Case No. 12-3590

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN P. KILROY,
Plaintiff-Appellant,

v.

JON HUSTED, In his Official Capacity as Ohio Secretary of State,
Defendant-Appellee.

On Appeal from the Opinion and Order in a Civil Case dated April 16, 2012
in the United States District Court for the Southern District of Ohio,
Case No. 2:11-CV-145 (Doc. No. 93)

BRIEF OF *AMICI CURIAE* CENTER FOR COMPETITIVE POLITICS, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, AMERICAN CIVIL LIBERTIES UNION OF OHIO, AMERICAN CIVIL LIBERTIES UNION FOUNDATION VOTING RIGHTS PROJECT, AND FIRST AMENDMENT COALITION IN SUPPORT OF PLAINTIFF-APPELLANT AND IN SUPPORT OF REVERSAL

Allen Dickerson
Counsel of Record
Tyler Martinez
Anne Marie Mackin
Center for Competitive Politics
124 S. West Street, Suite 201
Alexandria, Virginia 22314
Telephone: (703) 894-6800
Facsimile: (703) 894-6811
adickerson@campaignfreedom.org

Counsel for Amici Curiae *Center for Competitive Politics, Brennan Center for Justice at NYU School of Law, and First Amendment Coalition*

James L. Hardiman (0031043)
Jennifer M. Atzberger (0072114)
American Civil Liberties Union
of Ohio, Inc.
Max Wohl Civil Liberties Center
4506 Chester Avenue
Cleveland, Ohio 44103
Telephone: 216-472-2220
Facsimile: 216-472-2210

Counsel for Amicus Curiae *ACLU of Ohio, Inc.*

M. Laughlin McDonald
American Civil Liberties Union Foundation
Voting Rights Project
230 Peachtree Street, NW
Suite 1440
Atlanta, GA 30303-1513
(404) 523-2721 (telephone)
(404) 653-0331 (facsimile)
lmcdonald@aclu.org

Counsel for Amicus Curiae
ACLU Voting Rights Project

CORPORATE DISCLOSURE

Pursuant to Sixth Circuit Rule 26.1, *Amici Curiae* Center for Competitive Politics, Brennan Center for Justice at NYU School of Law, American Civil Liberties Union of Ohio, Inc., American Civil Liberties Foundation Voting Rights Project, and First Amendment Coalition make the following disclosure:

1. Are said parties subsidiaries or affiliates of any publicly owned corporation or corporations?

No.

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome?

No.

Dated: 19 July 2012

s/ Allen Dickerson
Allen Dickerson
Counsel for Amici Curiae

Certification Pursuant to F.R.A.P. 29

All parties have consented to the filing of this brief.

Amici certify that no counsel for either party authored this brief in whole or in part, that no party nor counsel for any party contributed money intended to fund the preparation or submission of this brief, and that no person – other than *Amici*, their members, or their counsel – contributed money that was intended for the preparation or submission of this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Statutes, and Rules

Other Authorities

Interest of the *Amici Curiae*

Amici are not-for-profit organizations that, as part of their missions, regularly participate in civil rights litigation, including by representing clients in such litigation on a *pro bono* basis. *Amici* do not express an opinion on the merits of this suit. But they are united in believing that this suit, and similar civil rights claims, deserve to be heard by federal courts and judged on their merits.

Amici hope to assist this Court in placing this litigation in its national context. At first blush this appeal appears to involve a narrow, technical application of a Sixth Circuit precedent to particular facts. But *Amici* believe that this seemingly technical case will have major implications for unquestionably important civil rights litigation.

The Center for Competitive Politics is a nonpartisan, nonprofit 501(c)(3) organization dedicated to protecting the exercise of the rights enumerated in the First Amendment to the United States Constitution. It does this through litigation, studies, historical and constitutional analysis, and media communications.

