitment *not* to enforce it. This nearly uniform rule simply reflects the reality that prosecutors normally do prosecute and, in all events, that the First Amendment "does not leave us at the mercy of *noblesse oblige*." *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010).

The contrary opinion below is, however, in line with the Sixth Circuit's uniquely restrictive approach to justiciability in pre-enforcement First Amendment cases. Here, of course, the court found advocacy groups' challenges nonjusticiable despite a probable-cause finding issued by a state commission about the *same speech* that the groups indisputably intended to engage in. In other cases, the Sixth Circuit has dismissed challenges where parties quite reasonably feared prosecution under speech-restrictive laws that were never disavowed, and had previously been enforced, even against the same speakers. The Sixth Circuit does not just fail to presume a credible threat of prosecution (as other Circuits do), but imposes insurmountable obstacles to proving one—effectively requiring *particularized* and *certain* threats of *successful* prosecution, and, absent such certainties, dismissing chill as merely "subjective."

In addition to departing from its sister Circuits on the more general "credible threat of prosecution" standard, the decision below squarely contradicts the Eighth Circuit's resolution of a virtually identical challenge to a virtually identical law in 2011. Reversing a district court, the Eighth Circuit allowed a speaker to challenge Minnesota's false-statement law: The statute was not in "disuse" and the state had not promised not to enforce it, and that was—per the usual presumption adopted by the Eighth and most Circuits—sufficient for standing and ripeness. Moreover, despite maintaining the truth of its statements, the plaintiff had a reasonable fear of prosecution, according to the Eighth Circuit, given that past complaints had been filed against it. The decision below, by contrast, held exactly the opposite on indistinguishable facts.

In short, the Sixth Circuit's approach to pre-enforcement challenges—in general and in this context—cannot be squared with the decisions of other Circuits or basic First Amendment principles. Yet it has profoundly impaired constitutional rights, shutting down numerous challenges to all manner of speech codes and chilling an unknowable quantity of speech. In this case, application of the Sixth Circuit's restrictive rulings has assured perpetuation of a blatantly unlawful regime under which bureaucrats are the supreme fact-checkers for every political campaign—a regime that has, predictably, been routinely abused and will continue to be, absent this Court's intervention.

I. THE SIXTH CIRCUIT HAS IRRECONCILABLY DEPARTED FROM SEVEN OTHER CIRCUITS BY ERECTING SUBSTANTIAL HURDLES TO REVIEW OF SPEECH-SUPPRESSIVE LAWS.

The Sixth Circuit's standard for whether a "credible threat of prosecution" exists, such that a pre-enforcement challenge may be mounted, is starkly different from that in seven other Circuits. The latter quite naturally presume such a threat if the plaintiff's intended speech arguably runs afoul of a speech prohibition, with that presumption subject to rebuttal only if the law has fallen into disuse or the government has made a firm commitment not to enforce it. But the Sixth Circuit, in case after case, has forbidden challenges, even *after* prior enforcement, unless the government took *specific* action to concretely threaten the *particular* plaintiff with *future* prosecution and the plaintiff admits that the speech violates the law.

More particularly, the Sixth Circuit's refusal to allow a pre-enforcement challenge to Ohio's false-statement statute rejects at every turn the position taken by the Eighth Circuit, which allowed the same challenge to be pursued against Minnesota's nearly identical statute. The decision below will prevent *any* court from reaching the merits of the Ohio law's constitutionality, other than after a final conviction.

A. Seven Circuits Ordinarily Presume That a Credible Threat of Prosecution Exists If the Intended Speech Is Arguably Proscribed, But the Sixth Circuit Demands Much More.

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

The Sixth Circuit's test cannot be satisfied even if a party has been subjected to prior enforcement proceedings for the same speech. This is purportedly because only a formal finding that specific speech is unlawful "establishes an imminent enforcement threat," while a previous finding of "probable cause" to so believe merely threatens the speaker with costly and intrusive "proceedings that may—or may not—find an infraction." Pet.App.11a. This test is irreconcilable with that used in seven other Circuits.

1. The First Circuit offered a clear rule for when a "credible threat of prosecution" exists in *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996). The plaintiff there wanted to make expenditures "arguably prohibited" by a campaign finance statute. *Id.* at 18. The court held that where a "non-moribund" law arguably proscribes speech, "courts will assume a credible threat of prosecution in the absence of compelling contrary evidence" like disavowal by state authorities. *Id.* at 15. "[A] pre-enforcement facial challenge to a statute's constitutionality is entirely appropriate unless the state can convincingly demonstrate that the statute is moribund or that it simply will not be enforced." *Id.* at 16.

