No. 13-193

IN THE

Supreme Court of the United States

SUSAN B. ANTHONY LIST AND COALITION OPPOSED TO ADDITIONAL SPENDING AND TAXES,

Petitioners,

v.

STEVEN DRIEHAUS, KIMBERLY ALLISON, DEGEE WILHELM, HELEN BALCOLM, TERRANCE CONROY, LYNN GRIMSHAW, JAYME SMOOT, WILLIAM VASIL, PHILIP RICHTER, OHIO ELECTIONS COMMISSION, AND JON HUSTED,

Respondents.

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

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BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

Pursuant to this Court's Rule 37.3, *amicus curiae* Foundation for Individual Rights in Education (FIRE) respectfully files this brief in support of petitioners.[1]

INTEREST OF *AMICUS CURIAE*

Amicus FIRE is a nonpartisan, nonprofit, tax-exempt educational and civil liberties organization pursuant to section 501(c)(3) of the Internal Revenue Code, and is dedicated to promoting and protecting First Amendment rights in our nation's institutions of higher education. Originally co-founded by Alan Charles Kors and Harvey A. Silverglate, FIRE is a unique organization in which liberals, conservatives, libertarians, atheists, Christians, Jews, and Muslims have successfully worked together to defend free speech rights for all in higher education.

FIRE works to ensure that the law remains clearly and vigorously on the side of free speech on campus. As part of its advocacy efforts, FIRE supports challenges brought by students and faculty members to overbroad campus speech codes and other unconstitutional restrictions—without regard to whether the speech or expression at issue emanates from the left, right, center, or otherwise. *See, e.g.*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, *With Election Day Close, Ohio University Ends Political Censorship in Dorms* (Oct. 9, 2012),

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[1] The parties have globally consented to the filing of *amicus* briefs in this case and, pursuant to Rule 37.3, letters evidencing such consent have been filed with the Clerk. In accordance with Rule 37.6, *amicus* FIRE hereby states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief.

http://tinyurl.com/OhioUnivSpeech (last visited March 3, 2014) (detailing FIRE's successful opposition of Ohio University's threat of discipline against student who posted a flyer criticizing the policy positions of both President Barack Obama and former Governor Mitt Romney); Azhar Majeed, *Vindicating Freedom of the Press from Alaska to Wisconsin*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Feb. 25, 2014), http://tinyurl.com/lswarly (last visited March 3, 2014) (detailing FIRE's successful lobbying of Wisconsin Governor Scott Walker to veto a budget provision from the state's Republican legislature that would have banned the independent and nonpartisan Wisconsin Center for Investigative Journalism from campus at the University of Wisconsin-Madison). And FIRE works to ensure that college students enjoy the full panoply of due process rights—including the right to counsel in disciplinary hearings. *See* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, *North Carolina Becomes First State to Guarantee College Students' Right to Attorney* (Aug. 23, 2013), http://tinyurl.com/RighttoCounsel (last visited March 3, 2014) ("For many students, especially first-generation college students or those who might come from disadvantaged backgrounds, facing down a room full of deans, administrators, and university lawyers when accused of a campus crime is a hugely intimidating task.").

When the constitutionality of these speech codes is litigated, the ripeness tests employed by the courts in those cases significantly affect FIRE's ability to pursue and promote pre-enforcement First Amendment challenges that protect free speech and inquiry in public universities. Because this case

involves that same issue in another First Amendment context, the error committed by the appellate court below is highly germane to FIRE's core mission.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is hardly controversial to observe that many of the most fundamental rights reserved to our citizenry are on display in the First Amendment. Seeking to ensure their ability to exercise those very rights, petitioners Susan B. Anthony List (SBA) and Coalition Opposed to Additional Spending and Taxes (COAST) each brought pre-enforcement challenges to an Ohio law that criminalizes knowingly or recklessly "false" statements made in connection with an election. Notwithstanding the fact that the state elections commission actually found probable cause to pursue charges against SBA for criticizing a political candidate's support for the Affordable Care Act—and that state action then dissuaded COAST from voicing similar concerns—the Sixth Circuit in this case held that neither of the petitioners' First Amendment pre-enforcement challenges were ripe.

The problem, as petitioners explain in detail, *see* Br. for Pets. 15–30, is that the Sixth Circuit's cramped approach to the ripeness standard cannot be squared with this Court's precedents, and it stands as an outlier amongst its sister circuits. And while petitioners amply explain why there is little doubt that leaving the lower court's decision undisturbed will improperly shut down the very sort of core political speech voiced by petitioners, its holding poses no less of a threat to First Amendment rights in another vital context—our Nation's public universities.

