No. 13-193

IN THE
Supreme Court of the United States

SUSAN B. ANTHONY LIST, *ET AL.*, *Petitioners*,
v.
STEVEN DRIEHAUS, *ET AL.*, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, U.S. Justice Foundation, Free Speech Coalition, Free Speech Defense and Education Fund, Gun Owners of America, Inc., Gun Owners Foundation, Downsize DC Foundation, DownsizeDC.org, English First Foundation, Lincoln Institute for Research and Education, Abraham Lincoln Foundation, Conservative Legal Defense and Education Fund, Institute on the Constitution, Policy Analysis Center, and Constitution Party National Committee in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

Citizens United, Free Speech Coalition, Inc., Gun Owners of America, Inc., DownsizeDC.org, and Abraham Lincoln Foundation for Public Policy Research, Inc. are nonprofit social welfare organizations, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC"). Citizens United Foundation, U.S. Justice Foundation, Free Speech Defense and Education Fund, Inc., Gun Owners Foundation, Downsize DC Foundation, English First Foundation, The Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3), and are public charities. Institute on the Constitution is an educational organization. Constitution Party National Committee is a national political party.

The *amici* were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of state, local and national concern, the construction of state and federal constitutions and statutes and ordinances related to the rights of citizens and human and civil rights secured by law. Each organization has filed many

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

amicus curiae briefs in this Court and in other federal courts.

SUMMARY OF ARGUMENT

This case ostensibly concerns the standing and ripeness requirements for pre-enforcement First Amendment judicial review. Those requirements, however, cannot be addressed fully without first correctly identifying Petitioners' substantive First Amendment claim.

Respondents and the court of appeals below appear to have assumed that Petitioners' claim is that, in an effort to exclude allegedly unprotected speech from election campaigns, the Ohio false-statement law has unconstitutionally excluded Petitioners' protected speech. Respondents claim that the case is not ripe for review, because Petitioners' speech neither has been, in fact, chilled nor is likely to be chilled in the future. The circuit court below agreed, reserving review on the merits, because the First Amendment question could be answered differently in different factual settings.

Petitioners' claim is that, as a matter of law, the First Amendment prohibits Ohio from establishing an official government process to arbitrate political truth in an election campaign in which both Petitioners participated. Because the establishment of such a process, by itself, has chilled, and will continue to chill, their protected speech, Petitioners' claim is ripe for decision in that the answer to their claim does not depend upon different facts in different settings. Rather, the First Amendment issue in this case

depends solely on whether the State of Ohio has jurisdiction to police the electioneering marketplace of ideas, separating truth from alleged lies.

In sum, Respondents claim that they are endowed with the power to "determine[] and proclaim[] to the electorate the truth...." Petitioners counter that the First Amendment prohibits Ohio from establishing such a "Ministry of Truth." This First Amendment issue is not only ripe for decision, but the courts are duty-bound by the power vested in them by Article III to "say ... what the law is."

ARGUMENT

I. PETITIONERS' FIRST AMENDMENT CLAIM CONCERNS THE LAWFUL ROLE OF OHIO IN THE FREE MARKETPLACE OF IDEAS.

Before reaching the procedural questions of standing and ripeness in this case, one must first correctly identify the substantive First Amendment claim presented by Petitioners, Susan B. Anthony List ("SBA List") and The Coalition Opposed to Additional Spending and Taxes ("COAST"). *See* Laird v. Tatum, 408 U.S. 1, 10-13 (1972).

A. Respondents Misstate Petitioners' First Amendment Claim as Fact-Based.

Respondents appear to assume Petitioners' First Amendment claim to be that the Ohio law unconstitutionally "chills" protected speech through a statutory scheme designed to prohibit allegedly

unprotected speech, that is, "false statements ... made ... with knowledge that they are false or with reckless disregard as to their falsity." *See* Brief of State Respondents in Opposition to Petition for Writ of Certiorari ("Resp.") at 4-5. Thus, Respondents contend that the Sixth Circuit "decision below ... merely applied the settled law of ripeness to particular facts." *Id.* at 1. Indeed, Respondents claim that the decision below turned on "narrow facts," namely, that "SBA List never specified how its speech was chilled, and, to the contrary, kept speaking despite the [Ohio Election] Commission's preliminary proceedings." *See id.* at 2.

