No. 13-193

In the Supreme Court of the United States

SUSAN B. ANTHONY LIST, ET AL., PETITIONERS

v.

STEVEN DRIEHAUS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PARTIAL REVERSAL

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QUESTION PRESENTED

When one of the petitioners in this case criticized a Congressman for his support of a particular federal statute, a panel of the Ohio Elections Commission found probable cause that the criticism had violated state laws regulating election-related speech. Petitioners filed suit against Commission officials, the Commission itself, the Ohio Secretary of State, and the now-former Congressman alleging petitioners' intent to make similar speech in the future and seeking to preclude enforcement of certain state electoral-speech laws.

The question presented is whether any or all of petitioners' claims—which raise First Amendment, due process, and preemption-based challenges to the state electoral-speech laws—are justiciable with respect to any or all of those defendants.

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INTEREST OF THE UNITED STATES

This case concerns the circumstances in which a suit seeking to preclude enforcement of a law is justiciable. The federal government frequently litigates challenges to federal statutes and regulations, and such cases often present threshold questions of scope, timing, and the identity of any proper parties. See, *e.g.*, *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138 (2013); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992); *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967). The United States accordingly has a substantial interest in the resolution of the question presented.

STATEMENT

1. Petitioner Susan B. Anthony List (SBA List) is a nonprofit organization that advances pro-life causes.

Pet. App. 3a. During the 2010 election cycle, SBA List disseminated materials criticizing then-incumbent Ohio Representative Steve Driehaus's vote in favor of the Patient Protection and Affordable Care Act (Affordable Care Act), Pub. L. No. 111-148, 124 Stat. 119 (2010). Pet. App. 3a, 43a. The materials described Driehaus as having supported "taxpayer-funded abortion." *Ibid.*

Driehaus filed a complaint against SBA List with the Ohio Elections Commission, an independent state agency that accepts complaints from "any person" who alleges a violation of certain state election laws. Pet. App. 2a-3a; Ohio Rev. Code Ann. § 3517.153(A) (LexisNexis 2013) (Ohio Rev. Code). One of those laws provides, *inter alia*, that "[n]o person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials, * * * shall knowingly and with intent to affect the outcome of such campaign" engage in certain activities. Ohio Rev. Code § 3517.21(B); see *id.* § 3517.153(A). Two such activities are "[m]ak[ing] a false statement concerning the voting record of a candidate or public official," *id.* § 3517.21(B)(9), and "disseminat[ing] a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate," *id.* § 3517.21(B)(10). Those activities are punishable by up to six months of imprisonment, a fine up to $5000, or both. *Id.* § 3517.992(V); see *id.* § 3599.39 (requiring disenfranchisement following successive convictions). Driehaus's complaint here alleged a violation both of those false-electoral-speech laws and

of a separate disclaimer law, which requires disclosure of the entities that funded certain electoral communications. Pet. App. 43a-44a; see Ohio Rev. Code § 3517.20(A)(2); see also *id.* § 3517.992(U) (violation of disclaimer law punishable by fine of up to $500); *id.* § 3599.39.

A complaint to the Commission is initially reviewed by a staff attorney. Ohio Rev. Code § 3517.154(A)(1). In nonexpedited cases, the Commission then has 90 business days in which to hold a hearing, at which it must "determine whether or not the * * * violation alleged in the complaint has occurred." *Id.* § 3517.155(A)(1); see *id.* § 3517.155(B) (permitting further investigation when evidence is insufficient). If the Commission finds, by clear-and-convincing evidence, that one of the false-electoral-speech provisions at issue here has been violated, it must "refer the matter to the appropriate prosecutor." *Id.* § 3517.155(D)(2); see *id.* § 3517.155(D)(1) (burden of proof). A prosecutor may not bring criminal charges under the false-electoral-speech provisions unless and until the Commission has received a complaint and completed its proceedings with respect to the complaint. *Id.* § 3517.153(C). Commission decisions must be made public, and they are subject to judicial review. *Id.* §§ 3517.153(E), 3517.157(D).