This Court long has recognized the primacy of free speech on campus and observed that protecting such speech is and always will be of critical import to the future of our polity, a future which of course contemplates that university environs will continue to foster the development of our future citizens, leaders, and lawmakers. As the Court put it a half-century ago:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

Despite this clear command that students and faculty must remain free to exercise their First Amendment rights, public universities routinely enact overbroad campus speech codes that necessarily "cast a pall of orthodoxy" on public campuses by threatening and punishing the very free exchange of ideas that is "a special concern of the First Amendment." *Id.* And as *amicus* FIRE's experience continues to show, these overbroad speech codes are notably effective in achieving their goals; that is to say, university speech codes have had the the actual effect of chilling speech on campus. Precisely to avoid this irretrievable loss of

constitutionally protected expression, courts have routinely permitted pre-enforcement challenges to vague and overbroad laws proscribing speech on college campuses. The decision below in this case threatens to shutter this essential window to obtaining relief, leaving literally hundreds of thousands of public university students and faculty in Kentucky, Michigan, Ohio, and Tennessee without means to seek judicial review of infringements on their First Amendment rights.

The Sixth Circuit achieved this unfortunate result by artificially constricting the standard under which plaintiffs bring pre-enforcement First Amendment challenges. In so doing, the appellate court appears to have departed from every other circuit to address the issue. And by incorrectly holding that petitioners failed to show a credible fear of prosecution because they did not establish that Ohio had previously enforced the law and that the statute would definitely proscribe their speech, the Sixth Circuit not only applied the wrong standard but simultaneously disregarded the facts: after all, the Ohio Elections Commission did issue a finding of probable cause that SBA List's speech violated the statute, which in turn caused COAST to refrain from voicing similar criticisms, both of which should have allowed petitioners to pursue their facial overbreadth challenges on the merits.

The decision below cannot stand consistent with the First Amendment. If the analytical framework applied below remains good law in the Sixth Circuit, then there is little doubt that the threat of self-censorship will become a reality. This result is untenable: As this Court long has recognized, the cost of self-censorship—particularly in the university

context—simply cannot be overstated, because without pre-enforcement challenges to laws that arguably prohibit speech, significant constitutionally protected rights will go unexercised for fear of prosecution.

Amicus FIRE respectfully submits that this Court should reverse the Sixth Circuit's judgment and take this opportunity to clarify the ripeness standard that applies to pre-enforcement challenges under the First Amendment. In particular, the Court should hold that every statute that arguably covers speech carries a credible threat of prosecution, and certainly does where the government cannot demonstrate that the statute has fallen out of use. Such a rule would reaffirm this Court's robust protection of the very free-expression rights that in many ways can be said to be the first principle underlying our constitutional experiment in democracy.

ARGUMENT

I. If The Sixth Circuit's Decision Is Allowed To Stand, It Will Chill Other Important Types Of Protected Expression, Including Speech And Ideas At Our Public Universities.

Just as the Sixth Circuit's decision improperly curtails pre-enforcement First Amendment challenges to state laws proscribing so-called "false" political speech, it will also unnecessarily constrain the ability of students and faculty members to raise pre-enforcement First Amendment challenges in public universities, where state officials too often seek to proscribe unwelcome but protected speech. Sometimes these restrictions are abuses meant to preclude criticism of university officials; other times, they are well-intended yet overbroad restrictions that

nonetheless impose an orthodoxy. Too often, all across the country, colleges and universities maintain and promulgate overbroad speech and "harassment" codes, many of which are specifically designed to censor otherwise protected First Amendment speech by students and faculty.

And while challenges to these codes and the chilling environments they create frequently are successful, the ability to continue to challenge such policies necessarily is contingent upon the availability of pre-enforcement review. In direct conflict with decades of this Court's precedents, as well as the decisions of its sister circuits, the Sixth Circuit's decision inevitably will restrict the ability to pursue pre-enforcement challenges and thus will jeopardize essential free speech rights of university students and professors. Regardless of whose orthodoxy is imposed, all will be harmed by this denigration of the First Amendment's "marketplace of ideas" if decisions like the one below are not reversed by this Court.