The First Circuit subsequently reaffirmed that rule. In *Rhode Island Association of Realtors, Inc. v. Whitehouse*, 199 F. 3d 26, 31 (1st Cir. 1999), emphasizing the need to be "sensitive to the danger of self-censorship," the court noted that the statute, albeit never enforced, had not "fallen into desuetude," nor had the state "disavowed" it. *Id.* at 31-32. Rather, nonenforcement simply showed that the prohibition had "proven to be an effective [speech] deterrent." *Id.* In *Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir. 2003), the court similarly permitted a pre-enforcement challenge to a criminal libel law. In determining "whether a First Amendment plaintiff faces a credible threat of prosecution, the evidentiary bar that must be met is extremely low. … A finding of no credible threat of prosecution under a criminal statute requires a long institutional history of disuse." *Id.* at 57.

Other Circuits followed. The Seventh Circuit, citing the First, held that "a threat of prosecution is credible when a plaintiff's intended conduct runs afoul of a criminal statute and the Government fails to indicate affirmatively that it will *not* enforce the statute." *Commodity Trend Serv., Inc. v. CFTC*, 149 F.3d 679, 687 (7th Cir. 1998). As Judge Posner elaborated, "[a] plaintiff who mounts a pre-enforcement challenge to a statute that he claims violates his freedom of speech need not show that the authorities have threatened to prosecute him; the threat is latent in the existence of the statute." *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (citations omitted). If the statute "arguably covers" intended speech, "and so may deter constitutionally protected expression …, there is standing." *Id.*

The Fourth Circuit, too, adopted the same rule. As Judge Wilkinson explained, the First Circuit's presumption "is particularly appropriate when the presence of a statute tends to chill the exercise of First Amendment rights." *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999). "A non-moribund statute that 'facially restricts expressive activity by the class to which the plaintiff belongs' presents such a credible threat, and a case or controversy thus exists in the absence of compelling evidence to the contrary." *Id.* No such evidence existed there because prosecutors expressed no "intention of refraining from prosecuting those who appear to violate the plain language of the statute." *Id.* at 710-11.

The Eighth and Ninth Circuits are in accord. In *St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481 (8th Cir. 2006), the plaintiffs "ha[d]

neither violated the Minnesota Statutes nor been threatened by Appellees with prosecution," yet the court found a credible threat. *Id.* at 485. Citing *New Hampshire Right to Life* and *Majors*, it observed that the statute in question was not "dormant" and that the state had "not disavowed an intent to enforce" it. *Id.* at 485-86. And the Ninth Circuit held, in *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003), that, "if the plaintiff's intended speech arguably falls within the statute's reach," then the speaker may "suffe[r] the constitutionally recognized injury of self-censorship" and bring suit. *Id.* at 1095; *see also Az. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1006-07 (9th Cir. 2003) (finding credible threat where "Arizona has not suggested that the legislation will not be enforced … nor has [it] fallen into desuetude").

The Second Circuit has gone even further, finding standing even when enforcement authorities affirmatively argued that the speech was *not* prohibited. In *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000), for example, the State argued that it "has no intention of suing VRLC," invoking an alternative reading of the statute under which the speech was permitted. *Id.* at 383. But so long as there was a "reasonable enough" construction under which the plaintiff's speech was proscribed, it "may legitimately fear that it will face enforcement of the statute by the State brandishing" it. *Id.* Notwithstanding the State's present intention not to enforce, "there is nothing that prevents the State from changing its mind." *Id.*; *see also Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003).

While the D.C. Circuit has adopted a demanding test for showing a credible threat of prosecution under a law "not burdening expressive rights," it agrees that, in First Amendment cases, it suffices that "plaintiffs' intended behavior is covered by the statute and the law is generally enforced." *Seegars v. Gonzales*, 396 F.3d 1248, 1252, 1253 (D.C. Cir. 2005). Thus, in *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995), the court allowed a pre-enforcement suit even though it was clear that the plaintiffs were "not faced with any present danger of an enforcement proceeding" because the agency was deadlocked. *Id.* at 603. As Judge Silberman reasoned, a credible threat still existed because "[n]othing … prevent[ed] the Commission from enforcing its rule at any time with, perhaps, another change of mind [of a Commissioner]." *Id.* at 603-04.

In sum, the First, Second, Fourth, Seventh, Eighth, Ninth, and D.C. Circuits all agree that, in the First Amendment context, a pre-enforcement challenge is proper so long as (i) the plaintiff's speech is at least arguably proscribed by the law; and (ii) the law has neither fallen into desuetude nor been bindingly disavowed by prosecutors. This is, as the First Circuit declared, an "extremely low" threshold. *Mangual*, 317 F.3d at 57.