Ohio law provides special expedited procedures for certain complaints, like Driehaus's, that are filed close to the time of the election. See Ohio Rev. Code §§ 3517.154(A)(2)(a), 3517.156. A panel of at least three Commission members must hold a hearing, generally within two business days, to determine whether probable cause of a violation exists. *Id.* § 3517.156(A)-(C). If it finds no probable cause,

the complaint is immediately dismissed. *Id.* § 3517.156(C)(1). If it finds probable cause, the full Commission must, within ten days, hold a hearing on the complaint. *Id.* § 3517.156(C)(2); see *id.* § 3517.156(C)(3) (permitting further investigation where evidence is insufficient).

Here, a Commission panel, by a 2-to-1 vote, found probable cause that SBA List had violated the false-electoral-speech provisions. Pet. App. 4a. But it dismissed Driehaus's claim that SBA List had violated the state disclaimer law, reasoning that the disclaimer law was preempted by federal law. *Id.* at 44a. A hearing before the full Commission on the alleged violations of the false-electoral-speech provisions was set for two weeks later, and the parties began discovery. *Id.* at 4a; see Ohio Admin. Code 3517-1-09 (2008) (discovery rules). Driehaus and SBA List subsequently agreed to postpone the full Commission hearing until after the election. Pet. App. 5a. Driehaus eventually lost the election, and he later moved to withdraw the complaint he had filed with the Commission. *Ibid.* SBA List consented to the motion, which the Commission granted. *Ibid.*

2. a. During the two-week interval between the probable-cause determination and the scheduled hearing before the full Commission, SBA List filed suit in federal district court, seeking declaratory and injunctive relief against enforcement of the Ohio statutory scheme. Pet. App. 4a. The district court denied SBA List's motion for a temporary restraining order and stayed the federal action in light of the pending state proceedings. *Id.* at 5a; see *Younger* v. *Harris*, 401 U.S. 37 (1971). The court of appeals upheld that stay. Pet. App. 5a.

b. After the Commission proceedings were dismissed, SBA List amended its complaint. Pet. App. 5a. The amended complaint alleged that SBA List's speech about Driehaus had been chilled; that SBA List "intend[ed] to engage in substantially similar activity in the future"; and that it "face[d] the prospect of its speech and associational rights again being chilled and burdened" by the prospect of future Commission proceedings. J.A. 121-122. The complaint sought prospective relief that would preclude such proceedings. J.A. 127-128. The complaint named Driehaus, the Commission's members and its staff attorney (in their official capacities), and the Ohio Secretary of State (in her official capacity) as defendants. J.A. 112-113. And it raised a variety of legal claims: that the state false-electoral-speech provisions violate the First Amendment on their face (Counts 1 and 3); that those provisions violate the First Amendment as applied to lobbyists taking positions on political issues (Counts 2 and 4); that the Commission's procedures for investigating violations of the false-electoral-speech provisions are unconstitutional (Count 5); and that the state disclaimer law is preempted by a section of the Federal Election Campaigns Act (FECA), 2 U.S.C. 453(a) (Count 6). J.A. 122-127.

The district court consolidated SBA List's suit with a separate suit by petitioner Coalition Opposed to Additional Spending & Taxes (COAST), an anti-tax advocacy organization that also sought to prevent future enforcement of the same state laws. Pet. App. 2a, 5a-6a; see J.A. 138-161. COAST's complaint (as amended) alleged that it had intended to disseminate materials criticizing Driehaus's vote for the Affordable Care Act as a vote "in favor of taxpayer-funded abor-

tion"; that the initiation of the Commission proceedings against SBA List had deterred it from engaging in that speech; that it desired in future election cycles "to make the same or similar statements" about Driehaus and other candidates who voted for or supported the Affordable Care Act; and that the prospect of future proceedings before the Commission chilled it from doing so. J.A. 146-150; Pet. App. 5a-6a. The complaint named the Commission, the Commission's members and its staff attorney (in their official capacities), and the Ohio Secretary of State (in her official capacity) as defendants. J.A. 142-143. The complaint raised a number of legal claims that substantially overlapped with SBA List's: that the false-electoral-speech provisions violate the First Amendment on their face (Counts 1 and 3); that the provisions violate the First Amendment as applied to citizens and organizations taking positions on political issues (Counts 2 and 4); that the false-electoral-speech and disclaimer laws are preempted by FECA (Counts 5-7); and that Commission's procedures violate the Due Process Clause (Count 8). J.A. 153-159.