Further, Respondents emphasize that the Ohio Elections Commission ("OEC") has "limited powers," none of which enable it to do anything more than "declare whether it finds statements false" and "in some cases, refer its findings to county prosecutors." *Id.* at 5. Instead, Respondents point out that only the county prosecutor is invested with power to punish any alleged false statement, and even then, the OEC has no more power to make that happen than an ordinary citizen. *Id.* at 5-6. Thus, Respondents allege that, until the local prosecutor takes action, nothing that the OEC did in this case has kept SBA List and COAST from fully participating in any election campaign, nor is there any way to know whether the Ohio law will fence out SBA List and COAST in the future. *Id.* at 11-12.

According to Respondents, then, the First Amendment issue before the court is "fact-bound." *Id.* at 12. The Sixth Circuit agreed, ruling that the First Amendment question need not be addressed now

because it "'may be answered differently in different settings,'" and thus, "[t]he current factual record is insufficient to permit review." SBA List, 525 Fed. Appx. at 423.

B. Petitioners' First Amendment Claim Is, in Fact, Law-Based.

The Sixth Circuit is mistaken. At stake is Petitioners' challenge to the constitutionality of Ohio's statutory scheme which anoints OEC as the State's "Ministry of Truth[],"[2] to referee and "proclaim" the truth or falsity of claims and counterclaims in a political campaign. Brief of Petitioners ("Pet. Br.") at 11. This is a First Amendment question of law, not fact.

Petitioners' claim is fundamentally a jurisdictional one — whether the First Amendment "allow[s] the government to serve as **arbiter** of political 'truth.'" *See* Pet. Br. at 10) (emphasis added). Petitioners note that Ohio is in a group of "nearly one-third of the states [that] have statutes prohibiting 'false' statements made during political campaigns...." *Id.* at 11. Petitioners contend that, under United States v. Alvarez, 132 S.Ct. 2537 (2012), "[t]hese laws do exactly what [this Court] warned against, inserting state bureaucrats and judges into political debates and charging them with separating **truth** from oft-alleged campaign '**lies**.'" *Id.* (emphasis added). Thus, Petitioners' claim that the Ohio law — which nakedly

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[2] Pet. Br. at 11.

prohibits knowing false statements, or statements made in reckless disregard of their truth or falsity concerning a candidate for election — establishes a "blatantly unlawful regime under which bureaucrats are the supreme **fact-checkers** for every political campaign...." *Id.* at 10 (emphasis added).

Respondents do not dispute Petitioners' claim that OEC plays a substantial "fact checking" role in Ohio election campaigns. However, Respondents disagree with Petitioners' claim that the Ohio law "cannot be squared with basic free-speech principles." *See id.* at 10. Actually, Respondents reinforce Petitioners' claim by their assertion that OEC "'**determines and proclaims to the electorate the truth** of various campaign allegations.'" Resp. at 6 (emphasis added). Instead of decrying Petitioners' characterization of OEC's "'truth-declaring' function," Respondents freely endorse that function, claiming that: "[T]he statements and findings of [OEC] fall exactly within the tenet that 'the usual cure for false speech is more speech.'" *Id.*

Indeed, resting entirely upon the Sixth Circuit First Amendment opinion Pestrak v. Ohio Election Commission, 926 F.2d 573 (1991), Respondents have asserted with great confidence that the Ohio law is constitutional, because:

> [OEC] cannot initiate investigations on the front end, nor can it prosecute or impose penalties on the back end... [I]t merely stands in the middle, **assessing statements and performing** what the Sixth Circuit calls

> [OEC's] "**recommending" and "truth-declaring**" functions. [Resp. at 12 (emphasis added).]

Hence, Respondents blithely conclude, quoting Pestrak, that "to the extent [OEC] does nothing more than recommend, then its actions, *per se*, have no official weight and cannot be the cause of deprivation of constitutional rights." Resp. at 6.

C. Petitioners' Claim Rests Upon a First Amendment Bedrock Principle.

According to the First Amendment principles identified in Alvarez: "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *Id.*, 132 S.Ct. at 2547. In short, Ohio has no jurisdiction to police the marketplace of ideas. *See* Pet. Br. at 10. In 1779, Thomas Jefferson observed that:

> the **opinions** of men are **not the object** of civil government, nor under its jurisdiction. That to suffer the civil Magistrate to intrude his powers into the **field of opinion**, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty; because he being of course Judge of that tendency will make his own **opinions** the rule of judgment, and approve or condemn the sentiments of others only as they shall square with, or differ from his own. [Thomas Jefferson, "A Bill for Establishing

> Religious Freedom," reprinted in 5 The Founders Constitution, 77 (item # 37) (Kurland, P. & Lerner, R., eds., Univ. Chi. Press: 1987) (emphasis added).]