2. Against all that, the Sixth Circuit stands alone. Rather than rely on the commonsense notion that there is a "credible threat of prosecution" when one's speech arguably violates a statute, the Sixth Circuit requires speakers to prove a *particularized*, virtually *certain* threat of *successful* prosecution, thus effectively restricting challenges to after the speaker has been found guilty.

In the Sixth Circuit, citizens cannot bring pre-enforcement challenges even if precisely the same speech has been found by an enforcement agency to probably violate the law; even if it is undisputed that the speaker intends to say the precise words that triggered a prior or pending enforcement; and even if it is undisputed that those proceedings chilled speech. Only a prior *conclusive finding* that the speech violates the law—or perhaps the speaker's admission that it does so—suffices. Since virtually no speaker will voluntarily drain his speech of all persuasive force (and admit a criminal infraction) by averring that the speech is a lie, the only way to challenge speech restrictions in the Sixth Circuit is *after* subjecting oneself to costly administrative hearings and successful prosecution—precisely the result that this Court's precedents reject.

Far from being an outlier, this case is only the latest in a series of free-speech challenges that the Sixth Circuit has thrust aside on justiciability grounds, employing a remarkably demanding test that goes far beyond a credible threat of prosecution. In any other Circuit, these challenges would have reached the merits.

a. In this case, when SBA and COAST filed their suits, SBA was facing actual enforcement proceedings. In those proceedings, the OEC panel found probable cause that SBA violated a criminal law. These proceedings made very clear to SBA and COAST that repeating that message would credibly subject them to prosecution. Driehaus' complaint was dismissed only once he withdrew it post-election.

None of that satisfied the Sixth Circuit. The previous enforcement against SBA was, according to

the court, not evidence supporting a fear of future enforcement, but merely a "prior injury," "not enough to establish prospective harm." Pet.App.9a. Even the probable-cause finding did not show a credible threat of prosecution, because the OEC "never *found* that [SBA] *violated* [the] law." Pet.App.10a (emphases added). To bring a pre-enforcement challenge, apparently you must first be convicted.

Moreover, the threat of prosecution is particularly likely under the Ohio law because enforcement can be triggered by a complaint from *anyone*—not just a single agency or prosecutor. Incredibly, according to the Sixth Circuit, the fact that a multitude of politically-motivated persons could trigger enforcement made it *more* difficult to establish this threat. Pet.App.12a. Plus, it was "far from certain" that the prior complainant, Driehaus, would run again. Pet.App.14a. Of course, as SBA pointed out and nobody disputed, it intended to launch the same criticism over the ACA against *other* candidates for office in Ohio who had supported the Act, and any citizen who supported those candidates could file a complaint. Pet.App.12a (quoting SBA's statement at oral argument that any "citizen in Ohio who supports Obama" could file a complaint). But absent an identifiable complainant, the court found that mere "conjecture." *Id.*

Finally, the Sixth Circuit found SBA could not "establish[] ripeness" because it would "not say that it plans to lie or recklessly disregard the veracity of its speech" in violation of the law. Pet.App.15a. But, of course, the OEC's prior finding of "probable cause"—and the district court holding, in the defamation action, that SBA's statements were

false—made prosecution for false political speech extremely credible. The Sixth Circuit's insistence on a preemptive (and untrue) *confession* to violating a criminal statute therefore does nothing to ensure ripeness, and itself greatly chills speech.

In any of the other Circuits, the district court would have been reversed. The false-statement law is not "moribund" and, not only had the state not "demonstrate[d] that [it] … will not be enforced," it was actively enforcing it. *N.H. Right to Life*, 99 F.3d at 15-16. The threat to SBA and COAST was certainly "latent in the existence of the statute," especially in light of past enforcement. *Majors*, 317 F.3d at 721. These groups were being "forced to modify their speech" to comply with the statute, and so were suffering injury. *St. Paul*, 439 F.3d at 487. In other Courts of Appeals, a credible threat of prosecution would have been presumed, *especially* given past enforcement proceedings. Obviously, none of the other Circuits would have cared that the Commission had not *already* found the petitioners guilty; in a *pre*-enforcement challenge, one does not demand a *prior* conviction.

Nor would the other Circuits have been bothered by petitioners' maintenance of their innocence: Whatever the speaker may think, a credible threat exists so long as the intended speech is "arguably" proscribed. *See N.H. Right to Life*, 99 F.3d at 18 ("arguably prohibited"); *Majors*, 317 F.3d at 721 ("arguably covers"); *California Pro-Life Council,* 328 F.3d at 1095 ("arguably falls within the statute's reach"). Indeed, some Circuits recognize standing even if the state *denies* that the intended speech is proscribed, because the state may change its mind.