A. This Court Long Has Held That The First Amendment Provides Special Protection For Speech At Public Universities.

Schools occupy a privileged place in our nation's free speech jurisprudence; indeed, "'[t]he vigilant protection of constitutional freedoms *is nowhere more vital than in the community of American schools*.'" *Keyishian*, 385 U.S. at 603 (quoting *Shelton*, 364 U.S. at 487) (emphasis added). Such protection is necessary both for the preservation of democratic ideals and the development of tomorrow's leaders, which is why courts repeatedly hold that free inquiry among students and teachers in universities is essential to the preservation of democratic values.

See Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the *vital role in a democracy* that is played by those who guide and train our youth. … Scholarship cannot flourish in an atmosphere of suspicion and distrust.") (emphasis added); *see also Keyishian*, 385 U.S. at 603 ("[T]he First Amendment … does not tolerate laws that cast a pall of orthodoxy over the classroom."). "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." *Sweezy*, 354 U.S. at 250. And the stakes here are high: If students or professors are stripped of their right to free inquiry, then "our civilization will stagnate and die." *Id.*

It should come as no surprise, then, that nurturing free exchange is of particular import in our public colleges and universities. It is almost axiomatic to state that "[t]he classroom is peculiarly the 'marketplace of ideas.'" *Keyishian*, 385 U.S. at 603 (citation omitted). Responsible self-government requires mutual respect and an appreciation for intellectual diversity, both of which come about as a result of the unfettered give-and-take of ideas and arguments encountered in a properly functioning classroom. *See id.* ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'") (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.)); *see also McCauley v. Univ. of the V.I.*, 618 F.3d 232, 242 (3d Cir. 2010) ("It is well recognized that the college classroom with its

surrounding environs is peculiarly the marketplace of ideas, and the First Amendment guarantees wide freedom in matters of adult public discourse.") (internal quotation marks and modifications omitted).

For all of these reasons, this Court repeatedly has held that the full panoply of First Amendment protections applies to campus speech—irrespective of the identity or cause of the speaker. When Central Connecticut State College attempted to deny official recognition to a Students for a Democratic Society chapter, for example, this Court unanimously concluded that the school had violated the students' constitutional rights. *See Healy v. James*, 408 U.S. 169, 171 (1972) (applying First Amendment protections to public college students and noting that "[w]e also are mindful of the equally significant interest in the widest latitude for free expression and debate consonant with the maintenance of order. Where these interests appear to compete, the First Amendment, made binding on the States by the Fourteenth Amendment, strikes the required balance"). When the University of Virginia discriminated against student speech on the basis of viewpoint, the Court held that those regulations violated the First Amendment as well. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995) ("For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.").

The federal appellate courts likewise have recognized that the First Amendment affords campus speech robust protection, even when competing

values might be involved. As Judge Pryor observed when the Eleventh Circuit evaluated a diversity "remediation" requirement for a graduate student, university regulations that amount to prior restraints on student speech are subject to a heavy presumption of unconstitutionality:

> [W]e have never ruled that a public university can discriminate against student speech based on the concern that the student might, in a variety of other circumstances, express views at odds with the preferred viewpoints of the university. Our precedents roundly reject prior restraints in the public school setting. As Judge Wisdom wrote over forty years ago, "When the restriction upon student expression takes the form of an attempt to predict in advance the content and consequences of that expression, it is tantamount to a prior restraint and carries a heavy presumption against its constitutionality."

Keeton v. Anderson-Wiley, 664 F.3d 865, 882 (11th Cir. 2011) (Pryor, J., concurring) (quoting *Univ. of S. Miss. Chapter of the Miss. Civil Liberties Union v. Univ. of S. Miss.*, 452 F.2d 564, 566 (5th Cir. 1971)). Similarly, the Seventh Circuit has noted that this Court's jurisprudence is clear that even "antidiscrimination regulations may not be applied to expressive conduct with the purpose of either suppressing or promoting a particular viewpoint." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 863 (7th Cir. 2006). And courts have reinforced these principles across the country in striking down

improper restrictions on student speech in public colleges and universities.

