

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SUSAN B. ANTHONY LIST, ET :

4 AL., :

5 Petitioners : No. 13-193

6 v. :

7 STEVEN DRIEHAUS, ET AL. :

8 - - - - - x

9 Washington, D.C.

10 Tuesday, April 22, 2014

11

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 10:28 a.m.

15 APPEARANCES:

16 MICHAEL A. CARVIN, ESQ., Washington, D.C.; on behalf

17 of Petitioners.

18 ERIC J. FEIGIN, ESQ., Assistant to the Solicitor

19 General, Department of Justice, Washington, D.C.; on

20 behalf of the United States, as amicus curiae,

21 supporting partial reversal.

22 ERIC E. MURPHY, ESQ., State Solicitor, Columbus, Ohio;

23 on behalf of Respondents.

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1 P R O C E E D I N G S

2 (10:28 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 13-193, Susan B. Anthony List
5 v. Steven Driehaus.

6 Mr. Carvin?

7 ORAL ARGUMENT OF MICHAEL A. CARVIN

8 ON BEHALF OF THE PETITIONERS

9 MR. CARVIN: Mr. Chief Justice, and may it
10 please the Court:

11 Under this Court's straight-forward precedent,
12 this case presents a clearly ripe and justiciable
13 controversy. All agree that the test is whether or not
14 there's a credible threat of enforcement. Here we know
15 THAT there's a credible threat of enforcement because
16 the Commission's Probable Cause panel in 2010 said that
17 the speech at issue probably violated Ohio's false
18 statement law.

19 Since an enforcement agency has already told
20 us that this statement probably violates their law, we
21 obviously face a clear and very credible threat of
22 enforcement if we repeat those statements as we alleged
23 we would do.

24 JUSTICE GINSBURG: Are you making that
25 argument on behalf of the other organization? Susan B.

1 Anthony List, you have accurately described what
2 occurred. But the other organization has never been
3 charged before the Ohio Election Commission. Is there
4 any reason to believe anybody's going to lodge a
5 complaint against it?

6 MR. CARVIN: Well, Your Honor, when they
7 filed their complaint, they alleged that they had not
8 spoken those words because Susan B. Anthony had already
9 been drawn into the Commission's procedures and the
10 Commission had already found probable cause. So
11 since --

12 JUSTICE SOTOMAYOR: How is that any
13 different from -- how is that any different from the
14 people in Younger, who the Court dismissed as having no
15 standing because they hadn't been prosecuted despite the
16 same identical claim? They were chilled, they might
17 intend to do something similar, et cetera.

18 MR. CARVIN: Well, as Justice Brennan put it
19 in Younger, the -- the speech that the other three
20 speakers were going to engage in was not even of the
21 same genre as that of the person who would be -- was
22 being prosecuted, which is why the Court, quite
23 correctly said, that their chilling effect was based on
24 an imaginary or speculative fear of enforcement.
25 Whereas here, COAST was going to say precisely the same

1 words that SBA had already been found to have probably
2 violated the False-Statement Law. So it's hard to
3 imagine or --

4 JUSTICE GINSBURG: I thought that the Court
5 in Younger said with respect to those other three, that
6 they had never been threatened with prosecution. I
7 don't recall it made a distinction on the basis of
8 what they wanted to talk about.

9 MR. CARVIN: Well, two of the people were
10 labor picketers that had never been threatened and one
11 was somebody who was simply teaching Marx in a classroom
12 environment. They were quite distinct from the speaker
13 who had been prosecuted under the incitement to violence
14 law. And, again, Justice Brennan looked at their
15 statements, compared them to the statements of the
16 person who had been prosecuted and said they're not even
17 of the same genre.

18 So we're not arguing that somebody could
19 come in here and argue that anything that's
20 controversial creates a credible threat of enforcement,
21 but we've got a very specific concrete example. Speaker
22 A says X, that's found to have a probable cause.
23 Speaker B quite reasonably thinks if they've just
24 dragged Speaker A in front of this Commission and the
25 Commission has found probable cause, there's no reason

1 in the world to think that we won't be brought in.

2 JUSTICE GINSBURG: But the one question is
3 who is the "they"? Now, it might be that Susan B.
4 Anthony List is considered a group with real clout. So
5 a candidate might be really concerned about Susan B.
6 Anthony's speech. But the other organization maybe is
7 not as well funded and the candidate says, well, a lot
8 of things are said in political campaigns. I'll let
9 this one go. This one doesn't hurt me as much.

10 MR. CARVIN: Two points, Justice Ginsburg.
11 First, Driehaus had shown a very -- he was in the middle
12 of a very tough reelection campaign and he had shown he
13 was going to take all the steps he could to squelch this
14 notion that he supported taxpayer abortions. He had
15 already spent all the money in terms of SBA list. So it
16 literally -- all he'd have to do is Xerox it to -- to
17 come after COAST.

18 But I think the key point here is we don't
19 have to negative every conceivable hypothetical on why
20 Driehaus might not do this, and the Commission might not
21 do that. There's a presumption that if you have
22 violated the laws as the Probable Cause Panel said we
23 probably had, that the agency is going to enforce the
24 law. If you require us to negative every hypothetical,
25 then the only way to test that hypothesis is to

1 engage in the speech and --

2 JUSTICE SOTOMAYOR: How do you square this
3 with Clapper?

4 MR. CARVIN: I apologize.

5 JUSTICE SOTOMAYOR: Why isn't this as
6 speculative as Clapper? You have to assume first that
7 there's a candidate who is going to react by initiating
8 an action, you have to assume further that a panel is
9 going to render the same decision, and you have to
10 assume even further that a Federal prosecutor -- that
11 the prosecutor is going to agree and actually bring the
12 case.

13 MR. CARVIN: Well, those are the steps that
14 are required to put my clients in jail. But we suffer
15 Article III injury well before any prosecutor prosecutes
16 us. Once a complaint is filed, then we are subjected to
17 very serious costs and risks of litigation in front of
18 the Commission, and in the middle of an election
19 campaign during the crucial weeks when we're trying to
20 get our speech out.

21 JUSTICE KENNEDY: And I take it that's --
22 that's enforced by subpoenas. If the speaker doesn't
23 want to appear before the Commission, he can be served
24 with a subpoena, which is judicially enforceable.

25 MR. CARVIN: There's -- there's two things,

1 Justice Kennedy. At the initial stage, if we don't
2 respond to the complaint, the Commission's regulations
3 make it clear that they may well view that as a default
4 judgment and -- and enter a judgment against us right
5 away.

6 Once the probable cause determination comes
7 down, you have all of these kinds of subpoenas and very
8 intrusive discovery of the sort you had in our case
9 where they ask for our communications with everybody on
10 the right wing of the political aisle, where we have to
11 reveal our internal communications as well as those of
12 others.

13 JUSTICE KENNEDY: Now, the State can
14 characterize its own position, but do you understand the
15 State to say that well, the existence of the Commission
16 means that frivolous claims can be washed out, that they
17 can actually get some protection by an advance ruling.
18 Is that the State's position?

19 MR. CARVIN: No. Neither the Commission has
20 argued that, and the Attorney General's amicus on our
21 side makes it quite clear that there is no provision for
22 doing it. If you read their rules, they have to go to a
23 probable cause hearing in three days. There's literally
24 no opportunity to wipe out so-called frivolous claims.

25 JUSTICE KENNEDY: But I mean, I thought -- I

1 thought their position was that this would -- would
2 sharpen the controversy and make it more concrete or
3 something like that.