c. The district court dismissed both suits as nonjusticiable. Pet. App. 21a-41a, 42a-63a. The district court concluded that neither suit presented a sufficiently concrete controversy for purposes of standing and ripeness, primarily because the Commission had not definitively determined that SBA List had violated Ohio election law and because it was not clear that future proceedings against either SBA List or COAST were likely. *Id.* at 23a-34a, 36a, 38a, 54a-63a. The district court also concluded that SBA List's claims had been mooted by the termination of the Commission proceedings and that the Secretary of State

was entitled to Eleventh Amendment immunity. *Id.* at 34a-41a.

3. The court of appeals affirmed, solely on ripeness grounds. Pet. App. 1a-18a. It explained that the ripeness doctrine is designed to "prevent[] federal courts from entangling themselves in a premature adjudication of legal matters." *Id.* at 7a (internal quotation marks, citation, and brackets omitted). The court further explained that "[t]hree factors guide the ripeness inquiry: (1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings." *Id.* at 7a (citation omitted).

The court of appeals stated that, "[i]n the First Amendment context, the likelihood-of-harm analysis focuses on [1] how imminent the threat of prosecution is and [2] whether the plaintiff has sufficiently alleged an intention to refuse to comply with the statute." Pet. App. 8a (internal quotation marks and citation omitted). On the first issue, the court of appeals reasoned that the Commission panel's probable-cause determination against SBA List did not show "an imminent threat of prosecution," because the Commission had never made a final determination "that SBA List violated Ohio's false-statement law." *Id.* at 10a. The court additionally observed that Driehaus had moved abroad and that it was accordingly "speculative" that any complaint would ever be filed against SBA List in the future. *Id.* at 12a-14a. On the second issue, the court of appeals reasoned that because SBA List "insist[ed] that the statement it made and plans to repeat

* * * is factually true," the "possibility of prosecution for uttering such statements [is] exceedingly slim." *Id.* at 15a.

The court of appeals also concluded that the "factual record here is not sufficiently developed to review SBA List's claims," because adjudication of those claims "would require [a court] to guess about the content and veracity of SBA List's as-yet unarticulated statement, the chance an as-yet unidentified candidate against whom it is directed will file a Commission complaint, and the odds that the Commission will conclude the statement violates Ohio law." Pet. App. 16a. Finally, the court concluded that "[w]ithholding judicial relief will not result in undue hardship to SBA List," because "[n]o complaint or Commission action is pending against SBA List"; "SBA List has not demonstrated an objective fear of future enforcement"; and SBA List "continued to actively communicate its message about Driehaus' voting record" even after the Commission panel's probable-cause determination. *Id.* at 17a.

The court of appeals also affirmed the dismissal of COAST's complaint. Pet. App. 18a. It reasoned that the claims raised by COAST, which had "never been involved in a Commission proceeding" and had not been threatened with legal action, were "even more speculative than SBA List's." *Ibid.*

SUMMARY OF ARGUMENT

Petitioners' suit against the Commission officials is justiciable to the extent petitioners are raising a facial First Amendment challenge to Ohio's false-electoral-speech restrictions. Petitioners do not specifically challenge the court of appeals' decision insofar as it affirmed the dismissal of petitioners' remaining

claims, but those claims are largely nonjusticiable in any event. This Court should accordingly reverse in part and permit petitioners' suits to continue in an appropriately bounded fashion.

I. In order to establish Article III standing, a plaintiff must show an imminent, nonconjectural injury that is traceable to the defendants and redressable by relief against those defendants. See, *e.g.*, *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). That burden is extremely difficult to carry when the plaintiff is challenging a statute that does not directly regulate primary conduct, and instead simply authorizes government officials to take certain actions in the future. But where, as here, the plaintiff is challenging a criminal statute that regulates primary conduct, this Court has generally found sufficient injury when the plaintiff faces a "credible threat of prosecution." See, *e.g.*, *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010).