The Brennan Center for Justice at N.Y.U. School of Law is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. The Brennan Center's work ranges from voting rights to campaign finance reform, and from racial justice in criminal law to Constitutional

protection in the fight against terrorism. In carrying out this work, the Brennan Center frequently participates in civil rights litigation, both as a party and as counsel.[1]

The American Civil Liberties Union of Ohio (ACLU of Ohio) is a nonprofit, non-partisan membership organization devoted to protecting basic constitutional rights and civil liberties for all Americans. The questions of law before this Court are closely tied to important and pressing concerns related to the Constitutional rights of all citizens who wish to express their political views, as well as those that wish to challenge laws that are unconstitutional.

The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The Voting Rights Project of the ACLU was established in1965 and has litigated hundreds of cases across the nation, many of which were brought on behalf of racial and language minorities to enforce the Fourteenth and Fifteenth Amendments and Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973 & 1973c. *E.g.*, *McCain v. Lybrand*, 465 U.S. 236 (1984); *Vander Linden v. Hodges*, 193 F.3d 268 (4th Cir. 1999); *Large v. Fremont County, Wyo.*, 670 F.3d 1133 (10th Cir. 2012); *Emery v. Hunt*, 272 F.3d

[1] This brief does not purport to convey the position of N.Y.U. School of Law.

1042 (8th Cir. 2001). The Voting Rights Project has a special interest in insuring access to the federal courts by those with constitutional and voting rights claims.

The First Amendment Coalition is a nonprofit membership organization, based in California, that is dedicated to freedom of speech and the public's "right to know" about the actions and policies of government. The Coalition, is greatly concerned about the availability of federal courts as a forum for the vindication of constitutional rights--in particular, the rights embraced by the First Amendment--through suits for injunctive relief against unconstitutional state laws or regulations. Although it views litigation as a last resort, the Coalition, since its founding in 1989, has participated in numerous suits in federal court involving First Amendment claims. The decision of the District Court in this case, if allowed to stand, would create a new Eleventh Amendment barrier to protection of First Amendment rights, relegating federal courts to a minor role in interpreting and enforcing such rights.

ARGUMENT

Introduction

This case presented timely issues that lie at the heart of the First Amendment's protections: may a state impose criminal penalties for receipt of certain campaign contributions? And does such a statute unconstitutionally chill the rights of campaign contributors?

We do not know the answer to these questions because no court has been permitted to reach the merits of Plaintiff's claim. By applying a needlessly restrictive reading of the Eleventh Amendment, the District Court dismissed Plaintiff's case, concluding that the Ohio Secretary of State was immunized from suit.

The District Court's erroneous application of the Eleventh Amendment would have a profound effect on civil rights litigation, which often challenges unconstitutional statutes that, because of their obscurity or recent passage, have no history of enforcement. But such statutes still may be enforced, and may be enforced selectively in a way that compounds the constitutional injury posed by their very presence.

Because of the risk of such constitutional injury, federal courts must – at a minimum – be permitted to hear these claims. *Amici* offer no opinion on the merits.

But we agree that the vindication of federal rights often requires parties to petition federal courts for relief, and that such an option would be rendered illusory in many meritorious cases if the District Court were affirmed.

Because the decision under review was mistaken, this Court should take the opportunity to clarify the law so as to prevent the chilling of future attempts to protect constitutional rights in federal court.

I. The District Court's application of the Eleventh Amendment and Sixth Circuit precedent was legal error, and would put the Sixth Circuit at odds with her sister circuits.

a. Whereas *Children's Healthcare* turned on the defendant's authority to enforce a challenged statute, the critical inquiry here is whether a statutory challenge can proceed absent imminent enforcement against the Plaintiff.

Ex Parte Young[2] requires that plaintiffs allege two elements to overcome Eleventh Amendment immunity: (1) the challenged statute must threaten enforcement and (2) the defendant must have "some connection" to that enforcement. Here, the District Court concluded that the defendant Secretary of State did have "some connection" to the statute in question, Ohio Rev. Code Ann. § 3599.45. Thus, its analysis necessarily turned on *Young*'s enforceability prong.

---

[2] 209 U.S. 123, 160 (1908).