B. Overbroad Campus Speech Codes Nevertheless Exist And Chill Protected Speech Around The Country.

Despite the settled principle that the First Amendment provides robust protection for campus speech, college administrators continue to enact regulations that chill constitutionally protected speech, even where some or all of the provisions were not intended to have that effect. Campus speech codes are regulations enacted by colleges or universities that seek to proscribe unprotected speech or conduct, such as "harassment," but which often (if not always) are written in vague or overbroad ways. Courts have routinely struck down as unconstitutional these sorts of overbroad speech and "harassment" codes. *See, e.g.*, *McCauley*, 618 F.3d 232 (striking down speech code provisions as unconstitutionally overbroad and finding standing for student who had not violated the challenged provisions); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (striking down sexual harassment code challenged by a graduate student even after the school amended the code); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (striking down a university speech code while not protecting the use of a racial slur by a college basketball coach); *College Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (granting a preliminary injunction against a student conduct code's civility requirement as overbroad); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (striking down as unconstitutionally overbroad a Texas Tech University speech code); *Bair v. Shippensburg Univ.*, 280 F.

Supp. 2d 357 (M.D. Pa. 2003) (same at Shippensburg University); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wisc. System*, 774 F. Supp. 1163 (E.D. Wisc. 1991) (striking down as overbroad portions of the University of Wisconsin's anti-discrimination code); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (striking down as overbroad and vague a University of Michigan discriminatory harassment policy).

Notwithstanding this long line of authority forbidding these sorts of unconstitutional incursions on First Amendment rights, problematic public university speech codes continue to be the rule and not the exception. In 2013, *amicus* FIRE reviewed the state of affairs at 323 public colleges, and found that *over fifty-seven percent* of them had "at least one policy both clearly and substantially restricting freedom of speech." *See* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, *Spotlight on Speech Codes 2014* at 3–4, http://tinyurl.com/Fire-2013-Final-Report (last visited March 3, 2014). *Nearly forty percent more* were found to maintain "policies that could be interpreted to suppress protected speech or policies that, while clearly restricting freedom of speech, restrict only a narrow category of speech." *Id.* Most startling, however, is that *only four percent* of these schools were found not to seriously threaten protected student speech. *Id.* And while this represents an improvement from only six years ago (when the breakdown on these three categories was seventy-nine percent, to nineteen percent, to two

percent), clearly much work remains to be done in protecting free speech on campus.[2]

Efforts by college and university administrators to stifle free speech in the pursuit of ideological goals are, unfortunately, not without support from within the university walls. Many academics actually encourage the proliferation of codes that criminalize or otherwise proscribe speech on and off campus—even to the point of subrogating the protections of the First Amendment to the mandates of the political orthodoxies of prevailing majorities. *See, e.g.*, Melissa Weberman, *University Hate Speech and the Captive Audience Doctrine*, 36 OHIO N.U. L. REV. 553, 557 (2010) ("Not only is more speech actually detrimental to the marketplace of ideas when it comes to hate speech, but it also causes individual and group harms."); Carol L. Zeiner, *Zoned Out! Examining Campus Speech Zones*, 66 LA. L. REV. 1, 24 (2005) (conceding that speech codes are almost impossible to craft consistent with the Constitution but "[n]evertheless" insisting that there is an obligation to combat "hate speech" on campus); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV.

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[2] *See also* Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C. & U.L. 385, 390–92 (2009) (describing some recent examples of university harassment codes being used to punish clearly protected speech, such as one university's use of a harassment code to censure a student janitor for reading *Notre Dame vs. The Klan: How the Fighting Irish Defeated the Ku Klux Klan*, ostensibly on account of the book's cover art). For a longer treatment from the President of *amicus* FIRE, *see* GREG LUKIANOFF, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE (2012).

2320, 2321 (1989) ("In calling for legal sanctions for racist speech, this Article rejects an absolutist first amendment position."); Rhonda G. Hartman, *Hateful Expression and First Amendment Values: Toward a Theory of Constitutional Constraint on Hate Speech at Colleges and Universities after* R.A.V. v. St. Paul, 19 J.C. & U.L. 343, 371 (1993) ("The law should not sacrifice the First Amendment rights of either vilifying speakers or their listeners unless the exercise of those rights infringes on the rights of others. At issue is the value-neutral question of whether sufficient evidence of harm exists. Unfortunately, First Amendment doctrine is not that simplistic."). And, of course, these sorts of anti-speech arguments eventually trickle down to affect the assumptions and expectations of students—sometimes in truly astonishing forms. *See, e.g.*, Sandra Y.L. Korn, *The Doctrine of Academic Freedom*, HARV. CRIMSON, http://t.co/STo20sUj27 (Feb. 18, 2014) ("If our university community opposes racism, sexism, and heterosexism, why should we put up with research that counters our goals simply in the name of 'academic freedom'?").