E.g., *Vt. Right to Life*, 221 F.3d at 383. One need not go that far here, where the OEC and district court had already effectively deemed SBA's speech false.

b. The Sixth Circuit's decision below is, however, par for the course in that court. The prior cases that the panel cited reflect the same hostile attitude toward First Amendment challenges.

In *Fieger*, an attorney with a "significant history of criticizing Michigan's judges" was reprimanded under disciplinary rules for "vulgar comments" about judges on his radio show. 553 F.3d at 957, 968. He brought a facial challenge to the rules, but the Sixth Circuit found no standing because Fieger was not "currently being threatened with discipline," *id.* at 973, and had articulated only a "generalized, subjective 'chilling' of speech," *id.* at 965. Past sanction does not prove future injury, said the court, citing *Los Angeles v. Lyons*, 461 U.S. 95 (1983), a Fourth Amendment case that raised no concerns of chill. Moreover, Fieger did not allege that his speech would, in his view, be so "vulgar, crude, or personally abusive" as to violate the rules, only that fear of such a determination was causing him to self-censor. 553 F.3d at 967, 970. Judge Merritt dissented:

> [Fieger] has alleged that he intends to continue being an outspoken critic of the Michigan judiciary. If history is any guide, much of that future criticism could very plausibly be described as "discourteous," putting him in realistic danger of prosecution. The fact that disciplinary action has "only" been brought against him twice does not undermine standing in this context, as the majority contends; it buttresses it.

Id. at 978 (Merritt, J., dissenting).

Fieger, in turn, relied on the earlier decision in *Morrison*, involving a school board with a "policy prohibiting students from making stigmatizing or insulting comments regarding another student's sexual orientation." 521 F.3d at 605. A Christian student who wanted "to tell others when their conduct does not comport with his understanding of Christian morality" sued, after refraining for a year from expressing those views. *See id.* Again, the court dismissed, because "whether [Morrison] would have been so punished [for violating the policy], we can only speculate." *Id.* at 610. The record was "silent" on "whether the school district threatened to punish or would have punished Morrison." *Id.* In the absence of a concrete threat, the court rejected the pre-enforcement challenge: Such a suit requires "some specific action on the part of the defendant," not just existence of a suppressive policy. *Id.* at 609.

The *Morrison* dissent warned that the opinion "unnecessarily muddles established doctrine … [and] may occlude the doctrine that a threat which chills a plaintiff's speech constitutes an injury-in-fact." *Id.* at 619 (Moore, J., dissenting).

Morrison emphasized that "[c]haracterizing chill as insufficient to establish standing is not original to this panel." *Id.* at 609 (majority op.). True enough. Yet another example of the Sixth Circuit's hostility is *Norton*, which the decision below also cited. *Norton* involved a challenge to the Freedom of Access to Clinic Entrances Act by two anti-abortion activists, who had been "handing out leaflets and speaking with individuals in cars stopped in the [abortion] Clinic driveway." 298 F.3d at 551. One of the two

was called to a meeting "with law enforcement," at which she was advised "that she was … impeding access to the Clinic," and that a pattern of such conduct "could be considered a violation of the [Act]." *Id.* Following this meeting and a follow-up letter, both protestors ceased their activities "because [they] feared arrest." *Id.* Yet again, the Sixth Circuit found a challenge unripe. Notwithstanding the warning by federal officers, the court said it "cannot conclude that plaintiffs have sufficiently demonstrated that the alleged harm will ever come to pass." *Id.* at 554. This was especially so given that they "professed an intention to comply with the Act," disputing the federal agents' suggestion that their protests might violate it. *Id.* If the protestors wanted to avoid the "uncertainty" about the law, the court suggested they "heed the government's advice and simply move their counseling activities across the street." *Id.* at 555.

c. The few cases in which the Sixth Circuit *has* allowed First Amendment challenges to proceed only confirm the backward nature of that Circuit's regime—under which prior adjudication of guilt is a prerequisite to suit.

In *Briggs v. Ohio Elections Commission*, 61 F.3d 487 (6th Cir. 1995), a candidate was found guilty of falsely suggesting that she was the incumbent; the OEC declined "to impose a fine or refer the matter for prosecution," but warned that her violation could be held against her in the future. *Id.* at 490. The Sixth Circuit held that the OEC's "promise to consider Briggs's violation, if subsequent complaints come before it, poses a cognizable threat of injury." *Id.* at 492. Similarly, in *Berry v. Schmitt*, 688 F.3d 290 (6th Cir. 2012), the court allowed an attorney to

bring a First Amendment challenge to Kentucky's Rules of Professional Conduct—*after* the Kentucky Bar Association investigated his speech, found that it did violate the Rules, and "issued a warning letter" that advised compliance. *Id.* at 295-97.