The lower court's basis for finding that Ohio Rev. Code Ann. § 3599.45 could not be challenged under *Young* was a misapplication of *Children's Healthcare is a Legal Duty v. Deters*.[3] There, this Court found that the *Young* test was not satisfied where (1) the defendant did not have authority to enforce the challenged statute and (2) the defendant had not threatened to enforce the challenged statute against the plaintiffs. In reading *Children's Healthcare,* the District Court decoupled these two findings. Despite noting that the Secretary of State had the requisite connection to the challenged statute, the Court additionally required that the Secretary "'threaten and be about to commence proceedings' to enforce" the statute in order to satisfy *Young*'s enforceability prong.[4]

But the threat or certainty of impending enforcement are not, in fact, what *Young* or *Children's Healthcare*—even read together—require. To be sure, *Children's Healthcare* calls for a searching inquiry into whether a plaintiff faces a threat of enforcement. But it makes this inquiry in a particular factual context: the plaintiffs in *Children's Healthcare* were not subject to enforcement under the law being challenged; rather than seeking to *enjoin* enforcement of the statute,

---

[3] 92 F.3d 1412, 1416 (6th Cir. Ohio 1996).

[4] *Kilroy v. Husted*, 2012 U.S. Dist. LEXIS 52791, at *23 (quoting *Children's Healthcare*, 92 F.3d at 1416, which cites—without quoting—*Ex Parte Young* at 155-56).

plaintiffs sought to *broaden* the scope of the challenged law.[5] This, alone, is a sufficient basis for distinguishing this case from *Children's Healthcare*. Even more significant, however, is the fact that *Children's Healthcare* primarily turned on its plaintiffs' failure to name a defendant with enforcement authority.

Neither of these factual elements, which make *Children's Healthcare* a novel case, is present here. Moreover, it is possible that the District Court mistakenly read an Article III standing imminence analysis into *Young*'s enforceability prong.

Further, in a previous decision applying the analysis of the *Young* exception to Eleventh Amendment immunity, this Court affirmed a district court's holding that a statute's threat of criminal liability was sufficient to satisfy *Young's* enforceability prong.[6] As in this case, the *Zielasko* plaintiff alleged that a criminal penalty threatened free speech. This Court found that the statute's threat of criminal penalty alone was enough to establish harm for the purposes of suit, though the record reflected no actual or threatened enforcement.

---

[5] *Children's Healthcare* at 1416.

[6] *Zielasko v.Ohio*, 873 F.2d 957 (6th Cir. 1989).

b. Courts in three other circuits have distinguished *Children's Healthcare*, declining to apply it in cases presenting facts similar to those here.

It bears repeating: in *Children's Healthcare*, the plaintiffs sued a state official who lacked authority to enforce the challenged statute.[7] *Young*, of course, requires "some connection" between the named defendant and the statute at issue[8]—and the District Court specifically found such a connection, noting that the Defendant is Ohio's chief election officer. When presented with similar facts, courts from the Seventh, Ninth, and Eleventh Circuits have explicitly distinguished *Children's Healthcare*.

In *National Audubon Society v. Davis*,[9] the Ninth Circuit held that the Eleventh Amendment did not bar a challenge to a recently passed ballot proposition, even though the district court concluded that there was no present threat that the proposition would be enforced.

California voters had recently passed Proposition 4, banning the use of certain wildlife traps, and various non-profit organizations challenged the law. The

---

[7] *See also Okpalobi v. Foster*, 244 F.3d 405, 411 (5th Cir. 2001) (finding that Eleventh Amendment barred suit against a governor and attorney general who had no specific duty to enforce a challenged statute beyond their general duties to enforce state's laws, because in such circumstances the enforcement connection requirement of *Ex Parte Young* was not satisfied).

[8] *Ex Parte Young*, 209 U.S. at157.

[9] 307 F.3d 835 (9th Cir. 2002).

district court found that there was no threat that Proposition 4 would be enforced, and the state argued that the non-profits' claims were therefore barred by the Eleventh Amendment. But the Ninth Circuit allowed the suit to proceed against the named defendant because he had the legal authority to enforce Proposition 4. The court also found that the harm suffered by plaintiffs was sufficiently "actual and imminent" to satisfy the Article III standing inquiry, even in the absence of any threat of enforcement, and was therefore also sufficient to satisfy *Ex Parte Young*.[10]

Audubon is analogous to the facts below, and suggests that the District Court erred in ruling that a present threat of enforcement is essential to satisfy *Young*'s enforceability prong. Indeed, in *Audubon*, the court found it dispositive that the defendant had authority to enforce the statute; no specific "imminence" threshold for that enforcement was required or imposed.[11] A*mici* submit that this court should follow the *Audubon* court's lead and similarly limit its "imminence" analysis.