4 MR. CARVIN: That's precisely right.
5 They're arguing -- the whole point of this statute is
6 some kind of truth-telling function, so they want us
7 to --

8 JUSTICE GINSBURG: There is a provision for
9 an advisory opinion, unless the question is if you are
10 arguing strenuously that this statute violates the
11 Constitution. You could have asked the Commission for
12 an advisory opinion saying that the statute can't be
13 enforced, but you didn't do that.

14 MR. CARVIN: No, we didn't because we think
15 that's unconstitutional. Our constitutional claim here
16 is the ministry of truth has no ability to judge our
17 political speech as falsity. So obviously, we wouldn't
18 have subjected ourselves voluntarily to the ministry of
19 truth before we decided to challenge their
20 constitutional validity. Then we would have been
21 inflicting the constitutional injury on ourselves.

22 JUSTICE KAGAN: Mr. -- please.

23 MR. CARVIN: I was just going to say, even
24 the Commission recognizes that the declaratory judgment
25 advisory opinion procedure doesn't work in the heat of

1 an election campaign as it was here. But please --

2 JUSTICE KAGAN: Is -- is your argument
3 dependent on the following two facts: The first that
4 there was a probable cause determination, and the second
5 that the Susan Anthony group and the other group wanted
6 to repeat the exact same statement? Are those the two
7 things that -- that ground your argument?

8 MR. CARVIN: We -- we think that makes it
9 all -- all but dispositive, yes. That it's possible not
10 to find a credible threat given those two facts. They
11 had found this speech probably violated the Ohio
12 election statute. And two, we were going to say exactly
13 the same thing. So --

14 JUSTICE KAGAN: So if -- I'm sorry.

15 MR. CARVIN: Well, I just want to make it
16 clear that the threat of enforcement is particularly
17 acute here because not only is -- is enforcement power
18 handed to a group of elected officials with certain
19 ethical and political accountability things. Any one of
20 our political opponents is -- is empowered under the
21 statute to bring us in front of the Commission. So all
22 they have to do is Xerox the Driehaus complaint, Xerox
23 the probable cause finding, and Xerox a district court
24 finding that said our speech was untrue. So since there
25 is millions of people who were deputized under the

1 statute, who have every political motivation to squelch
2 our speech in -- before a campaign, then I think --

3 JUSTICE KAGAN: But that would suggest
4 something even broader. That would suggest that even in
5 the first instance, before the probable cause
6 determination was made, Susan Anthony would know that
7 it's going to be speaking about a very controversial
8 subject in which some people will think it's telling the
9 truth and other people will think it's lying, and that
10 there's a very good chance that somebody is going to
11 bring this to the Commission. So that would suggest
12 that they have standing even at that moment before the
13 initial probable cause determination is made.

14 MR. CARVIN: Justice Kagan, we can agree
15 that given the amorphous nature of this prohibition in
16 the false statement, it's difficult to predict in
17 advance who and when is going to do it. But to return
18 to my prior answer, all of that ambiguity is gone once
19 the expert agency has already told you that there's a
20 probable cause to believe it violates it.

21 So this separates us from every other
22 speaker who is simply concerned that they will be
23 brought in front of the Commission. We have an
24 identifiable track record that we have been brought in
25 front of the Commission. And in that regard, I would

1 point out that the Secretary of State is obliged to
2 refer anything to the Commission if he has -- should
3 know that there's a violation.

4 Well, in the wake of the Probable Cause
5 Panel's prior probability determination, it would seem
6 that he's either ethically obliged to file a complaint
7 against us or at least there's a very high likelihood
8 that he would. And, again, I don't want us to lose
9 sight of the other side of the calculus, which is that
10 if -- if we have to prove all of these hypotheticals
11 with certainty, if we have to engage in more the
12 presumption that the State will enforce its own laws,
13 you have created an insoluble dilemma for speakers,
14 because you have -- you have conditioned their access to
15 the political marketplace of ideas on a very serious
16 threat of being dragged into this process.

17 JUSTICE SOTOMAYOR: Well, let me ask you
18 something going back in part to Justice Kagan.
19 Basically, as a bottom line, you think there's nothing
20 that could be salvaged from this process. Presumably,
21 you think that even if your client speaks a falsehood,
22 it still chills improperly.

23 MR. CARVIN: We think that if the commission
24 is going to drag us in front of them to justify our
25 political speech to a bunch of State officials that

1 they -- that is, A, Article III cognizable injury, and
2 B, unconstitutional. I was explaining to
3 Justice Ginsburg --

4 JUSTICE SCALIA: You're -- you're not asking
5 us to resolve the constitutional question, just the
6 question of whether you can raise the Constitution.

7 MR. CARVIN: All we're trying for is our day
8 in court so that we can make this argument. And I was
9 just explaining to Justice Ginsburg that that's a reason
10 we wouldn't voluntarily invoke a procedure that we are
11 about to challenge as constitutional. It would be
12 cutting off our nose to spite our face.

13 And -- and I also would like to point out
14 that this is election speech. And -- and that has two
15 very significant components to it. One is that it's
16 obviously the core of the First Amendment. This is how
17 we choose our representatives in our democracy. But it
18 also has an extraordinarily short shelf life. No one is
19 listening to election speech hardly at all 60 days
20 before an election, and the day after the election no
21 one either speaks or listens. So you have about a
22 2-month window where you can make these election speech
23 points, which means two things. One is any distraction
24 during that crucial period, as this Court noted in
25 Wisconsin Right to Life, really does constitute a

1 serious Article III injury.

2 But the other point is you're never going to
3 be able to adjudicate it within that 60-day window,
4 right? You're never going to go from complaint to final
5 judgment, which means that the speech will become
6 arguably moot after the election, in which case you go
7 to the capable of repetition yet evading review
8 exception to mootness, which is essentially the same
9 kind of prediction of future activity that's implicated
10 here.

11 If you adopt the extraordinarily Draconian
12 requirements that the Sixth Circuit imposed on credible
13 threat, this means that you will literally never be able
14 to challenge restrictions on election speech, right?
15 Before the campaign it will be premature. During the
16 enforcement proceeding, Federal courts have to abstain
17 under Younger. And afterwards, it'll be deemed moot,
18 and then no -- no possibility of capable of repetition
19 yet evading review. So you have this -- this regime
20 which has existed for decades in Ohio, where they
21 continue to impose very serious burdens on speakers on
22 what we consider a facially unconstitutional law, yet it
23 has consistently evaded judicial review precisely
24 because of the short time frames of the election --

25 JUSTICE GINSBURG: Why did -- why did you

1 say it would be found capable -- not capable of
2 repetition? It seems to me that you were quite right to
3 say before that this is most capable of repetition.

4 MR. CARVIN: Oh, if you accept our view of
5 credible threat, then -- then you're -- you're entirely
6 right, we would -- we would satisfy both the ripeness
7 standard and the capable of repetition yet evading
8 review standard. What I was trying to point out was
9 that if you adopt the what we consider absurdly high
10 straitjacket that the Sixth Circuit imposed on speakers
11 trying to bring pre-enforcement challenges in the First
12 Amendment context, that will essentially guarantee that
13 these things are never brought, because by the time the
14 election is done then you will have a mootness argument
15 and you won't be able to satisfy the capable of
16 repetition yet evading review standard. So you will --
17 you will have put us in this Catch 22 endless cycle of
18 suppressing speech, deterring speech, chilling speech,
19 but never being able to get to a court to adjudicate our
20 First Amendment --

21 JUSTICE KENNEDY: Your best cases you think
22 are Steffel and Thompson and Babbitt? Are there others
23 that are more --

24 MR. CARVIN: Well, Babbitt is certainly the
25 most on point because there the prohibition was, like

1 ours, was saying something untrue, something false. And
2 it's very important to note that the plaintiff in
3 Babbitt neither specified what they were going to say in
4 the future; it didn't specify what company it was going
5 to bring this consumer publicity campaign against; and
6 it expressly disavowed any intention to say anything
7 false. But nonetheless, the Court found that "a
8 credible threat was certainly impending," was the phrase
9 they used.