Below, the court distinguished *Briggs* and *Berry* precisely because they involved prior findings of guilt. Pet.App.11a-12a (noting that, in *Briggs*, OEC "actually found a violation" and, in *Berry*, "the bar association was unequivocal that his conduct violated the rule"). Only such *final determinations* create a sufficient injury in the Sixth Circuit. The bizarre consequence of this regime is that one must have been *previously adjudicated* in violation *before* one may challenge a speech-restrictive law—undermining the entire purpose of *pre-enforcement* review. And only in extremely unusual cases where authorities impose no sanctions (like in *Briggs* and *Berry*) may the law be challenged without actually *suffering* penalties.

* * *

In at least seven Circuits, a threat of prosecution is presumed if a law (i) arguably proscribes intended speech and (ii) there is no history of disuse or non-enforcement. But the Sixth Circuit demands a particularized threat of future enforcement (to show that prosecution is *certain*), as well as a prior finding or concession that the speech is unlawful (to show that prosecution would *succeed*). Consequently, it has tossed out challenge after challenge that would easily satisfy other courts. Intervention is necessary to ensure that the First Amendment has equal force in the Sixth Circuit as in the rest of the country.

B. On Nearly Identical Facts, the Eighth Circuit Allowed a Pre-Enforcement Challenge to a Law Prohibiting False Statements.

Moving from the broader legal question to a more particular scenario, the decision below conflicts with a recent decision of the Eighth Circuit on nearly identical facts. There is now a square split on the viability of pre-enforcement challenges to state laws that prohibit false political speech.

In *281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. 2011), the Eighth Circuit addressed a challenge to Minnesota's false-statement law, which (like Ohio's) forbids dissemination of knowingly or recklessly false statements in campaigns. Under the Minnesota law, like the Ohio law, any person may file a complaint alleging violation of the provision; county attorneys may choose to bring criminal charges after administrative proceedings end. *See id.* at 625. The plaintiff in *281 Care Committee* was an organization opposed to a school-funding ballot initiative; a school official told the media that the school district was "investigating" the organization for spreading "false" information about the initiative. *Id.* at 626. The group was thereafter "chilled from … vigorously participating in the debate surrounding school-funding ballot initiatives in Minnesota." *Id.*

Although the district court there (as here) dismissed as nonjusticiable, the Eighth Circuit reversed. It explained—in accord with the majority rule—that, "[t]o establish injury in fact for a First Amendment challenge …, a plaintiff need not have been actually prosecuted or threatened with prosecution." *Id.* at 627. "Rather, the plaintiff needs only to establish that he would like to engage in

arguably protected speech, but that he is chilled from doing so by the existence of the statute." *Id.* Although Minnesota's law had been "infrequent[ly]" enforced, "only in extreme cases approaching desuetude" may lack of enforcement of a statute "undermine the reasonableness of chill." *Id.* at 628.

Nor was the Eighth Circuit bothered that the plaintiffs had "not alleged that they wish to knowingly make false statements." *Id.* The point was that they "*have* alleged that they wish to engage in conduct that could reasonably be interpreted as making false statements"; that was "enough to establish that [their] decision to chill their speech was objectively reasonable." *Id.* Determining political "truth" leaves considerable "room for mistake and genuine disagreement," and thus for allegations of wrongdoing by "political opponents who are free to file complaints under the statute." *Id.* at 630. Further, that the plaintiffs' speech had triggered enforcement proceedings in the past—even though "no complaints … ever reached the criminal stage and no criminal prosecution was ever threatened"—confirmed the "reasonableness of the alleged chill." *Id.* Even dismissed complaints impose costs, in time and "attorney fees." *Id.*

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

On each of these issues, the decision below directly diverged from *281 Care Committee*. Contrary to the Eighth Circuit, the Sixth held that SBA and COAST *did* need to show that they were

"actually prosecuted or threatened with prosecution," and that their "chill" alone was not cognizable injury. 638 F.3d at 627. Contrary to the Eighth Circuit, the Sixth held that fear of a "false prosecution" was categorically unreasonable, even though SBA had already been subject to enforcement proceedings for the same speech—and even though the Commission had found probable cause and the district court had found the speech false. And, contrary to the Eighth Circuit, the Sixth found that "factual development"—*i.e.*, concrete application of the law—was necessary, such that a pre-enforcement challenge to a false-statement law would, in practice, *never* be ripe.

* * *

Conflict between the Sixth and Eighth Circuits over whether any speaker may challenge a speech-restrictive law common to at least 16 states warrants the Court's attention. That this division reflects a deeper dispute over justiciability of pre-enforcement challenges to any speech restriction only makes certiorari even more warranted.