---

[10] *Id.* at 849.

[11] *Id.* at 847 (distinguishing *Okpalobi*, 244 F.3d at 417 and *Children's Healthcare*, 92 F.3d at 1417, since these cases "primarily address the question of whether a named state official has direct authority and practical ability to enforce the challenged statute, rather than the question of whether enforcement is imminent").

Similarly, the Eleventh Circuit focuses its Eleventh Amendment analysis on the authority of a state to enforce a challenged law, as opposed to the "imminence" of any such enforcement.[12] Moreover, the Eleventh Circuit highlights the practical difficulties of straining *Young* to require "imminence:" "[w]e are unable to understand how, as a practical matter, a potential plaintiff will ever be able to predict when prosecution is indeed 'imminent.'"[13] Though this analysis comes specifically from a "prosecution" rather than "enforcement" context, the logic is analogous to the present case. Even if *Young* were read to require a threat of prosecution, the practical difficulties of establishing "imminence" remain. As the Eleventh Circuit concluded, "[t]he *Ex parte Young* doctrine does not demand that a plaintiff first risk the sanctions of imminent prosecution or enforcement in order to test the validity of a state law."[14]

---

[12] *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1340 (11th Cir. 1999) (noting that *Children's Healthcare* was distinct because "the defendant in question had no authority to enforce the statutes," and "the plaintiffs did not even seek to enjoin the statutes' enforcement...Given the absence of any connection between the state officer defendant and any enforcement of the statutes, as well as the odd [non-injunctive] nature of the relief sought, the court could not justify applying *Ex parte Young*." (internal citations omitted)).

[13] *Id. at* 1339.

[14] *Id.* at 1338.

Finally, a court in the Seventh Circuit has also adopted this approach. In *Deida v. City of Milwaukee*[15], the court allowed a case to proceed under *Ex parte Young* where the plaintiff intended to engage in conduct prohibited by the challenged statute, regardless of whether the government had threatened enforcement.

> "The State Defendants' argument that they cannot be sued until they threaten plaintiff misunderstands the role that the threat of future enforcement plays in the *Ex Parte Young* analysis. Threat of future enforcement is relevant under *Ex Parte Young* only to the extent it shows that the plaintiff is suing the correct state official and is seeking prospective relief for future harms, as opposed to retroactive relief for past harms, which is unavailable under *Ex Parte Young*. If state law clearly empowers the named defendant to enforce the statute and the plaintiff seeks only prospective relief, then whether the defendant has actually threatened the plaintiff with enforcement is irrelevant. *Ex Parte Young* applies anyway."[16]

Like the Ninth and Eleventh Circuits, the court in *Deida* distinguished *Children's Healthcare*, noting that in *Deida* "certain state officials are expressly charged with enforcing the law," whereas in *Children's Healthcare* the defendant did not have such authority.[17] Moreover, the court declined to find an additional "imminence" requirement in *Young*'s enforceability prong beyond what is subsumed in Article III-standing analysis, holding that "given that plaintiff's

---

15 192 F. Supp. 2d 899, 916 (E.D. Wis. 2002).

16 *Id.* at 915 (internal citations omitted).

17 *Id.* at 916.

alleged conduct is clearly proscribed by a penal statute that state law requires the State Defendants to enforce, I must assume that they will enforce it unless they produce evidence showing that they have affirmatively disavowed it."[18]

The courts above distinguished *Children's Healthcare* as confined to a specific set of facts, and not as a general description of the proper *Ex Parte Young* inquiry. These courts concluded that to read a *Children's Healthcare*-style imminence requirement into *Young* where the proper state official is named is to "strain" the case, at best.[19] Under the persuasive reasoning of these courts, *Children's Healthcare* is not directly controlling in this case, and *Amici* urge this Court to adopt their reasoning. By contrast, applying the District Court's interpretation of *Children's Healthcare* would not only put the Sixth Circuit in conflict with three other courts that have considered its application and rejected it, but would fly in the face of *Ex Parte Young*. Doing so would have the potential to foreclose judicial review of important and meritorious constitutional challenges that lie at the heart of our Constitution's protections.