10 And I also think the Court's recent decision
11 in Holder is -- is quite on point there. There the
12 plaintiffs didn't say that they were subject to the
13 statute. They adamantly denied that the statute even
14 read -- reached them. They weren't bringing a facial
15 challenge as we are. They were bringing an as-applied
16 challenge to the statute and there had never been a
17 prior threat by any expert agency that their activities
18 were going to be monitored.

19 I think American Booksellers is an excellent
20 case as well, Justice Kennedy. There there had been no
21 argument -- there had been no prior threat of
22 enforcement. The State absolutely denied --

23 JUSTICE SOTOMAYOR: So please -- please
24 define for me the rule you'd like us to announce?
25 What's a credible threat?

1 MR. CARVIN: The narrowest rule, and the
2 only rule we need to survive, is that if the enforcement
3 agency has previously announced that your speech
4 probably violates the law at issue, then you have a
5 credible threat of future enforcement if you repeat that
6 speech. I think --

7 JUSTICE SOTOMAYOR: Do we need them to say
8 they are going to, even though the person who they said
9 it against is not running again?

10 MR. CARVIN: Oh. Well, two points on that.

11 JUSTICE SOTOMAYOR: And how do you deal with
12 Golden, in other words?

13 MR. CARVIN: Oh, yeah. Well, Golden was
14 very simple. All the speaker there was concerned about
15 was that one representative. We are not concerned about
16 Representative Driehaus as such. We're concerned about
17 people who supported the ACA's taxpayer-funded abortion,
18 which is a politically salient issue to this day. We
19 mentioned Representative Kaptur as well as
20 Representative Driehaus in one of the false statements
21 that's already been brought in front of the commission.
22 And in 2010, Sherrod Brown was on the ballot for the
23 Senate and he also was an ACA supporter.

24 So our complaint was not candidate specific.
25 It didn't turn on any personal attribute of

1 Representative Driehaus. It turned on people who were
2 supporting the ACA because of its taxpayer funding
3 abortion provisions. And that remained politically
4 salient and candidates who had engaged in precisely the
5 same act as Representative Driehaus were on the ballot
6 again in -- in 2012. So that -- that is our basic
7 argument.

8 JUSTICE SOTOMAYOR: So that you've been
9 prosecuted before and that you are intending to do the
10 identical speech against others.

11 MR. CARVIN: A preliminary finding and
12 identical speech we think more than satisfies the
13 credible threat thing for the reasons I was articulating
14 to Justice Kennedy a few moments ago. We think this far
15 exceeds the showing that was required in Holder,
16 Babbitt, American Booksellers, and a number of other
17 cases as well.

18 JUSTICE GINSBURG: Do you think this is a
19 matter of standing or ripeness? The Sixth Circuit said
20 ripeness.

21 MR. CARVIN: In all candor, Justice
22 Ginsburg, I can't figure out the difference between
23 standing and ripeness in this context. No question that
24 we are being subject to something. I think the question
25 is whether or not the threat is sufficiently immediate.

1 I think people tend to think about that as a ripeness
2 issue, but I think all of the Court's teachings on
3 standing and immediacy of injury from the standing cases
4 apply equally here. So I would view standing and
5 ripeness in this context as essentially coextensive.
6 And I think the Sixth Circuit was wrong for both
7 reasons.

8 CHIEF JUSTICE ROBERTS: Do you want us to
9 just forget about the disclaimer issue and the
10 commission procedure issue or even the as-applied issue?
11 I got the sense from particularly footnote 7 in your
12 reply brief that you're happy to just have those taken
13 off the board.

14 MR. CARVIN: Well, can we take them one at a
15 time? The disclaimer issue, Ohio agreed with us. So I
16 think they took that off the table.

17 The procedure issue is inextricably
18 intertwined with our Alvarez argument, that being
19 subject to a process where the -- the State is
20 determining the truth of our speech, we weren't saying
21 the procedures in the abstract were problematical.

22 In terms of the as-applied challenge, we do
23 disagree with the Solicitor General. We think that's
24 certainly fit for review just as the as-applied
25 challenge was in Holder and in American Booksellers and

1 in Babbitt. I do in candor, and I think this is what
2 the footnote the Chief Justice was referring to goes to
3 -- as a practical matter, we don't care. Frankly, the
4 as-applied challenge was basically saying, look, even
5 if -- even if the law is constitutional as applied to
6 basic assertions of fact, it's not constitutional as
7 applied to opinions.

8 We think Alvarez has essentially eliminated
9 that distinction because the speech at issue in Alvarez
10 was a pure assertion of fact. Frankly, the district
11 court that we're going to go back to if we prevail here
12 has already ruled that our interpretation of the ACA was
13 an assertion of fact. So as a practical matter, it has
14 no consequence. We're going to go back, make a facial
15 challenge that (B)(9) and (B)(10) are facially
16 unconstitutional under Alvarez. There's no -- we're not
17 asking for any savings, constructions or -- or limited
18 application. So it will be a pure question of law that
19 is fit for immediate review. And as I say, we need --
20 if we do prevail here on justiciability, we need to get
21 relief right away because we have yet another election
22 cycle approaching.

23 Unless there are further questions, I'll
24 reserve the remainder of my time. Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Feigin.

2 ORAL ARGUMENT OF ERIC J. FEIGIN

3 ON BEHALF OF THE UNITED STATES,

4 AS AMICUS CURIAE, SUPPORTING PARTIAL REVERSAL

5 MR. FEIGIN: Thank you, Mr. Chief Justice,
6 and may it please the Court:

7 I'd like to begin, if I could, by addressing
8 Justice Kagan's question, which Justice Sotomayor then
9 followed up on. We think that the probable cause
10 finding and the fact that they want to repeat
11 essentially the speech that was made earlier are the two
12 critical factors in this case and without that, none of
13 their claims would be justiciable. As it is, we think
14 that their purely legal First Amendment challenges are
15 ripe for those particular case-specific reasons.

16 CHIEF JUSTICE ROBERTS: Well, you -- you
17 insist that they -- there has actually been a probable
18 cause finding that their speech would violate the law
19 before they would have standing?

20 MR. FEIGIN: Not necessarily that their
21 particular speech would violate the law, but that there
22 have been -- without the probable cause finding, it
23 would simply be speculative whether particular speech
24 would actually result in any sort of enforcement
25 proceeding.

1 One critical aspect of this case --

2 CHIEF JUSTICE ROBERTS: Even in a case like
3 this, where the procedures can be triggered by any
4 citizen in the State?

5 MR. FEIGIN: Well, Your Honor, again, we
6 don't think that someone can come into court and say, I
7 want to make some speech, I don't think that speech
8 would be violating the statute, I don't have any good
9 evidence that anyone else thinks my speech would violate
10 the statute or that some sort of enforcement action
11 would be brought against me, but nevertheless, I want to
12 get into court --

13 CHIEF JUSTICE ROBERTS: Is that a realistic
14 proposition? I mean, first of all, in the first place,
15 surely you don't expect them to come in and say, I'm
16 going to say something totally false and I'm afraid I
17 might be prosecuted for that. But then you have to say
18 they have -- you would never imagine that somebody else
19 might think in a hotly contested election that their
20 speech is false?