While Jefferson's Bill targeted an effort to impose a religious orthodoxy upon the people, it is noteworthy that he invoked a much broader principle applicable to all "opinions," asserting "[t]hat it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." *Id.* Thus, Jefferson proclaimed:

> that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to errour, and has nothing to fear from the conflict, **unless by human interposition,** disarmed of her natural weapons, free argument and debate; errours ceasing to be dangerous when it is permitted **freely** to contract them. [*Id.* (emphasis added).]

It is this bedrock First Amendment principle, undergirding the nation's free marketplace of ideas, upon which Alvarez stands:

> Permitting the government to decree this speech to be a criminal offense ... would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no

> clear limiting principle. [Alvarez, 132 S.Ct. at 2547.]

And it is this "basic First Amendment principle[]" upon which SBA List rests its claim that the Ohio "fact-checking" system covering "political campaigns" is unconstitutional. Pet. Br. at 10.

II. PETITIONERS' FIRST AMENDMENT CLAIM IS A RIPE CONTROVERSY.

It is undisputed that SBA List, a pro-life organization, planned to put up a billboard charging Steve Driehaus, an incumbent Congressman, with having voted for taxpayer-funded abortion, based upon Driehaus's vote for the Patient Protection and Affordable Care Act. *See* SBA List, 525 Fed. Appx. at 416-417. Next, it is undisputed that Driehaus filed a complaint with OEC, charging SBA List with violating the Ohio false-statement law. *Id.*, 525 Fed. Appx. at 417. Further, it is undisputed that an OEC panel voted 2-1 against SBA List, finding probable cause that it had made a prohibited false statement, and referred the Driehaus complaint to the full Commission. *Id.* Finally, it is undisputed that SBA List scrapped its billboard plan, and that, after losing his campaign for reelection, Driehaus withdrew his complaint. *Id.*

Unlike SBA List, COAST was never formally charged with a violation of Ohio's false statement law. *Id.*, 525 Fed. Appx. at 423. Nevertheless, upon learning of Driehaus's action against SBA List, COAST dropped its plans to criticize the Congressman,

utilizing a variety of communicative methods and making essentially the same charge as SBA List. *Id.* at 418. Both advocacy organizations indicated their future plans to criticize candidates for public office in Ohio, but alleged that their constitutional right to speak was chilled by the prospect of being charged with violation of the Ohio false statement laws. *See* Pet. Br. at 3-7.

Skipping over the question whether SBA List and COAST had standing to sue, the Sixth Circuit declined to reach the merits of their claims for Article III and "prudential reasons." *See* SBA List, 525 Fed. Appx. at 418. Citing N.R.A. v. Magaw, 132 F. 3d 272, 284 (1997), the SBA List court of appeals gave as its threshold reason that any adjudication of the First Amendment claim was "'premature,'" since it was "'anchored in future events that may not occur as anticipated, or at all.'" *Id.* In other words, the Sixth Circuit decided that "[t]he **factual** record here is not sufficiently developed to review [Petitioners'] claims,"[3] as if Petitioners were making an "as applied," rather than a "facial" challenge to Ohio's statutory scheme:

> Ohio has not **applied** its law to SBA List's speech. The Commission has not found that SBA List violated the false-statement law. And no prosecutor has taken any action upon any Commission referral. SBA List says it seeks to engage in substantially similar speech in the future. Allowing such a case to proceed

[3] *Id.* at 422 (emphasis added).

> would require us to guess about the content and veracity of SBA List's as-yet unarticulated statement, the chance an as-yet unidentified candidate against whom it is directed will file a Commission complaint, and the odds that the Commission will conclude the statement violates Ohio law. [SBA List, 525 Fed. Appx. at 422 (emphasis added).]

As noted above, none of these considerations is relevant to Petitioners' actual First Amendment claim. At issue here is the facial constitutionality of a law that empowers a government agency, upon the filing of a complaint, to insinuate itself into a political campaign to determine and proclaim to the electorate which of two political antagonists is telling the truth. *See* Resp. at 6. To decide this foundational question, the court does not need to know the "content and veracity of SBA List's as-yet unarticulated statement," or know which side the OEC **would** take. It is enough to know that the law **empowers** OEC to exercise a "truth-declaring" function, that its panel performed such a function in the 2010 election cycle, that SBA List and COAST have firmly indicated that they are coming back to Ohio to engage in similar speech, and that the Sixth Circuit had no reason to "doubt that [they] will." *See* Warshak v. United States, 532 F.3d 521, 526 (6th Cir. 2008).