II. The chilling of speech inherent in uncertain enforcement is itself a constitutionally cognizable harm under the First Amendment, and cases involving such chill should be heard even absent an explicit threat of enforcement.

---

[18] *Id.* at 909.

[19] *Audubon*, 307 F.3d at 847.

Amici are unable to find any cases discussing Eleventh Amendment immunity in the context of claims regarding the chill of speech under the First Amendment. But the Supreme Court has often recognized that the chilling of speech inherent in uncertain enforcement is a constitutionally cognizable harm to be specifically guarded against. Indeed, the Supreme Court often applies a relaxed standard in the area of Article III standing when dealing with cases involving chilled activity protected by the First Amendment. This relaxation of standing requirements is due to the peculiar nature of chilled speech. While the Article III standing and *Young* enforceability analyses are not precisely coextensive, the Supreme Court's special treatment of this danger should inform this Court's analysis of *Young*.

a. The Supreme Court's Article III standing cases highlight the peculiar harm of chilled speech and the consequent relaxed standards applied in cases involving First-Amendment chill.

The Supreme Court has recognized chill to be a separate, constitutionally cognizable harm that brings relaxed standards for Article III standing. The Court has explained that chill is peculiar in that fear itself can lead to protected speech never being spoken, and that the risk of such self-censorship must be recognized in

analyzing parties' standing.[20] The courts of appeals have similarly applied relaxed standards when faced with statutes that chill speech.[21]

These holdings arise in the context of Article III standing. But the concerns of *Young* and its progeny are similar.[22] In this case, as in many cases where standing is in doubt, a significant question is whether enforcement poses a threat to plaintiffs. And specifically, in the context of standing, the Supreme Court has applied a relaxed standard in cases dealing with potential, future enforcement.

In *Virginia v. American Booksellers Association*, booksellers challenged a Virginia law that made it a crime to knowingly display obscene materials where

---

[20] *See, e.g. United States v. Alvarez*, 2012 U.S. LEXIS 4879, 41-42 (U.S. June 28, 2012) ("the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby "chilling" a kind of speech that lies at the First Amendment's heart"); *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988) ("the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution"); *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions").

[21] *See, e.g. Ruocchio v. United Transp. Union*, 181 F.3d 376, 385 (3d Cir. 1999) ("Courts have been expansive in their view of standing to bring legal action in situations in which free speech rights are implicated"); *ACLU v. Johnson*, 194 F.3d 1149, 1154-55 (10th Cir. 1999) ("customary ripeness analysis" is "relaxed somewhat" where a case is brought that "implicat[es] First Amendment values")(internal quotation marks and citations omitted).

[22] *See* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 189-90 (3d ed. 2006) (stating that one theory of the Eleventh Amendment is as a constitutional limit on subject-matter jurisdiction for all suits against state governments).

juveniles could examine them.[23] The booksellers brought the action before any enforcement action by the state or county.[24] Because the law was aimed at their commercial activity, because the stores had a "well-founded" fear that the law would be enforced against them,[25] and because the Court understood that the law's existence would cause others' speech to be chilled, the Court held that the booksellers had standing.[26] Based on these facts, the courts were allowed to reach the merits of the case.

Similarly, in *NAACP v. Button*, the civil rights organization challenged newly added provisions of a state's rules of professional conduct that prevented the advertisement of legal business, thereby threatening the NAACP's public-interest-litigation model.[27] The Supreme Court allowed the NAACP to have standing, even though the organization itself was not threatened with enforcement under the new provisions.[28] The Court further allowed standing on vagueness and

---

[23] *American Booksellers*, 484 U.S. at 386.

[24] *Id.* at 393.

[25] *Id.* at 393.

[26] *Id.* at 393.