21 MR. FEIGIN: Well, Your Honor, we may be
22 simply debating how similar the previous speech that was
23 a subject of a probable cause finding, or that there's
24 some other reason to believe will be the subject of an
25 enforcement proceeding has to be to the speech that the

1 plaintiffs allege that they intend to make. But we
2 definitely don't think that a plaintiff can simply come
3 into court and say, look, I want to make this speech, I
4 don't think it violates the law.

5 JUSTICE KAGAN: Well, what would happen,
6 Mr. Feigin, what would happen if a candidate knew -- it
7 seems actually quite plausible that Representative
8 Driehaus would know -- that this was something that
9 Susan Anthony or some other like group would talk about
10 in his campaign, and he were to write letters to all
11 these groups saying, if you start advertising in this
12 way, if you put up billboards, I'm going to take you
13 before the Ohio Commission. Would that be sufficient?

14 MR. FEIGIN: That would at least be
15 sufficient, Your Honor, to bring a suit against
16 Driehaus. That would be kind of similar to the
17 situation in MedImmune v. Genentech, which was a civil
18 suit that the putative defendant had standing to bring a
19 declaratory judgment action to prevent --

20 JUSTICE KAGAN: I'm not sure I understood
21 that. Is it sufficient that somebody has said, I'm
22 going to bring an action against -- before the
23 Commission, but there's been no prior Commission
24 determination as to this speech. And it's just somebody
25 saying, I'm going to go to the Commission and raise this

1 with them if you start speaking in this way. Would that
2 present a credible threat?

3 MR. FEIGIN: That specific threat would be
4 enough to allow for a lawsuit. And, Your Honor, I think
5 there'd be a significant question whether the suit could
6 only be brought against Driehaus, who brought the
7 threat, or whether you could also join in the
8 Commission. But as a practical matter, that wouldn't
9 really make much difference because if constitutional
10 claims were raised in that proceeding, the district
11 court would be obligated to inform the State of Ohio and
12 the State of Ohio would be entitled to intervene in the
13 litigation.

14 JUSTICE KAGAN: Now, take it just a step
15 further. Surely, there are some kinds of statements or
16 -- I don't know. Maybe "surely" is the wrong word. Are
17 there some kinds of statements where, even though the --
18 the representative doesn't say, I'm going to do this,
19 you know that somebody is going to do this, whether the
20 representative or somebody else? It's the kind of
21 statement that, given this process, it's just going to
22 require too much fortitude to resist the temptation to
23 bring this in front of this Commission.

24 MR. FEIGIN: Well, Your Honor, I think in
25 the absence of good evidence of an enforcement

1 proceeding, it would simply be too speculative. But I
2 would add that in this particular case, the credible
3 threat of enforcement test might be relaxed to a certain
4 extent, because this is a private attorney general
5 statute. And the entire point of private attorney
6 general statutes is to allow for enforcement in a wider
7 range of circumstances than would be possible under most
8 Federal laws, for example, which are enforced solely by
9 the executive. That might be a reason, a case-specific
10 reason why your hypothetical might have more salience
11 here than it would in the Federal context.

12 Another difference between this and the
13 Federal context is we don't have any potential statutory
14 barriers to bringing this action. Congress hasn't
15 decided to provide a cause of action only for a -- for,
16 for example, final agency action, as it did in the
17 Administrative Procedure Act, and it's not attempting to
18 channel these claims through a particular agency.

19 JUSTICE GINSBURG: Are you arguing that the
20 other organization, COAST, also has standing? Because
21 you -- you seem to require for the credible threat for
22 there to have been a proceeding before the Commission
23 and there's been nothing with regard to the other
24 organization.

25 MR. FEIGIN: Your Honor, we don't think that

1 the proceeding before the Commission has to involve the
2 entity that wants to make the speech in the future.
3 It's enough that it involves speech similar to the
4 speech that the plaintiff is alleging that the plaintiff
5 intends to make.

6 JUSTICE GINSBURG: So how do you distinguish
7 the three in *Younger v. Harris* that the Court said
8 didn't have standing?

9 MR. FEIGIN: I think in the same way the
10 Petitioners do, Your Honor, and I think that's how we
11 reconcile the case with *Steffel*, where one of the
12 factors the Court looked to, to find a credible threat
13 of enforcement in that case was the actual prosecution
14 of the plaintiff's hand-billing companion.

15 One thing I would emphasize about this case
16 is that in this particular context, this unique Ohio
17 scheme, the administrative proceedings before the Ohio
18 Elections Commission are the relevant enforcement
19 proceedings. It wouldn't normally be the case that
20 administrative proceedings that can result only in
21 government speech would be considered enforcement
22 proceedings for that purpose. But in this particular
23 circumstance, not only can the Ohio Elections Commission
24 recommend a case for further prosecution, but a decision
25 by the Ohio Elections Commission is a decision by a

1 neutral decision maker following a full-dress adversary
2 proceeding that someone has violated Ohio criminal law
3 by knowingly misinforming the electorate in the context
4 of a political campaign.

5 In that particular context, and particularly
6 as to entities like Petitioners that engage in political
7 advocacy on a regular basis, that kind of finding is a
8 significant sanction. And, in fact, the State itself
9 views it that way in two relevant ways. First of all,
10 such a finding by the Commission is treated as an
11 adverse effect for purposes of the statute that allows
12 for judicial review. And second of all, if you look at
13 actual orders by the Ohio Elections Commission, they
14 sometimes refer to the finding of a violation in
15 particular cases as a penalty.

16 Before my time is up, I would like to
17 address a few things Petitioner said about the
18 justiciability, for example, of as-applied challenges
19 under this Court's decision in Holder. I think it's
20 very significant that in Holder, the Court noted that
21 there were -- Holder v. Humanitarian Law Project -- the
22 Court noted that there had been 150 prosecutions brought
23 under the statute that the plaintiffs in that case were
24 challenging and that many of them had involved the same
25 provision. And we think that's a circumstance in which

1 there would be a credible threat of prosecution because
2 the plaintiffs had showed a pattern or practice of
3 prosecution of similar conduct.

4 CHIEF JUSTICE ROBERTS: How many proceedings
5 have been brought under this Ohio statute?

6 MR. FEIGIN: So under the Ohio statute
7 between 2001 and 2010, according to the statistics in
8 the green brief by the Ohio Attorney General, it's a
9 little bit over 500. And that's just for violations of
10 this False-Statement Law or asserted violations of this
11 False-Statement Law.

12 JUSTICE KENNEDY: Any -- any breakdown of
13 whether those were brought by candidates or just
14 interested citizens?

15 MR. FEIGIN: The -- we don't have statistics
16 on that, Your Honor. The brief doesn't break it down.

17 If the Court has no further questions, we'd
18 ask the Court to partially reverse and allow only the
19 purely legal ripe, legal challenge to these laws to
20 proceed.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 Mr. Murphy?

23 ORAL ARGUMENT OF ERIC E. MURPHY

24 ON BEHALF OF THE RESPONDENTS

25 MR. MURPHY: Mr. Chief Justice, and may it

1 please the Court:

2 The Court should affirm the Sixth Circuit's
3 judgment in this case because Petitioners have not
4 established a credible threat of criminal prosecution
5 and any other injury, to the extent it is adequately
6 alleged, is not certainly impending. And I'd like to
7 begin with the prior probable cause finding.