Not only do they not dispute, but Respondents concur with, Petitioners' description of the "fact-checking" role of the OEC as the State's ministry of truth in election campaigns. There is no reason to believe that role will change under the current

statutory regime and, thus, no reason to believe that Petitioners' constitutional challenge "'may be answered differently in different settings.'" *See* SBA List, 525 Fed. Appx. at 423 (citing Warshak, 532 F.3d at 528). As the Sixth Circuit previously observed in an earlier opinion refusing to dismiss a case under the ripeness doctrine, "[f]urther development of a factual record ... would not inform the court's legal analysis." *See* N.R.A. v. Magaw, 132 F3d 272, 290 (6th Cir. 1997).

Additionally, Petitioners' claim does not turn "'on an understanding of' complex factual issues,"[4] such as was the case in Warshak, upon which the Sixth Circuit below relied. Warshak involved a Fourth Amendment dispute where "the 'reasonableness' of searches [is] typically [measured by] the 'totality of the circumstances,'" and thus, "'the sort of question which can only be decided in the concrete factual context of the individual case.'" *See id.*, 532 F.3d at 528, 529. However, SBA List and COAST have submitted a First Amendment claim where "the Supreme Court has enunciated concerns that justify a lessening of the usual prudential requirements for a pre-enforcement challenge to a statute with criminal penalties." *See* N.R.A., 132 F.3d at 284-85. As is true of First Amendment cases, "the harm alleged [here] is the 'chilling effect' on the constitutionally protected right to free expression[,] lead[ing] to 'self-censorship, a harm that can be realized even without an actual prosecution.'" *Id.*, 132 F.3d at 285. *See also* Pet. Br. at 12.

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[4] 532 F.3d at 528.

III. FOR "PRUDENTIAL REASONS," THIS CASE IS RIPE FOR DECISION.

As Petitioners have summarized in their brief, "Ohio's false-statement law is far from moribund[,] the OEC 'handl[ing] about 20 to 80 false statement complaints per year.'" Pet. Br. at 53. Thus, there is no doubt that, unless overturned, the Ohio law will continue to be enforced, sending the debates over public policy in election campaigns "to be **adjudicated** by bureaucrats and/or criminal courts" rather than "to be '**resolved**' by voters." *See* Pet. Br. at 54 (emphasis added). As Petitioners have observed, in America's constitutional republic, it is the people, not the nation's civil magistrates, who are the authorized judges of truth, whether it be political, religious, or otherwise. *Id.* And for good reason. As Thomas Jefferson warned:

> [It is] the impious presumption of legislators and rulers ... who, being themselves but fallible and uninspired men, have assumed dominion over ... others, setting up their own **opinions** and **modes of thinking**, as the only true and infallible, and as such, endeavoring to impose them on others.... [Thomas Jefferson's Bill, at 5 The Founders' Constitution at 77 (emphasis added).]

The court of appeals below belittles this time-honored principle, asserting that "[w]ithholding judicial relief will not result in **undue** hardship to SBA List." SBA List, 525 Fed. Appx. at 423 (emphasis added). Indeed, the court below boldly proclaims that

"there is **no** hardship where the evidence suggests SBA List is not deterred from engaging in the very conduct that it claims is encumbered." *Id.* (emphasis added).

What alternative do SBA List and COAST have, but to soldier on — if their voices are to be heard in Ohio election campaigns? And why have SBA List and COAST persisted in this litigation to obtain a decision on the merits of their constitutional claim? "Because," as James Madison wrote in his great *Memorial and Remonstrance*, "it is proper to take alarm at the first experiment on our liberties."[5] Indeed, Madison added:

> We hold this **prudent** jealously to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America **did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents**.... We revere this lesson too much to soon forget it. [*Id.* (emphasis added).]

Prudence, then, calls for expedition, not delay, in the exercise of judicial power in **this** controversy. Indeed, it is not simply the judicial department's "province," but its "duty ... to say what the law is." *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). The Sixth Circuit erred when it ruled that this case was not ripe for decision on the merits.

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[5] James Madison, "Memorial and Remonstrance Against Religious Assessments," reprinted in 5 The Founders' Constitution at 82 (item # 43).

CONCLUSION

The opinion of the Sixth Circuit should be reversed.

Respectfully submitted,

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