[27] *NAACP v. Button*, 371 U.S. 415, 424-426 (1963). The NAACP used local private attorneys to represent clients in public-interest litigation.

[28] *Id.* at 428.

overbreadth facial challenges despite the lack of criminal prosecution.[29] Recognizing that the First-Amendment freedoms are "supremely precious in our society" yet "delicate and vulnerable," the Court found that the deterrent presented by the possibility of sanctions was itself sufficient to establish standing[30] because the vagueness and overbreadth of the statute was enough to possibly "freeze out" civil rights activity.[31]

In this case, a member of the Secretary of State's staff said he had no reason to believe the statute would not be enforced[32] (and in fact that he imagined the statute *would* be enforced), but also at one point said that he would "not recommend" enforcement of Ohio Rev. Code § 3599.45(A).[33] Furthermore, the District Court speculated that if the statute were enforced, then perhaps Mr. Kilroy would be in a better position to challenge the statute.[34]

---

[29] *Id.* at 432.

[30] *Id.* at 433; *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) (holding that the threat of prosecution, even if the prosecution is likely to fail, may chill speech and thus confers standing); *Dombrowski v. Pfister*, 380 U.S. 479, 493-94 (1965) (same).

[31] *Button*, 371 U.S. at 436.

[32] *Kilroy v. Husted*, 2:11-cv-145, slip op. at 14-15 (S.D. Ohio Apr. 16, 2012) (Op. and Ord.) (citing R. 83-18 (Mayhew dep. at 7-8)).

[33] *Id.* at 15.

[34] *Id.* at 23.

But Plaintiff alleges that he in fact chose not to take action he otherwise would have, and that the challenged statute's chill is, therefore, not merely hypothetical. And Plaintiff has alleged that such chill itself infringes on important First-Amendment rights. As discussed by the Supreme Court, chill is a different, distinct constitutional harm that triggers a relaxed approach to standing and ripeness that would not otherwise apply. As discussed in *American Booksellers* and *Button*, the harm is not only a statute's enforcement, but all the protected actions not taken *for fear of* enforcement.

The Supreme Court engaged in a relaxed standing inquiry based upon chill in the context of commercial speech (*American Booksellers*) and regulating lawyers (*Button*). This case, however, centers on political speech and the campaign process—the very heart of the expression the First Amendment was designed to protect. Therefore the threat of chill is even more significant than that found in either *American Booksellers* or *Button*, and must be weighed in analyzing whether the case may be heard.

b. If *Children's Healthcare* is applied in the circumstances presented here, lower courts are likely to conflate Article III ripeness analysis with the enforceability prong of *Ex Parte Young*.

The *Young* doctrine exists to allow meritorious cases to be heard without circumventing the Eleventh Amendment. It is not, as the appellees contend,

designed to impose some arbitrary temporal imminence requirement on legitimate and substantive constitutional challenges.[35] Indeed, courts make searching inquiries into Article III standing to determine whether a case is suitable for review when it is filed, an inquiry wholly separate from *Young*'s governmental-immunity analysis.

This case is not the first in which the ripeness analysis has been mistaken for a question of Eleventh Amendment immunity. Indeed, the *Audubon* court explicitly identified the potential for such confusion:

> Essentially, the state argues that we should recognize a 'ripeness' component in the *Ex Parte Young* exception, and cites numerous cases in support of that argument, including....*Children's Healthcare*." But "[t]hese cases are concerned with plaintiffs circumventing the Eleventh Amendment under *Ex Parte Young* simply by suing any state executive official. That is, they are concerned with the question of 'who' rather than 'when.' We decline to read additional 'ripeness' or 'imminence' requirements into the *Ex Parte Young* exception to Eleventh Amendment immunity in actions for declaratory relief beyond those already imposed by a general Article III and prudential ripeness analysis. The Article III and prudential ripeness requirements...are tailored to address problems occasioned by an unripe controversy. There is thus no need to strain *Ex Parte Young* doctrine to serve that purpose."[36]

The case at bar illustrates this very phenomenon. Consequently, *Amici* ask this Court to affirmatively distinguish between these two analyses, and decline to apply *Children's Healthcare* to the facts of this case.