8 Petitioners repeatedly characterized the
9 prior probable cause finding as a finding by the prior
10 panel that the -- the speech at issue there was probably
11 criminal. That's not what the finding indicated. It's
12 a very, very low standard. It's not a standard that --
13 it's -- it's well below a preponderance of the evidence,
14 so "probably criminal" is way too high. It's just --
15 it's analogous in the civil context to -- to a malicious
16 prosecution case; one of the elements is to establish
17 that a prior case lacked probable cause.

18 CHIEF JUSTICE ROBERTS: Are you ready --

19 JUSTICE SOTOMAYOR: But you have to admit
20 that --

21 CHIEF JUSTICE ROBERTS: Are you prepared to
22 represent to us that if they do the exact same thing the
23 next election that they did in the last one, that you
24 will not take action against them?

25 MR. MURPHY: No, I'm not -- I have not -- I

1 do not have authority to disavow. But their -- their
2 argument that you need to disavow is inconsistent with
3 some of the Court's cases suggesting that the threat
4 implied by the existence of a law itself is not
5 sufficient. And so they -- they fall back on this
6 probable cause finding as suggesting that it creates the
7 objective evidence necessary. But because -- because
8 the probable cause finding is so low and because there
9 are so many steps between the probable cause finding and
10 the potential criminal prosecution --

11 JUSTICE SCALIA: Well, but the criminal
12 prosecution isn't all that they're complaining about.
13 They're complaining about having -- having to be dragged
14 through this same -- this same proceeding next time in
15 the midst of an election campaign, and however minimal
16 the finding that is ultimately made may be, they are
17 going to be subject, for sure, to that proceeding in the
18 next election campaign.

19 And I don't care if all the commission says
20 is, you know, there is some reason to believe that they
21 were lying. Even if it's that minimal, you are forcing
22 them, and it is pretty sure that it's going to happen
23 because somebody will complain, the candidate they are
24 criticizing, you are forcing them to go through this
25 procedure in the midst of an election campaign, right?

1 MR. MURPHY: Well, with respect, Your Honor,
2 I think there is a couple of answers. First off, I
3 think it's speculative. If you look at the complaints,
4 the SBA List complaint simply says they would like to
5 engage in substantially similar activity in the future.
6 Now, you have to keep in mind what that activity was.
7 They weren't challenging anybody who voted for the
8 Affordable Care Act. They were challenging specific
9 congressmen. At JA-113, it says certain congressmen.
10 That's in their complaint.

11 JUSTICE SCALIA: Their organization is not
12 an anti-Driehaus -- is that his name, "Driehaus"?

13 MR. MURPHY: Yes, Your Honor.

14 JUSTICE SCALIA: That's not what they are
15 about. They are about opposition to the abortion
16 funding portion of the Affordable Care Act and they're
17 going to make the same, the same contentions against
18 anybody else who runs for office who has voted for that
19 Act, whether it's Driehaus or anybody else.

20 MR. MURPHY: Well, with respect, the people
21 that they targeted in 2010 were only pro-life Democrats
22 who originally voted against the Act and then changed
23 their vote in response to the executive order. This is
24 at JA-52 when they announced their Votes
25 Have Consequences Bus Tour. It wasn't against everybody

1 who voted for the Act.

2 JUSTICE KENNEDY: But your very argument,
3 Mr. Murphy, to the effect that, well, probable cause is
4 a very low standard, seems to me to work against you.
5 It means that more complaints are more likely.

6 MR. MURPHY: Well, it depends on what you
7 are talking about the relevant injury is. If the
8 relevant injury is a criminal prosecution, I think it
9 very much shows that a prosecution is entirely unlikely.
10 And if your relevant injury is some of these preliminary
11 injuries that they're asserting, I do think that the
12 credible threat test is probably not even the test
13 because, as the Court said in Clapper, injuries in that
14 context had to be certainly impending.

15 JUSTICE KENNEDY: Well, but this is a point
16 brought up by Justice Scalia's question as well. Don't
17 you think there's a serious First Amendment concern with
18 a state law that requires you to come before a
19 commission to justify what you are going to say and
20 which gives the commission discovery power to find out
21 who's involved in your association, what research you've
22 made, et cetera?

23 MR. MURPHY: Well, remember that the issue
24 here is standing, so setting aside the -- the First
25 Amendment concern should have no impact into whether an

1 Article III case or controversy exists. They would --

2 JUSTICE BREYER: Why? Why?

3 MR. MURPHY: Because --

4 JUSTICE BREYER: Why can't a person say, you
5 know, there are things I want to say politically, and
6 the Constitution says that the State does not have the
7 right to abridge my speech, and I intend to say them.
8 And if I say them, there's a serious risk that I will be
9 had up before a commission and could be fined. What's
10 the harm? I can't speak. That's the harm. Right? So
11 why isn't that end of the matter?

12 MR. MURPHY: Well, the Court -- the Court --
13 the Court -- has repeatedly said that chilling effect by
14 itself is not the harm. The relevant harm in your hypo
15 would be --

16 JUSTICE BREYER: Why shouldn't it be the
17 harm? That is, whatever -- has any case said when
18 somebody says, we're going to take an extreme, you want to speak in a
19 campaign, and we
20 have a law here that if you do we will throw you in jail
21 and you really do want to speak and the law really does
22 prevent you from speaking, why shouldn't that be the end
23 of it?

24 MR. MURPHY: Well, remember the test has to
25 be a credible threat of prosecution. What the Court --

26 JUSTICE BREYER: Well, I'm saying is there a

1 statute -- not a statute. Is there a case which says
2 the little syllogism I just went through is not the law
3 of the United States? Now, there may be. That's why I
4 asked the question.

5 MR. MURPHY: So I think the closest case
6 would be Golden, for instance, where the Court clearly
7 indicated, and I quote, "The constitutional question,
8 First Amendment or otherwise, must arise in the context
9 of a specific live grievance."

10 JUSTICE GINSBURG: But that was a very
11 special situation. In Golden they were going out after
12 a particular candidate. It was not -- it was not a
13 political view that an organization is taking, and they
14 are not targeting this particular candidate, but they
15 are targeting that issue, any candidate who supports
16 that issue.

17 MR. MURPHY: Well, with respect, Your Honor,
18 in Golden the plaintiff clearly indicated that he was
19 targeting that congressman because of the congressman's
20 votes on -- for a particular care package.

21 JUSTICE GINSBURG: But didn't the Court say
22 that there wasn't -- once that congressman wasn't going
23 to run for office any more, there was no suggestion that
24 they wanted to talk about somebody else.

25 MR. MURPHY: So he did have suggestions that

1 he wanted to engage in substantially similar leafletting
2 in the future, and the Court found them too speculative
3 because he had only identified that one congressman.
4 And so I think that's significant because I think by
5 analogy that would suggest that the only single
6 forward-looking allegations in SBA List's complaint at
7 JA-122 are that it plans to engage in substantially
8 similar activity in the future, but they don't identify
9 any other candidates, just like they didn't identify any
10 other candidates in Golden, just like they didn't
11 identify any candidates in the Renne decision, which was
12 part of the reason why the Court found the decision --
13 that case right there.