The biggest problem with these administrative efforts to restrict free expression is that they work. Students and faculty who otherwise would speak out on issues are forced to hold back for fear of punishment by the university. *See, e.g.*, Eugene Volokh, *A View from an Incoming Harvard 1L*, THE VOLOKH CONSPIRACY (May 1, 2010), http://www.volokh.com/2010/05/01/a-view-from-an-incoming-harvard-1l/ (posting an email from a rising first-year law student detailing how the administration's response to a speech controversy chilled constitutionally protected speech). And these

restrictions can and do target a wide and disparate spectrum of protected expression. *Compare Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 669–70 (1973) (*per curiam*) (allowing University of Missouri School of Journalism graduate student—who was expelled for violating university code of conduct prohibiting "indecent conduct or speech" after distributing an underground student newspaper on campus that contained, among other things, an article entitled "Motherf****r Acquitted" which discussed the acquittal of a member of the "radical" group "Up Against the Wall, Motherf****r"—to pursue declaratory and injunctive relief on the ground that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency'") *with DeJohn*, 537 F.3d at 317–18 (affirming grant of injunctive relief to Army veteran pursuing a master's degree in military and American history at Temple University who claimed that school's anti-harassment code intimidated him into self-censoring his academic opinions on matters of military history and policy due to his fear that the school might conclude his views ran afoul of the code); *see also* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, *University of Kansas: Anti-NRA Tweet Results in Professor's Suspension*, http://tinyurl.com/KUProfSuspension (last visited March 3, 2014) (discussing FIRE's opposition to University of Kansas' decision to place professor on administrative leave after he "posted a tweet to his personal Twitter account condemning the National Rifle Association in the wake of the September 16, 2013, shooting at the Washington Navy Yard, saying, 'Next time, let it be YOUR sons and daughters. Shame on you. May God damn

you.'"). Indeed, some colleges even publicly tout these chilling effects as an effective means of deterring undesirable but unquestionably protected speech. *See, e.g.*, Susan Kruth, *UCLA Report Suggests Chilling Speech Is the Answer to Offensive "Microaggressions*," FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Jan. 8, 2014), http://tinyurl.com/UCLA-Report (last visited March 3, 2014) (discussing a UCLA report that proposed using the threat of investigation as a tool to deter "unconsciously" "offensive" speech, known to some as "microaggressions").

C. The Sixth Circuit's Radical Restriction Of Pre-Enforcement Review Will Only Serve To Embolden Those Within Universities Who Seek To Further Restrict And Chill Student And Faculty Speech.

The chief means by which this Court can prevent "chilling" effects on student and faculty speech is to re-affirm that First Amendment plaintiffs are freely permitted to pursue pre-enforcement challenges to regulations proscribing *protected* speech. *Amicus* FIRE urges the Court to continue to provide First Amendment plaintiffs—including both petitioners and students and faculty at public colleges and universities—with the ability to challenge these chilling effects in a timely and effective manner. Although it goes without saying that these challenges must satisfy the standing and ripeness requirements of Article III, decisions like the one in this case ask much more; the Sixth Circuit's standard unduly and artificially hinders a given student- or teacher-plaintiff from obtaining judicial review of an encroachment on her First Amendment rights.

Here, the appellate court claimed that "[n]o sword of Damocles dangle[d] over SBA … justify[ing] its fears [of prosecution]." Pet. App. 12a. The panel reached that conclusion notwithstanding respondent Driehaus' real efforts to enforce the prohibition on false political speech against SBA. *See* Br. for Pets. 3–4. And the court reasoned that SBA does not suggest that the Secretary has ever attempted to enforce the law against the type of speech it intends to make," and thus that any potential actions by Mr. Driehaus suffer from a "fatal" "degree of speculation." Pet. App. 13a–14a. Worst of all, the court relied on circuit precedent to foreclose SBA's ability to bring suit on the astonishing ground that it had not demonstrated an intention *to lie* in the future. Pet. App. 15a (SBA "would be closer to establishing ripeness if it had alleged that it intends to violate Ohio's false-statement law."). Missing the point entirely, the Sixth Circuit concluded that "SBA List's insistence [that it was telling the truth] makes the possibility of prosecution for uttering such statements exceedingly slim, particularly because SBA List can only be liable for making a statement 'knowing' it is false," *id.*, and that SBA had "no basis" for its fear of prosecution. *Id.*