Petitioners have adequately established a credible threat of prosecution under Ohio's false-electoral-speech laws. They have sufficiently alleged that, but for those laws, they would likely make election-related speech about the Affordable Care Act. Although petitioners have not affirmatively conceded that their speech would violate the false-electoral-speech laws, the Commission panel's probable-cause determination about SBA List's previous statements provides an adequate basis for finding a credible threat of prosecution. In the context of this case, the relevant "prosecution" can be regarded as including a hearing before the full Commission, because a determination by the Commission that petitioners knowingly misinformed the electorate during an ongoing election would not

only increase the prospect of a criminal prosecution but also could substantially impede petitioners' ability to engage in electoral advocacy. The fact that a Commission panel previously found probable cause to trigger full Commission proceedings against SBA List could embolden future complaints and shows a sufficient prospect of future proceedings against petitioners to satisfy Article III.

Petitioners have not, however, established an Article III injury with respect to their claims challenging Ohio's disclaimer law and particular Commission procedures. Even assuming petitioners have preserved a challenge to the dismissal of those claims, they cannot show a likelihood that the disclaimer law (which the Commission found to be preempted) or the particular procedures will be applied to them. In addition, petitioners' credible-threat-of-prosecution injury is only traceable to, and redressable by relief against, the Commission officials. It is wholly speculative that Driehaus (who may never run for Congress again) or the Ohio Secretary of State (who took no action in response to SBA List's prior speech) would ever initiate enforcement proceedings against petitioners.

II. The sufficiency of petitioners' allegations of imminent injury is a necessary, but not a sufficient, condition for satisfying the ripeness doctrine, which precludes federal courts from prematurely adjudicating disputes that are not yet sufficiently concrete. One additional ripeness criterion is that the issues presented be fit for judicial decision. *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985). That requirement generally forecloses preenforcement challenges to hypothetical future applications of a law, as well as facial claims that would bene-

fit from further development of the facts or interpretation of the law. Here, petitioners' challenges to the Commission's procedures (which require hypothesizing how those procedures might affect particular cases) and their as-applied First Amendment claims (which appear to require context-dependent determinations) are not fit for judicial review. Petitioners' facial First Amendment challenges to Ohio's false-electoral-speech laws, however, are entirely legal in nature and appear to be fit for judicial decision. The same would likely have been true of petitioners' preemption claims, had petitioners not forfeited them.

The other additional ripeness criterion requires consideration of the hardship to the parties from withholding review, balancing the potential burden on the plaintiff against the possibility of inappropriately interfering with administrative action. *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 733 (1998). In the particular circumstances of this case, that analysis favors allowing petitioners to proceed on their facial First Amendment challenges to the false-electoral-speech laws. In light of the paramount importance of election-related speech, the burden on petitioners of withholding review is uniquely high. And because adjudication of these suits would neither force an agency to take a premature position on how the law would apply to certain facts, nor circumvent a legislative scheme that contemplates case-by-case public health, safety, or comparable determinations by an administrative agency, they will not inappropriately interfere with administrative activity.

ARGUMENT

Article III limits the jurisdiction of the federal courts to "Cases" and "Controversies." U.S. Const.

Art. III, § 2. The doctrines of standing and ripeness "originate" from that textual limitation and help to ensure that federal litigation remains within constitutionally prescribed boundaries. *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006); see *Allen* v. *Wright*, 468 U.S. 737, 750 (1984). The standing and ripeness doctrines often overlap, see, *e.g.*, *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007), and this Court frequently evaluates the justiciability of pre-enforcement suits through the lens of Article III's basic case-or-controversy requirement, rather than as a specific question of standing or ripeness, see, *e.g.*, *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010); *Golden* v. *Zwickler*, 394 U.S. 103, 104-110 (1969). Here, petitioners' suits are justiciable to the extent they seek relief against the Commission officials on the basis of facial First Amendment challenges to Ohio's substantive restrictions on false electoral speech. Petitioners' remaining claims, however, have been forfeited by petitioners' decision not to pursue them in this Court and are, in any event, largely nonjusticiable.