---

[35] *Audubon*, 307 F.3d at 847.

[36] *Id.* at 846 (internal citations omitted).

III. The District Court's Standard Would Have Blocked Major Civil Rights Cases

The District Court insists that Appellant Kilroy did not have a reasonable fear of enforcement because the state was not presently threatening legal action. The foregoing sections have demonstrated that this standard is based on an erroneous view of Eleventh Amendment jurisprudence. The District Court's standard would create an exceptional and unnecessary barrier to civil rights adjudication. Indeed, the District Court's standards would have barred some of the most important civil rights cases of the past 40 years.

a. *Epperson v. Arkansas*

Under the District Court's rule, the Supreme Court would not have had jurisdiction to hear the seminal case of *Epperson v. Arkansas*.[37] Epperson was a public- school teacher who challenged an Arkansas statute that banned the teaching of evolution.[38] The statute was passed in 1928 in the wake of the *Scopes* trial concerning a similar Tennessee statute.[39] The statute sat on the books for 40 years,

---

[37] 393 U.S. 97 (1968).

[38] *Id.* at 98-99.

[39] *Id.* at 98.

during which time the state took no action to enforce it. Indeed, Arkansas had stated its intent to never enforce the law.[40]

The District Court would likely have dismissed Epperson's claim. Ohio Rev. Code § 3599.45, in its current form, was passed in 1978. This is comparable to the 40-year old statute in *Epperson*. But while the statute in *Epperson* was clearly a dead letter, an unenforced relic from a culturally different time in the state's history, Ohio's statute is being considered at a time when states are, if anything, *increasing* their regulation of campaign finance. Ohio cannot credibly say that it has little interest in campaign-finance reform in the post-*Citizens United* world. Nor can Ohio claim that it will never enforce the statute, as Arkansas claimed in *Epperson*. Rather, the Secretary can only muster a claim that the law, for one employee subordinate to him, is not a priority now, and *in its current form* is possibly too difficult to enforce. This was not enough for the Supreme Court in *Epperson*, nor should it be enough for this Court.

b. *Doe v. Bolton*

Decided on the same day as *Roe v. Wade*, *Doe v. Bolton* concerned an unenforced Georgia statute that severely restricted the right to an abortion.[41] Mary Doe, a pregnant woman, filed suit along with several medical and social

---

[40] *Id.* at 109-10 (Black, J., concurring).

[41] 410 U.S. 149, 183 (1973).

professionals who would potentially be affected by the statute.[42] While Doe had been denied abortion services, the other plaintiffs had never faced enforcement or even a threat of enforcement.[43] The Court granted the other petitioners standing on the grounds that the Georgia statute was "recent and not moribund."[44] The Court made this determination based on the fact that the statute was passed in 1968, and that it was the successor to an 1876 statute that had been enforced nine times, or roughly once per decade.[45]

Had the *Doe* petitioners brought their case before the District Court, it would have been dismissed. Appellant Kilroy, like the medical professionals in *Doe*, merely seeks a vindication of his rights against a statute that *could* be enforced. There was not a substantial record or pending threat of enforcement, but the Supreme Court did not ask the parties in *Doe* to wait until they faced criminal or civil penalties to vindicate their rights. This Court should do the same here.

---

[42] *Id.* at 185.

[43] *Id.* at 188.

[44] *Id.*

[45] *Id.* at 182.

c. *Babbitt v. United Farmer Workers Nat'l Union*

Again in 1979, the Supreme Court upheld standing and justiciability for a never-enforced statute.[46] The statute concerned the criminal provisions of several regulations of union activity and consumer-publicity campaigns.[47] The Court noted that the challenged provisions had not been enforced and indeed may never be enforced, but held that "a plaintiff need not 'first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.'"[48] Consequently, the Court found that the union had a justiciable claim.

Babbitt again shows that the Supreme Court has not required an imminent or concrete threat of enforcement before allowing civil rights challenges to go forward. Nevertheless, the District Court likely would have dismissed that case.

d. *Bowers v. Hardwick*

Bowers v. Hardwick is well known as an early, unsuccessful challenge to a state anti-sodomy law.[49] While the case was substantively overruled, it is still good law in terms of standing and justiciability. Although Respondent Hardwick was initially investigated for engaging in homosexual sodomy, the state had

---

[46] *Babbitt v. United Farmer Workers Nat'l Union*, 442 U.S. 289 (1979).