As petitioners' brief demonstrates, all of this is plainly incorrect. Even worse, there is little doubt that these errors will infect other First Amendment contexts, because while the decision below involves political speech, the Sixth Circuit already has applied this erroneous threat-of-future-injury standard in the educational context. Applying a cramped threat-of-harm analysis to the case of a high school student, the Sixth Circuit concluded that the issue turned on the plaintiff's "choice to chill his own speech based on

his perception that he would be disciplined for speaking." *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 610 (6th Cir. 2008). The court observed that it could "only speculate" whether or not the plaintiff would have run afoul of the harassment code had he spoken. *Id.* Ultimately ruling in favor of the school, the Sixth Circuit claimed that the plaintiff's constitutional claim "trivializes the important business of the federal courts," because "[plaintiff] asks us, essentially, to find a justiciable injury *where his own subjective apprehension counseled him to choose caution* and where he assumed … that were he to speak, punishment would result." *Id.* 610–61 (emphasis added).

As *Morrison* and the decision at issue in this case both demonstrate, the Sixth Circuit's rule requiring plaintiffs to allege an intention to violate the provision of law at issue not only is wrong as a doctrinal matter, it is particularly pernicious in the educational setting. At a school with an overbroad speech or harassment code, virtually no one actually *intends* to harass or be "hateful" in her speech, and that is not what the pre-enforcement review is about. The concern, instead, is that protected speech on important but sensitive issues will be *deemed* "harassing" or "hateful" under an impossibly vague harassment or speech code. *See DeJohn*, 537 F.3d at 317 ("Further, the policy's use of 'hostile,' 'offensive,' and 'gender-motivated' is, on its face, sufficiently broad and subjective that they 'could conceivably be applied to cover any speech' of a 'gender-motivated' nature 'the content of which offends someone.'") (quoting *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (Alito, J.)). This is to say that the student at a school with a speech code does

not intend to violate the code but has no way of actually knowing whether or not she will be prosecuted; the student, understandably, will self-censor as a matter of prudence to avoid punishment.

The Sixth Circuit's approach is both an outlier and mistaken. This Court and the lower courts have made clear that plaintiffs are not required to risk punishment—whether by conceding their speech is "false," "harassing," "hateful," or otherwise proscribed—in order to assert a claim. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (explaining that, if otherwise, "free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser"); *see also Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) ("In an effort to avoid the chilling effect of sweeping restrictions, the Supreme Court has endorsed what might be called a 'hold your tongue and challenge now' approach rather than requiring litigants to speak first and take their chances with the consequences."). Given these principles, the Sixth Circuit simply cannot be correct that every plaintiff must admit a violation of law in order to challenge the law on First Amendment grounds: after all, that bizarre prerequisite would defeat the entire purpose of the pre-enforcement challenge. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007) ("[W]here threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced.") (emphasis in original); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that the

plaintiff first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.").

Unlike the Sixth Circuit below, courts routinely recognize that the longstanding and accepted means by which plaintiffs are to seek to vindicate their First Amendment rights is through facial overbreadth challenges. As the *DeJohn* court observed, "since the inception of overbreadth jurisprudence, the Supreme Court has recognized its prominent role in preventing a 'chilling effect' on protected expression. This laudable goal is no less implicated on public university campuses throughout this country, where free speech is of critical importance because it is the lifeblood of academic freedom." *DeJohn*, 537 F.3d at 313–14; *see also id.* at 314 ("Because overbroad harassment policies can suppress or even chill core protected speech, and are susceptible to selective application, amounting to content-based or viewpoint discrimination, the overbreadth doctrine may be invoked in student free speech cases."). This means of redress is particularly important for challenging overbroad university speech codes, which, like other First Amendment challenges, are exempted from the general constitutional rule favoring as-applied challenges. *See Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 258–59 (3d Cir. 2002).

The point of all this is that if a university scholar were required to admit to violating a speech code in order to challenge its constitutionality, then for all practical purposes that scholar would never be able to bring a facial overbreadth challenge with respect to that code—thus eradicating access to the core means by which academic freedom is protected. Indeed,

without the availability of pre-enforcement facial challenges, few, if any, students or faculty would *ever* admit to violating a campus speech or harassment code, rendering such codes immune from challenge and perpetually chilling protected student speech. And yet this is *precisely* what the Sixth Circuit's decision here will encourage—certainly in the university context. At bottom, it is hard to postulate a state of affairs more offensive to the continued vigor of First Amendment freedoms on our college campuses, and FIRE thus respectfully submits that the Court should reverse the appellate court's decision and make clear that there is no room in our country's classrooms for this sort of "pall of orthodoxy" to be cast down from above by university administrators. *Keyishian*, 385 U.S. at 603.