II. THE SIXTH CIRCUIT'S APPROACH IS FUNDAMENTALLY INCONSISTENT WITH FIRST AMENDMENT JURISPRUDENCE.

As should already be obvious, the Sixth Circuit is very much on the wrong side of this lopsided conflict. This Court's First Amendment jurisprudence clearly holds that pre-enforcement review is proper when a speaker refrains from speaking based on a restrictive law that the government has not disavowed; any contrary rule would impose an obvious, direct burden on constitutional freedoms.

A. When a Statute Is Reasonably Construed To Prohibit a Plaintiff's Intended Speech, the Statute Itself Causes "Chill" Injury.

This Court has never required a plaintiff to show certainty, or a particularized threat, that *he* would be prosecuted; or that authorities *already* found his speech unlawful; or that he *agreed* that his speech was proscribed. To the contrary, First Amendment jurisprudence confirms that those showings—now imposed by the Sixth Circuit as prerequisites to pre-enforcement challenge—are both unnecessary for justiciability and irreconcilable with free speech.

The leading case is *Babbitt*, 442 U.S. 289, where a union challenged an Arizona law that prohibited unions from inducing consumers, via "dishonest, untruthful, and deceptive publicity," to refrain from buying certain products. *Id.* at 301. This Court found a "credible threat of prosecution." *Id.* at 298. The plaintiff "actively engaged in consumer publicity campaigns in the past" and "alleged … an intention to continue to engage in boycott activities." *Id.* at 301. "Although [it] d[id] not plan to propagate untruths," the union could still pursue its challenge, because "erroneous statement is inevitable" and so the union would be forced to "curtail [its] consumer appeals" due to fear of prosecution for "inaccuracies inadvertently uttered." *Id.* (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 271 (1964)).

Moreover, although the provision "ha[d] not yet been applied," the Court recognized that "when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not 'first expose himself to actual arrest or prosecution to be entitled to

challenge the statute.'" *Id.* at 302 (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). Critically, to show reasonable fear of prosecution, it sufficed that "the State has not disavowed any intention of invoking the criminal penalty provision" and so the union was "not without some reason in fearing prosecution for violation of the ban." *Id.*

The Court reaffirmed *Babbitt* in *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383 (1988), involving a state law restricting display of sexually explicit materials. This Court was "not troubled by the pre-enforcement nature of this suit": the State had "not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise"; the plaintiffs thus had "an actual and well-founded fear that the law will be enforced against them." *Id.* at 393. It did not matter that the law only *arguably* applied to them; it sufficed that, "if their interpretation of the statute is correct, [they] will have to take significant and costly compliance measures or risk criminal prosecution." *Id.* at 392.

More recent decisions are to the same effect. For example, in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), "preenforcement review" was proper because "[t]he Government has not argued to this Court that plaintiffs will not be prosecuted if they do what they say they wish to do." *Id.* at 2717. Citing *Babbitt*, the Court found that absence of countervailing evidence to be sufficient to create a "credible threat of prosecution." *Id.*

Babbitt, *American Booksellers*, and *Holder* show that (i) the government's non-disavowal of an intent to enforce is enough to presume a credible threat of prosecution; and (ii) a plaintiff need not allege that

he intends to violate the law, only that he intends to engage in action that *enforcement authorities* could think violates the law. Yet, as shown, the Sixth Circuit holds just the opposite on both points.

B. The Sixth Circuit's Reasons for Finding Suits Like This One Unripe Reflect Gross Naiveté About the Evils of Speech Suppression.

In the decision below, as in its other decisions, the Sixth Circuit gave a number of reasons for why pre-enforcement review should not be allowed. Those reasons fundamentally misunderstand the injuries caused by speech-suppressive laws.

1. The Sixth Circuit repeatedly identifies the absence of any pending enforcement proceedings as a basis for denying review. *E.g.*, Pet.App.17a ("No complaint or Commission action is pending against SBA …."); *Fieger*, 553 F.3d at 973 ("[T]his case does not arise in the midst of a criminal prosecution or disciplinary proceeding."). But the reason why this Court has never required a plaintiff to "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*, 415 U.S. at 459, is because such a rule would directly infringe constitutional freedoms. Allowing the statute to stand until someone "hardy enough to risk criminal prosecution" is permitted to challenge it would, in the interim, prevent everyone else from exercising their rights, *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965); *see also Am. Booksellers*, 484 U.S. at 393 ("[T]he alleged danger … is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."). Indeed, that is

indisputably what happened to COAST in this case.[1] (Moreover, once a proceeding is pending, *Younger* precludes preemptive relief.)