[47] *Id.* at 292-93.

[48] *Id.* at 298 (citing *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)).

[49] 478 U.S. 186 (1986).

decided not to pursue the case.[50] The Court still allowed Hardwick to bring suit challenging the constitutionality of the statute, even though he was no longer at risk of prosecution.

Under the District Court's theory, Hardwick's case would have been dismissed. But if a case can proceed even where the state has formally declined to enforce, then certainly one should proceed where, as here, a mid-level bureaucrat has stated only that he would "not recommend" enforcement. As established in *Bowers*, Appellant Kilroy's contributions need not be currently under investigation to support a challenge to the Ohio statute's constitutionality.

e. *New Hampshire Right to Life Political Action Committee v. Gardner*

In addition to the Supreme Court, the First Circuit has also implicitly rejected the District Court's theory of a "credible threat." While the First Circuit's decision is not binding on this Court, it stands as additional evidence that the District Court is out of step with its sister circuits and that the District Court's theory would stifle civil rights litigation. As in other cases, *Gardner* involved a plaintiff challenging a law that had not been enforced.[51] The court noted that the state was unable to guarantee future failure to enforce (just as Ohio can give no

---

[50] *Id.* at 188.

[51] 99 F.3d 8 (1st Cir. 1996).

such guarantee here), and moreover that a facial challenge did not need a pending enforcement action.[52]

As the District Court acknowledged below, the state of Ohio was equivocal in its commitment not to enforce the statute. At best, the state had no present intention of enforcing it. This is a far cry from an intention to *never* enforce the statute. The plaintiffs in *Gardner* were similarly denied such assurances. Moreover, as the court observed in *Gardner*, a facial challenge to a statute's constitutionality doesn't require the immediate threat of a suit. It is enough that Ohio may, without notice to Mr. Kilroy, begin enforcing the law at any point (not to mention that Mr. Kilroy suffers irreparable injury in the meantime).

Conclusion

The District Court's application of *Children's Healthcare* was erroneous, as that case dealt with *Young*'s requirement of "some connection" between a challenged statute and a named defendant. Expanding that precedent to also require an imminent prosecution before suit may be brought in federal court was error. Courts in three other circuits have explicitly declined to do so, and the Supreme

---

[52] *Id.* at 16 ("More importantly, the court confused the threat of enforcement which existed *relative to the initial expenditures* with the broader threat of enforcement that had to be considered in ruling on N-PAC's standing to seek a declaration that the statutory scheme is unconstitutional on its face. In this case, the distinction is crucial.") (emphasis in original).

Court has consistently accepted civil rights cases that would have failed the District Court's analysis.

The District Court should be reversed. Failing to do so would leave the Sixth Circuit application of the Eleventh Amendment in conflict with that of other courts, chilling civil rights litigation and leading to fewer protections for Americans living within this Circuit.

Dated: 19 July 2012

Respectfully submitted,

s/ Allen Dickerson
Allen Dickerson
Center for Competitive Politics
124 S. West Street, Suite 201
Alexandria, Virginia 22314
Telephone: (703) 894-6800
Facsimile: (703) 894-6811
adickerson@campaignfreedom.org

Counsel for *Amici Curiae*

COMBINED CERTIFICATIONS

Certification Pursuant to F.R.A.P. 32(a)(7)

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing document is written in a proportionately-spaced, 14-point Times New Roman font, and contains 5,256 words, exclusive of the material not counted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

s/ Allen Dickerson
Allen Dickerson
Counsel for *Amici Curiae*

Certificate of Service

I certify that on 19 July 2012 I filed the foregoing document electronically with the Clerk of the United States Court of Appeals for the Sixth Circuit. The Court's ECF system will automatically generate and send by email a Notice of Docket Activity to all registered attorneys currently participating in this case, constituting service on those attorneys.

s/ Allen Dickerson
Allen Dickerson
Counsel for *Amici Curiae*