II. This Court Should Reject The Sixth Circuit's Extreme Test And Hold That Pre-Enforcement Challenges Under The First Amendment Need Only Meet Article III's Ripeness Requirements.

This case presents the Court with the opportunity to articulate the ripeness rule that controls for pre-enforcement challenges brought under the First Amendment. By holding that a pre-enforcement challenge is ripe for review when a statute arguably proscribes protected speech and the government cannot show that the statute has fallen out of use, this Court would provide the definitive framework under which all lower courts will analyze this issue going forward, which will serve to prevent those courts from straying down the erroneous path taken by the Sixth Circuit in this case and others.

The vast majority of courts and commentators have recognized that the threat of chilled speech

justifies a unique approach to ripeness in the First Amendment Context. Federal appellate courts outside the Sixth Circuit agree that the ripeness analysis is applied "most permissively" in this context. *See Harrell v. Florida Bar*, 608 F.3d 1241, 1258 (11th Cir. 2010); *see also Cooksey v. Futrell*, 721 F.3d 226, 240 (4th Cir. 2013) ("Much like standing, ripeness requirements are also relaxed in First Amendment cases."); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1000 (9th Cir. 2010) ("[W]hen a challenged statute risks chilling the exercise of First Amendment rights, the Supreme Court has dispensed with rigid standing requirements and recognized self-censorship as a harm that can be realized even without an actual prosecution.") (internal quotation marks and citations omitted); *Kan. Judicial Review v. Stout*, 519 F.3d 1107, 1116 (10th Cir. 2008) ("Our ripeness analysis is relaxed somewhat in the context of a First Amendment facial challenge … because an unconstitutional law may chill free speech.") (internal quotation marks omitted); *Peachlum v. City of York, Pa.*, 333 F.3d 429, 434 (3d Cir. 2003) ("A First Amendment claim, particularly a facial challenge, is subject to a relaxed ripeness standard."); *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90 (2d Cir. 2002) ("[I]n the First Amendment context, the ripeness doctrine is somewhat relaxed.") (citation omitted). And commentators in this area have similarly noted that the "First Amendment rights of free expression and association are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss." *See, e.g.*, 13B Charles Alan Wright and Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 3532.3 (3d ed. 1984).

Given the potential for "chilling" effects on speech, the majority of circuits have concluded that, in the First Amendment context, the existence of a statute that arguably restricts a plaintiff's speech is sufficient to give rise to a credible threat of prosecution—even absent any specific enforcement threats by the government. *See, e.g.*, *Stout*, 519 F.3d at 1118 (concluding that a credible threat of prosecution existed because, "[s]o long as the Canons remain in effect in their current form, the state is free to initiate such action against candidates"); *Peachlum*, 333 F.3d at 435 ("[I]n cases involving fundamental rights, even the remotest threat of prosecution, such as the absence of a promise not to prosecute, has supported a holding of ripeness where the issues in the case were predominantly legal and did not require additional factual development.") (internal quotation marks omitted); *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) ("A plaintiff who mounts a pre-enforcement challenge to a statute that he claims violates his freedom of speech need not show that the authorities have threatened to prosecute him; the threat is latent in the existence of the statute.") (internal citations omitted); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003) ("A finding of no credible threat of prosecution under a criminal statute requires a long institutional history of disuse, bordering on desuetude.") (citation omitted); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710–11 (4th Cir. 1999) (reasoning that a "non-moribund statute" presented a credible threat of prosecution even though the State had taken the litigation position that the alleged speech would not be statutorily proscribed).

Similarly, most circuits agree that a plaintiff's speech need only *arguably* violate the challenged statute to give rise to a credible and actionable fear of prosecution. *See Cooksey*, 721 F.3d at 238 (concluding that plaintiff faced a credible fear of prosecution because his complaint "describes speech that *could* fall under each of these categories" of prohibitions in the statute) (emphasis added); *Stout*, 519 F.3d at 1118 ("As previously discussed, the *arguable* vagueness of a statute greatly militates in favor of finding an otherwise premature controversy to be ripe.") (emphasis added; citation and internal quotation marks omitted); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003) ("In the free speech context, such a fear of prosecution will only inure if the plaintiff's intended speech *arguably* falls within the statute's reach.") (emphasis added); *Majors*, 317 F.3d at 721 (explaining that a plaintiff faces a credible threat of prosecution when the statute "arguably" covers the plaintiff's conduct).