14 JUSTICE GINSBURG: Mr. Murphy, you said
15 there was no credible threat of prosecution, but what
16 about the harm that is occurring? Mr. Carvin said it's
17 a very short time. They're brought before the
18 commission, they have to answer this charge that they
19 lied, that they made a false statement. And that just
20 that alone is going to diminish the effect of their
21 speech because they have been labeled false speakers,
22 and it costs money to defend before the commission,
23 right? That's not --

24 MR. MURPHY: Well, keep in mind that the
25 reputational harm they have essentially asserted for the

1 first time in this Court. They didn't assert any type
2 of reputational injuries in the Sixth Circuit. And I
3 think it would be entirely speculative to suggest that
4 those would exist here with respect to these
5 organizations.

6 JUSTICE KAGAN: Well, I'm not sure it's a
7 reputational harm. I mean, why isn't, as Justice
8 Ginsburg suggested, the relevant harm the probable cause
9 determination itself? There are voters out there and
10 they don't know that probable cause is such a low bar as
11 you describe it. They think probable cause means you
12 probably lied, and that seems a reasonable thing for
13 them to think and that's a relevant harm and we
14 should just -- you know, we don't even need the
15 prosecution to serve as the relevant harm. That seems
16 quite enough.

17 MR. MURPHY: They -- they did not rely on
18 any type of that type of harm below and I think -- a
19 harm flowing from the misrepresentation of what the
20 probable cause finding means -- I would think you would
21 have to allege more than they have here with respect
22 to -- that it would exist in this case.

23 There was no -- they hadn't -- there was no
24 misrepresentations by SBA List, for instance, that this
25 probable cause finding meant that they probably lied.

1 They told their supporters -- it's in the joint appendix
2 at 74 and 75 -- that all it meant was that you go --
3 that they found that you have to go before the full
4 commission. They didn't say to their supporters that
5 you probably lied.

6 CHIEF JUSTICE ROBERTS: I guess it was in
7 the case of COAST; the problem is other people are going
8 to be intimidated from helping them engage in their
9 political speech. What was it, a billboard? The
10 billboard company said --

11 MR. MURPHY: No more advertising.

12 CHIEF JUSTICE ROBERTS: -- I'm not going to
13 let you put your sign up on my billboard, I might be
14 liable. So, I mean, they may have a certain fortitude
15 and proceeding based on all the reasons that you've
16 given, but they need third parties to help carry out
17 their message and there is no reason to think those
18 third parties have any commitment to their political
19 message at all and the slightest whiff of, oh, this is
20 going to be legal trouble, they say, forget about it.

21 MR. MURPHY: I guess two responses. Keep in
22 mind that at JA-27 in the letter to Lamar, Driehaus
23 indicated essentially that we reserve the right to
24 proceed against you in the commission or in a court of
25 law, indicating that he was already contemplating a

1 defamation action. So if this statute -- talking about
2 the redressability prong of standing or the directness
3 test with respect to ripeness, he could have said the
4 exact same thing and it would have chilled them Lamar
5 from --

6 CHIEF JUSTICE ROBERTS: Well, no, but a
7 defamation action, people sue everybody all the time.
8 No one's going to take that seriously. In fact, it's
9 probably going to redound to the benefit of SBA and
10 COAST to say the congressman is, you know, bringing a
11 defamation action. It highlights it, but it's another
12 thing to have the State involved making a determination
13 that there's probable cause that you lied.

14 JUSTICE SCALIA: The mere fact that a
15 private individual can chill somebody's speech does not
16 say, well, since a private individual can do it, you
17 know, the ministry of truth can do it. That's not --
18 that's not the law.

19 MR. MURPHY: Well, the law -- so that's the
20 First Amendment question, it seems to me. On the
21 standing question, it's whether this harm would have
22 come up -- can't come about absent this law, and the
23 fact that he notified the company that they might be
24 thinking about a defamation action suggests that it's
25 entirely speculative that it would have come about

1 absent this law.

2 JUSTICE KENNEDY: There's a curious
3 inversion here. Usually we're concerned about citizen
4 suits, too many people can challenge -- challenge the
5 law. Here we're concerned that many, many citizens can
6 bring the challenge against the candidate. So it's
7 somewhat reversed. In other words, you have tens of
8 thousands of private attorney generals waiting to pounce
9 and get these people before the commission and have to
10 follow discovery orders.

11 MR. MURPHY: Well, I mean, that's true. But
12 keep in -- keep in mind that there -- when you -- when
13 you think about the fundamental Article III purposes
14 here, separation of powers and federalism purposes, it
15 seems to me that a finding in -- in this case that they
16 have standing would undermine those. With respect to
17 separation of powers, the Court has repeatedly said that
18 courts are not -- in our constitutional system are not
19 roving commissions designed -- assigned to pass judgment
20 on the validity of the nation of laws, and --

21 JUSTICE SOTOMAYOR: Do you know of the 500
22 cases that you mentioned earlier, how many actually
23 ended up in full prosecutions?

24 MR. MURPHY: So there's -- since 1996, when
25 the statute was amended to allow for this

1 pre-enforcement process, there have been five referrals,
2 and then of those five referrals, three plea agreements.
3 So there's only been three --

4 JUSTICE SOTOMAYOR: Three what? I'm sorry.

5 MR. MURPHY: Three plea agreements at the
6 end of -- so there was five referrals from the
7 Commission to the relevant prosecutor, and then -- and
8 of those five cases, three charges were brought and plea
9 agreements were essentially entered immediately.

10 So that -- that just also goes to show that
11 the credible threat of any criminal prosecution is very
12 unlikely.

13 CHIEF JUSTICE ROBERTS: Well, how many of
14 those do you know were mooted out by the election?

15 MR. MURPHY: Well --

16 CHIEF JUSTICE ROBERTS: In other words, the
17 proceedings are going on and people's speech is being
18 chilled and it's back and forth, then the election is
19 over, and people say, oh, forget about it.

20 MR. MURPHY: How many of the overall number
21 of --

22 CHIEF JUSTICE ROBERTS: 500. You gave us
23 some answers about how many of the 500 resulted in
24 criminal prosecutions. And all I want to know is how
25 many of the 500 proceedings were mooted out by the fact

1 that the election took place.

2 MR. MURPHY: So I -- so roughly 40
3 percent -- 60 percent, there's a finding of no probable
4 cause. That leaves 40 percent. And of those, I -- you
5 know, Your Honor, I don't know the statistics on the
6 number of dismissals. I would say that there are
7 substantial number of --

8 JUSTICE BREYER: What would you say as a
9 lawyer -- you're now a lawyer for the Commission. You
10 understand it better than I. I'm just making up an
11 example. Do you think they'd prosecute this or not?
12 Somebody walks in front of the House of a political
13 opponent has a big sign that says murderer. Now when
14 asked, you said but he voted for legislation that led
15 to the death of many cats. Would they prosecute that or
16 not?

17 MR. MURPHY: Well, I think, Your Honor, it
18 might fall within -- it -- it depends on the scope of
19 the statute --

20 JUSTICE BREYER: I just want to know your
21 opinion as the lawyer for the Commission, do you think
22 that's going to be prosecuted or not?