2. Below, the Sixth Circuit also discounted the prior "probable-cause" proceedings against SBA, on the theory that "past" actions have no significance for justiciability. Pet.App.10a. Obviously, though, past enforcement of a law that remains on the books—unlike, say, past use of a particular police practice during a random interaction, as in *Lyons*—*is* an extraordinarily good predictor of future enforcement for similar speech. More important, the Sixth Circuit's bizarre regime creates the worst of all worlds for core political speech: enforcement proceedings to chill such speech during campaigns, cessation of such burdensome enforcement once the election-related speech is valueless, and repetition of the speech-deterring enforcement during the next election cycle, without any judicial review in the interim. Such a regime of enforcement that evades review is clearly impermissible; it is well-established, even outside the speech context, that an agency's cessation of enforcement proceedings does not eliminate jurisdiction to challenge them. *See United*

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[1] The Sixth Circuit found that SBA, unlike COAST, was not "chilled" because it continued to express its message after Driehaus filed his complaint. Pet.App.17a. But obviously SBA was not chilled while enforcement proceedings were *pending*; it was already on the hook and *repeating* its already-challenged speech would not subject it to any more prosecution. After the OEC dismissed the proceeding, however, SBA did fear that repeating its message would expose it to additional costs and burdens, and so alleged. Those allegations are undisputed (and obvious, since many other candidates supporting the ACA ran in 2012).

States v. W.T. Grant Co., 345 U.S. 629, 632 (1953) ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case," because otherwise defendant would be "free to return to his old ways."). To the contrary, it shifts the burden to the "party asserting mootness" to show that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968)). Yet instead of requiring the OEC to meet that standard—which it plainly could not—the Sixth Circuit held that the voluntary cessation of the OEC proceedings shielded the *entire statute* from judicial review unless *petitioners* proved that future prosecution was virtually certain, thereby directly authorizing and encouraging the abusive tactic of initiating politically motivated proceedings during campaigns and dropping them after. *See infra* p.34.

3. The Sixth Circuit also routinely says that it is "speculative" that a speech-suppressive law will be enforced. Here, it wondered precisely who would file a complaint against SBA or COAST. Pet.App.12a ("Who is likely to bring a complaint to set the wheels of the Commission in motion?"). In other cases, it found it "speculat[ive]" that a school would enforce its speech code, *Morrison*, 521 F.3d at 610 ("The record is silent as to whether the school district … would have punished Morrison …."); "speculative" that the Michigan Supreme Court would, "in its discretion, impose [ ] sanctions" for violation of its rules, *Fieger*, 553 F.3d at 967; and "speculat[ive]" that activists would be charged with crimes that

agents warned they might be committing, *Norton*, 298 F.3d at 554. Of course, it is *always* somewhat "speculative" that a prosecutor will bring charges; only the prosecutor knows for sure. But prosecution is at least credible and, more important, *resolving* the speculation requires self-exposure to sanctions, chilling speech. "Speculative" enforcement thus cuts *in favor* of allowing pre-enforcement review. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006) (en banc) ("We cannot ignore such harms just because there has been no need for the iron fist to slip its velvet glove.").

4. Finally, the Sixth Circuit has held it against plaintiffs that they did not concede that their speech would be unlawful. *See* Pet.App.15a ("[SBA] does not say that it plans to lie …."); *Fieger*, 553 F.3d at 965 (plaintiffs did not allege intent "to make vulgar, crude, or personally abusive remarks"); *Norton*, 298 F.3d at 554 (noting statute's specific-intent element and that "plaintiffs have professed an intention to comply with the Act"). But pre-enforcement First Amendment review is meant to free speakers from chill; what matters is obviously not *their* view of their speech's legality, but whether they *reasonably fear* enforcement by authorities or complainants, which turns on what those people think. *See 281 Care Comm.*, 638 F.3d at 628. And, even if a prosecution is unlikely to succeed, "[t]he chilling effect … may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski*, 380 U.S. at 487; *accord Mangual*, 317 F.3d at 59 ("The 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 the reporter would be convicted.").

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The bottom line of this Court's First Amendment jurisprudence is that if a law objectively chills speech, it causes injury and can be challenged right away. The Sixth Circuit's contrary approach entirely misses that fundamental point.

III. THE SIXTH CIRCUIT'S APPROACH PROFOUNDLY IMPAIRS FREE SPEECH IN ITS MOST IMPORTANT CONTEXTS.

This case is worthy of this Court's attention because the effect of the Sixth Circuit's approach is to prevent even meritorious challenges to laws that suppress speech, resulting in self-censorship, chill, and degradation of political discourse—the very evils that the First Amendment is designed to combat. As the *SBA-Fieger-Morrison-Norton* pattern illustrates, the effects of the Sixth Circuit's uniquely restrictive approach can be felt in many different contexts; this is a recurring issue of broad significance.