In marked contrast to the posture of these other circuits, the Sixth Circuit employs an extreme and untenable approach to the ripeness inquiry in pre-enforcement First Amendment cases. That court refuses to presume that a non-moribund statute poses a "credible threat" of prosecution; it instead demands that pre-enforcement First Amendment plaintiffs discharge the affirmative burden of showing that the government actually has previously "attempted to enforce the law against the type of speech it intends to make." Pet. App. 13a. Along these same lines, the Sixth Circuit requires plaintiffs to prove that their intended speech will certainly, not just arguably, violate the statute. Applying precisely this erroneous framework, the appellate court in this

case held that because petitioners refused to concede that they intended to make false statements in connection with an election, the possibility of prosecution was exceedingly small. Pet. App. 15a; s*ee also* Br. for Pets. 37 (citing additional Sixth Circuit cases adopting similar standard). And because the appellate court claimed that petitioners' only fear was that they would be subject to a "false" prosecution, that opened the door for the panel to conclude that the threat was insufficient to render petitioners' claims ripe.

This Court should put an end to the Sixth Circuit's continued adherence to this mistaken and outlier approach, and should hold that the majority rule already utilized by the other circuits is the proper standard for assessing whether pre-enforcement First Amendment claims are ripe. By formally announcing that the more permissive ripeness inquiry applies in the First Amendment context, this Court would be preserving core constitutional values of promoting the rule of law and protecting free speech, as well as simultaneously ensuring that the jurisdictional analysis remains distinct from the merits analysis.

In all events, articulating that non-moribund statutes pose a credible threat of prosecution to speech arguably falling within the statute's scope is to recognize the rule of law. *MedImmune*, 549 U.S. at 128–29; *Steffel*, 415 U.S. at 459. As the Ninth Circuit thus noted, requiring a party "to violate the [statute] as a precondition to bringing suit would [] turn respect for the law on its head." *Wolfson v. Brammer*, 616 F.3d 1045, 1061 (9th Cir. 2010) (internal quotation marks omitted). If a statute that arguably proscribes speech remains on the books, then law-

abiding citizens understandably will be hesitant to violate it. To suggest that citizens should make judgments about which laws to follow and which laws to ignore based upon the history of prosecutions is impossible to square with the normal operation of our system of government.

Just as it promotes respect for the rule of law, this standard provides critical protection for otherwise chilled speech—both in the public university setting and elsewhere. As the Third Circuit has recognized, "[o]ur stance toward pre-enforcement challenges stems from a concern that a person will merely comply with an illegitimate statute rather than be subjected to prosecution. Or, the government may choose never to put the law to the test by initiating a prosecution, while the presence of the statute on the books nonetheless chills constitutionally protected conduct." *Peachlum*, 333 F.3d at 435. And as the Eleventh Circuit explained: "Something will be gained, but much will be lost if we permit the contours of regulation to be hammered out case by case in a series of enforcement proceedings. … While the 'hammering out' continues so do the vices of vagueness; the appellants' uncertainty about the reach of the ordinance will force them to continue to restrict their … activities." *Harrell*, 608 F.3d at 1258 (quoting *Int'l Soc'y for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 822 (5th Cir. 1979)).

And finally, this standard would keep the ripeness inquiry separate from the merits. In reality, requiring—as the Sixth Circuit did below—that plaintiffs must prove that it is *certain* that their intended speech will violate the statute necessarily involves a merits-like determination that is misplaced at the jurisdictional stage. This problem is

particularly acute in the context of a vagueness challenge: After all, *the whole point* of such a challenge *is that the law is vague*; to require proof that a plaintiff's protected speech would certainly fall within the scope of the law thus seems indistinguishable from a decision on the merits.

Suffice it to say, public policy and the protection of core constitutional values favor pre-enforcement challenges involving speech in democratic elections and academic pursuits of knowledge. Indeed, it is these very values that often lead to court decisions quashing exercises of censorial power that violate the first principles undergirding our constitutional republic. Pre-enforcement review helps to vindicate these values and to avoid the inevitable chilling effect that results from the existence of laws prohibiting speech. In the end, it should go without saying that allowing laws violative of the Constitution to remain on the books undermines confidence in our legal system. Because that is precisely what the Sixth Circuit's decision does in this case, we respectfully urge the Court to reverse and allow petitioners to assert their First Amendment claims on the merits.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioners' briefs, the Sixth Circuit's judgment should be reversed.

Respectfully submitted,

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