23 MR. MURPHY: I think the -- I would say
24 probably not, but -- but that's just my --

25 JUSTICE BREYER: Probably not.

1 MR. MURPHY: -- personal opinion. Because
2 they would say that you -- you would adopt the rule from
3 the defamation context, that if -- if it can be
4 interpreted under -- either as a hyperbole or either as
5 a reasonable interpretation of an ambiguous statement or
6 were the -- but if -- if there's any interpretation of
7 the statement that is ambiguous, where it's true, it
8 would fall within the defamation rule that it can't be
9 considered false within the meaning of the statute. So
10 the murder hypo, if it's actually he is a murderer of
11 cats, it might -- it might mean that it's misleading.
12 But by --

13 JUSTICE BREYER: But why did they prosecute
14 this here?

15 JUSTICE KENNEDY: Yeah. Why wasn't that --

16 JUSTICE BREYER: I mean, we've heard in
17 other cases, you know, just recently, a very major case,
18 where people really believed about the same thing and
19 they were sincere in their beliefs. So why --

20 MR. MURPHY: The commissioner has now fully
21 conceded that it would be a difficult proposition in
22 this case, certainly. But I -- I think it's the very
23 nature of the probable cause finding that is --

24 JUSTICE ALITO: Well, why don't the
25 statistics that you provided us portray a system that

1 really limits core First Amendment speech without
2 providing much of an opportunity for a judicial review
3 if you're correct about -- about Article III here
4 where -- you have a system where thousands of complaints
5 are filed, and yet in the end, there's very few
6 prosecutions. And you say, well, the filing of the
7 complaint isn't enough and the probable cause
8 determination isn't enough. So you have this system that
9 goes on and on, year after year, where arguably there's
10 a great chilling of -- of core First Amendment speech,
11 and yet you're saying that basically you can't get into
12 Federal court.

13 MR. MURPHY: Well, we're not saying that,
14 Your Honor. I think we're just saying you can't get
15 into Federal court in this case. And I do think that
16 this -- those chilling effect concerns should not play a
17 role in the Article III cases or controversy --

18 JUSTICE KAGAN: Well, but how would you
19 get into Federal court? I mean, your own office
20 expresses grave concern about the constitutionality of
21 this statute. So that suggests somebody should be able
22 to get into Federal court to do this. But I don't see a
23 way where you would allow a pre-enforcement challenge.
24 One would have to go through the entire process and get
25 to the end of it and get a judgment to enable a

1 challenge under your theory; is that right?

2 MR. MURPHY: Well, I think under our theory,
3 it really depends. There's two types of cases that are
4 brought. One is a case like Babbitt, where they're
5 saying the law is ambiguous, it could mean A or it
6 could -- it could mean B. If it means A, my speech is
7 covered within it. There, all you essentially have to
8 do is allege you want to engage in the speech that would
9 fall within the rule. But that's not what they're doing
10 here. They're saying their speech falls completely
11 outside this law, this unambiguous law, the distinctions
12 between false and true, but we're going to get
13 prosecuted anyways. And in that context, I think you do
14 have to allege what the government suggested is more
15 objective evidence that you're going to be prosecuted
16 outside --

17 JUSTICE BREYER: I had a reason for asking
18 what sounds like a silly hypothetical, but a possible
19 one. We understand how people take different views on
20 that. And then you have a hard time, it seems to me,
21 distinguishing this case from that one in terms of their
22 exercising their authority. And so at least it must
23 raise a question, a First Amendment question on the
24 merits. It seems pretty serious. So if you lose on
25 this procedural matter, how quickly can you get this

1 decided? I mean, there are elections coming up. People
2 would like to know. They want to know what they're
3 supposed to say. And how long is all this procedural
4 skirmishing going to take, which in and of itself is an
5 obstacle to what they might say in the next election?

6 MR. MURPHY: So procedural skirmishing,
7 you're talking about within --

8 JUSTICE BREYER: I mean, you're saying,
9 well, they don't have standing -- you know, I was
10 interested in this field, administrative law, and even
11 my class, despite the scintillation, would sometimes go
12 to sleep when I got to such questions.

13 (Laughter.)

14 JUSTICE BREYER: So -- so I'm saying that
15 these seem to be preliminary questions on a matter in
16 respect to which there seems serious doubt. I'll repeat
17 myself. The elections are coming up. And people have
18 to know what they're supposed to say and what they can
19 say and what they can't. So how do we get this decided?

20 MR. MURPHY: Well, it seems to me your
21 question is the -- your question is suggesting that the
22 underlying law is -- is -- there's serious doubts about
23 the constitutionality of the underlying law.

24 JUSTICE BREYER: It is suggesting that. I agree, it is suggesting that.

25 MR. MURPHY: And that provides -- that

1 doesn't provide any basis. The entire purposes of
2 Article III's case or controversy requirement is to
3 ensure that courts only decide constitutional questions
4 in concrete cases. And to allow the merits to slip into
5 the Article III question fundamentally undermines
6 the separation of powers --

7 JUSTICE BREYER: Well, I would say one of
8 the purposes of standing is to allow people who are
9 really going to be hurt to be able to be heard in
10 court. Well, of course, if they're not going to be
11 hurt, there's no reason. And what the merits
12 discussion is designed to suggest is that there are real
13 people who would really like to speak in an election
14 campaign. And if they feel they can't, they are really
15 being hurt. That's what the other side is arguing. And
16 I've listened to the argument. I'm curious as to the
17 practicalities. If they're right, when is this going to
18 be heard and decided in your opinion?

19 MR. MURPHY: So the -- are you talking if
20 there's a remand in the district court, or --

21 JUSTICE BREYER: You tell me how to do it.

22 MR. MURPHY: Well, I think that case should
23 be dismissed, obviously.

24 JUSTICE BREYER: I'm saying if you were to
25 lose on the --

1 MR. MURPHY: Okay. If I was to lose? Oh,
2 you could -- frankly, if you remanded finding a concrete
3 case here, you could instruct the district court to
4 certify to the Ohio Supreme Court, for instance, which
5 could give an immediate authoritative interpretation of
6 the law and it could -- it could include all the
7 relevant narrowing constructions that this Court has
8 adopted --

9 CHIEF JUSTICE ROBERTS: Well, that will
10 speed things up.

11 (Laughter.)

12 CHIEF JUSTICE ROBERTS: You don't even
13 want -- you don't even want the district court to decide
14 it. You want to go through a certification process that
15 will bring in a whole another court system.

16 MR. MURPHY: But it has to decide the scope
17 of a law. As the United States v. Williams said, to
18 determine the constitutionality of the law, you need to
19 know its scope. And -- and the entire suggestion here
20 that their speech is covered suggests that the scope --
21 or the scope of the law is much broader than the Ohio
22 Supreme Court could interpret it to be.

23 JUSTICE ALITO: Well, what -- what narrowing
24 construction would be consistent with Alvarez?

25 JUSTICE SCALIA: Yeah, what? I can't

1 understand what that would be. It has to be really
2 false. Is that it?

3 (Laughter.)

4 MR. MURPHY: Well, I think -- I think -- I
5 think Alvarez is completely distinguishable as being
6 about false statements in the abstract. This Court
7 already held in McIntyre that the State has a compelling
8 interest in policing fraud and libelous statements
9 in the election context because of the risk to the
10 public from those statements. And Mark Twain --

11 JUSTICE ALITO: Well, Alvarez wasn't about
12 false statements in the abstract. It was a criminal
13 prosecution for making particular false statements. And
14 they were as hard factual statements as you will ever
15 find. Did somebody receive the Congressional Medal of
16 Honor or not?

17 MR. MURPHY: No, I agree with that. There
18 was a false statement of a verifiable -- verifiable
19 fact, but it was a false statement anywhere, anytime;
20 even like at home, if you make the statement, it could
21 be covered. What we're saying here is that false
22 statements in the election context, the State has a much
23 more compelling interest in that context because, as
24 the Court said in McIntyre, the -- the false statements
25 can have an impact on the election.