Moreover, the specific context of the decision below creates a special need to reverse the Sixth Circuit's perverse approach. Ohio's false-statement law is far from moribund; the OEC "handles about 20 to 80 false statement complaints per year." *Ohio Elections Commission Gets First Twitter Complaint*, THE NEWS-HERALD (Oct. 29, 2011). The OEC has been asked to determine the "truth" or "falsity" of everything from whether a congresswoman's receipt of donations from a Turkish PAC constituted "blood money" given the Armenian genocide, *State Hears Schmidt Genocide Case*, CINCINNATI ENQUIRER, 2009 WLNR 16019649 (Aug. 14, 2009), to whether a school board "turned control of the district over to the union," Ray Crumbley, *Hearing Set on Complaint*

That School Levy Foes Violated Law, COLUMBUS DISPATCH, 1992 WLNR 4914401 (May 16, 1992), to whether a city council member had "a habit of telling voters one thing, then doing another," *Election Complaint Filed*, CLEVELAND PLAIN DEALER, 1997 WLNR 6374883 (Nov. 12, 1997), to whether a state senator had supported higher taxes by voting to put a proposed tax increase on the ballot, *Ethics Commission Says Bueher Made False Statements*, AP ALERT (Oct. 19, 2007). And at least 15 other states have analogous statutes.[2]

Yet such laws, after *Alvarez*, are almost certainly unconstitutional. *All* the Justices there agreed that laws restricting false political statements would be subject to strict scrutiny. *Alvarez*, 132 S. Ct. at 2548 (plurality); *id.* at 2552 (Breyer, J., concurring in judgment); *id.* at 2564 (Alito, J., dissenting). Even the Solicitor General conceded that laws like Ohio's "are going to have a lot harder time getting through the Court's 'breathing space' analysis." Tr. of Oral Argument 18, *Alvarez*, 132 S. Ct. 2537 (No. 11-210).

Despite that broad consensus, the Sixth Circuit's holdings assure the indefinite perpetuation of this censorious regime. Judicial review is precluded by *Younger while* enforcement proceedings are pending. And the Sixth Circuit's approach makes it impossible

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[2] *See* Alaska Stat. § 15.56.014; Colo. Rev. Stat. § 1-13-109; Fla. Stat. Ann. § 104.271(2); La. Rev. Stat. Ann. § 18:1463; Mass. Gen. Laws ch. 56, § 42; Mich. Comp. Laws § 168.931; Minn. Stat. § 211B.06; Mont. Code Ann. § 13-37-131; N.C. Gen. Stat. § 163-274(a)(8); N.D. Cent. Code § 16.1-10-04; Or. Rev. Stat. Ann. § 260.532(1); Tenn. Code Ann. § 2-19-142; Utah Code Ann. § 20A-11-1103; Wisc. Stat. § 12.05; W. Va. Code § 3-8-11.

to sue *earlier* (because prosecution is "speculative") or *later* (because past enforcement proves nothing). *See also Krikorian v. Ohio Elections Comm'n*, No. 10-CV-103, 2010 WL 41167556 (S.D. Ohio Oct. 19, 2010) (dismissing challenge after OEC issued reprimand). Thus, the *only* way to obtain federal review would be to subject oneself to prosecution and appeal to Ohio courts, hoping that this Court would grant certiorari.

Not only does that regime ensure that untold volumes of political speech will be chilled—in the context where "the constitutional guarantee has its fullest and most urgent application," *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)—but it fails to account for the abuse that has predictably become the norm. As in this case, complainants often drop their complaints once the election is over and the political damage done. *E.g.*, *Candidates for Judge's Seat Drop Complaints*, COLUMBUS DISPATCH, 2004 WLNR 21190313 (May 14, 2004); Jim Woods, *Complaint, Suit Over Election Ad Dropped*, COLUMBUS DISPATCH, 2001 WLNR 11914358 (Mar. 2, 2001); Michele Fuetsch, *Mayor Drops Complaint Against Council President*, CLEVELAND PLAIN DEALER, 1998 WLNR 7134266 (July 31, 1998). That leaves no remedy for the speaker's political injury, litigation costs, and distraction:

> The initial hearing alone can require the accused party to spend time and money preparing a defense. And savvy politicians know to make such complaints just before an election, so that the target of the complaint suffers bad publicity in the final days of the campaign, when it is too late for the complaint to be upheld or dismissed.

Speech Police, COLUMBUS DISPATCH, 2012 WLNR 5833464 (Mar. 19, 2012).

Absent this Court's review, there is no solution to the Catch-22 created by the Sixth Circuit's approach, and no way to shut down—or even obtain judicial review on the merits of—the unconstitutional regime under which every election in battleground Ohio and at least 15 other states is now conducted.

CONCLUSION

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

Respectfully submitted,

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