1 Of course, there's false positives if the
2 commission gets it wrong. But think about the false --
3 false negatives that slip through when somebody is
4 making a false statement, and that actually impacts a
5 campaign, leading to somebody voting for somebody else.

6 JUSTICE SOTOMAYOR: But how are you going to
7 prove -- how are you ever going to prove that one false
8 statement cost somebody an election?

9 MR. MURPHY: What's that?

10 JUSTICE SOTOMAYOR: How are you ever going
11 to prove that one false statement cost somebody an
12 election?

13 MR. MURPHY: Well, I don't think we -- I
14 don't think we have to prove that to get a conviction in
15 any case. I think we just prove that their false
16 statements can have impacts on elections, and that shows
17 the interest in this case, as compared to the interest
18 in Alvarez, in which the false statements could be made
19 at any time, under any circumstances. It wasn't -- it
20 wasn't narrowly tailored to the election context.

21 JUSTICE SCALIA: Do you think that the
22 allegedly false statement here was a false statement of
23 fact?

24 MR. MURPHY: I think there's a good argument
25 that it was not, that there was a false statement of --

1 that there's reasonable interpretations of this
2 ambiguous Affordable Care Act, and if so --

3 JUSTICE SCALIA: There's a good argument on
4 the other side. But it's an argument over a fact, isn't
5 it, whether this person was responsible for the
6 Affordable Care Act. I mean that was the charge, you
7 know, that this person made the decisive vote, right, in
8 the --

9 MR. MURPHY: Well, that's a different case.
10 This charge was he voted for taxpayer-funded abortion,
11 was the -- was the charge. And so it's whether this
12 Act --

13 JUSTICE SCALIA: But by voting -- by voting
14 for that Act.

15 MR. MURPHY: For the Act, yes.

16 JUSTICE SCALIA: Yes.

17 MR. MURPHY: So it's whether the Act covers
18 taxpayer-funded abortion, and that's a complex question
19 that if the court were to -- if the Ohio Supreme Court,
20 through certification, were to adopt the Bose standard,
21 it would suggest that it might not be covered because
22 the Bose standard suggests that speech about an
23 ambiguous topic cannot be false under the actual malice
24 standard. So this whole -- this whole speech could be,
25 through certification, eliminated and the statute

1 narrowed to cover only false statements of verifiable
2 fact.

3 JUSTICE SCALIA: And then all you have to do
4 is litigate it. That's all.

5 (Laughter.)

6 JUSTICE SCALIA: You -- you make the
7 statement, and then, you know, you can litigate it on
8 the basis of whatever the Ohio Supreme Court says.
9 Right?

10 MR. MURPHY: Well --

11 JUSTICE SCALIA: I mean, let's litigate
12 whether it's factually inaccurate or legally inaccurate,
13 right? It's a lawsuit.

14 MR. MURPHY: So we're talking about the
15 scope of the law, correct?

16 JUSTICE SCALIA: Yes, we are. But I mean,
17 we're talking about whether this law imposes limitations
18 upon the freedom of speech. And if you say whenever you
19 do it, you are going to have a lawsuit, you're going to
20 be hauled before this commission. You may have a good
21 case, you may not have a good case, but you have to
22 justify yourself to this commission before you can --
23 before you can make the assertion.

24 MR. MURPHY: Well, that's not true. That
25 doesn't happen in every case. It makes -- you're making

1 it sound like the commission hears every political
2 statement out there. But it has to be filed by a
3 person, and only one person filed a complaint against
4 the SBA this last time, and he is in Africa now. So I
5 don't think he'll be filing complaints any time soon.

6 JUSTICE SCALIA: He really lost, didn't he?

7 (Laughter.)

8 MR. MURPHY: I see my time is up. Could I
9 just ask the --

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 Mr. Carvin, you have 5 minutes.

12 REBUTTAL ARGUMENT OF MICHAEL A. CARVIN

13 ON BEHALF OF THE PETITIONERS

14 MR. CARVIN: A few brief points. I think
15 the key point to take away from the colloquy with
16 Mr. Murphy is that when he was asked, How do you bring a
17 pre-enforcement challenge, his only solution was to
18 admit you're lying before you speak. Well, obviously
19 that completely defeats the value of your speech. No
20 speaker is ever going to do it. You're not going to
21 confess to a crime before you speak. And I would point
22 out in Babbitt they didn't say they were going to lie.
23 They said just the opposite, and they nonetheless had
24 standing.

25 On the certification point, further delay in

1 the Ohio Supreme Court for a limiting construction that
2 we don't want, that can't possibly do it. After
3 Alvarez, this fact/opinion distinction is of no legal
4 relevance. We don't want a limiting construction. We
5 want to say that anything, fact or opinion, is
6 unconstitutional to limit under the false statement law.

7 I point out that we did litigate in front of
8 this very same district court judge the fact/opinion
9 issue in the libel case, where it does have some
10 resonance, and he's already found that our assertion was
11 factual. So we don't want to go on that tangent.

12 If the Court would just look at them,
13 Browskins and Citizens United, those cases articulate as
14 well as any can, when you are making a facial challenge
15 to a First Amendment, the last thing you want to do is
16 abstain to State court judges because you actually
17 exacerbate the constitutional injury through the delay
18 and the fact that you've got to go through declaratory
19 judgments, when our entire point is it's
20 unconstitutional for us to say, "Mother, may I?" before
21 we speak.

22 As to Mr. Murphy's attempt to downplay the
23 probable cause finding, on 7A attached to their brief
24 they have what the probable cause finding is. And it
25 says that there is probable cause to believe that

1 there's been a violation of the law alleged and that the
2 complaint has occurred.

3 Under this Court's probable cause
4 determination, that means reasonable people would
5 believe that a violation has occurred, even though you
6 need to show it by clear and convincing evidence, and
7 even though my opponent claims that any reasonable
8 interpretation of this law is not false. Well, that
9 means that they've already found that through clear and
10 convincing evidence we are advancing not only a false,
11 but an unreasonable interpretation of the ACA, which
12 simply, of course, exacerbates the credible threat.

13 And I think my final point will be, he
14 says -- well, two things. One is he says we didn't
15 allege with specificity the kind of speech that we were
16 going to say in the future. We said we're going to
17 engage in the same or similar speech. I don't think the
18 language, the English language, permits a more direct
19 and precise articulation of what we're going to say in
20 the future.

21 The only difference will be, instead of
22 Representative Driehaus, we will substitute
23 Representative Kaptur, another pro-life Democrat in Ohio
24 who we have already criticized for her vote on the ACA
25 and which we would have repeated in the 2012 election

1 cycle but for the chilling effect.

2 This is obviously completely different from
3 Golden, which my opponent continues to raise, where
4 the Court found that the only interpretation of the
5 facts is that the plaintiff's, quote, "sole concern" was
6 with the representative at issue, who had gone off to a
7 judgeship.

8 It is blazingly obvious that our sole
9 concern is not Representative Driehaus. It is any
10 legislator that voted for an Act that we believe
11 devoutly has "taxpayer-funded" and "abortion" in it.

12 So we're facing a credible threat. We ask
13 the Court to lift this yoke so that we can become full
14 participants in the next election cycle.

15 Unless there are any further questions, I
16 thank you.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel,
18 counsel.

19 The case is submitted.

20 (Whereupon, at 11:25 a.m., the case in the
21 above-entitled matter was submitted.)

22

23

24

25

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