I. PETITIONERS HAVE STANDING TO THE EXTENT THEIR SUITS SEEK TO PRECLUDE THE COMMISSION OFFICIALS' ENFORCEMENT OF OHIO'S RESTRICTIONS ON FALSE ELECTORAL SPEECH

To establish Article III standing, a plaintiff must show (1) that he has "suffered an injury in fact * * * which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) a sufficient "causal connection between the injury and the conduct complained of"; and (3) a "likel[ihood] * * * that the injury will be redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*,

504 U.S. 555, 560-561 (1992) (internal quotation marks and citations omitted); see, *e.g.*, *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). The plaintiff must "demonstrate standing separately for each form of relief sought." *DaimlerChrysler Corp.*, 547 U.S. at 352 (citation omitted). Petitioners here have sufficiently alleged standing to seek relief that would preclude the Commission officials from enforcing the challenged false-electoral-speech restrictions, but not to seek relief with respect to other laws or other defendants.

A. The Commission Panel's Probable-Cause Determination Shows A Sufficiently Credible Threat Of A False-Statement Prosecution To Satisfy Article III's Injury Requirement

1. This Court has "repeatedly reiterated" that a "'threatened injury must be *certainly impending* to constitute injury in fact'" and that "'allegations of *possible* future injury' are not sufficient." *Clapper*, 133 S. Ct. at 1147 (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990)) (brackets omitted). The determination whether a plaintiff has sufficiently alleged injury is context-specific, see *Allen*, 468 U.S. at 752, and depends heavily on the precise nature of the plaintiff's claim.

A plaintiff typically will not be able to show "certainly impending" injury when challenging a law that does not regulate primary conduct but instead simply authorizes government officials to take certain actions in the future. In *Clapper* v. *Amnesty Int'l*, *supra*, for example, the Court found that the plaintiffs did not have standing to challenge a statute authorizing government surveillance, where their assertions of injury "relie[d] on a highly attenuated chain of possibilities"

about how various entities might act. 133 S. Ct. at 1148; see *id.* at 1148-1150. Nor could the plaintiffs "manufacture standing" by altering their primary conduct "based on their fears of hypothetical future harm that [was] not certainly impending." *Id.* at 1151. Similarly, in *Summers* v. *Earth Island Institute*, 555 U.S. 488 (2009), the Court found no threat of imminent and concrete injury to plaintiffs who challenged regulations authorizing the U.S. Forest Service to take certain land-management actions without satisfying certain procedural prerequisites, *id.* at 495-496, rejecting contentions that an imminent injury could be shown based on a "statistical probability," or even a "*realistic* threat," of harm. *Id.* at 497-500. And in *Laird* v. *Tatum*, 408 U.S. 1 (1972), the Court found a challenge to an Army data-gathering program nonjusticiable notwithstanding the contention that the program "produce[d] a constitutionally impermissible chilling effect upon the exercise of [the plaintiffs'] First Amendment rights," emphasizing that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.* at 13-14.

This Court has, however, permitted plaintiffs challenging a criminal statute that regulates primary conduct to satisfy the imminent-injury requirement by showing that a "credible threat of prosecution" has effectively coerced them to comply with the challenged law. *Humanitarian Law Project*, 130 S. Ct. at 2717; *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (*Farm Workers*); see *MedImmune*, 549 U.S. at 129 (citing cases in which a "genuine threat of enforcement" was sufficient for justiciability). The presence of such a threat does not flow

automatically from the mere existence of a substantive law backed by an enforcement scheme. Rather, when plaintiffs "'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." *Farm Workers*, 442 U.S. at 298-299 (quoting *Younger* v. *Harris*, 401 U.S. 37, 42 (1971)). And the plaintiff must establish a "prospect of immediacy and reality" that an "occasion might arise when [the plaintiff] might be prosecuted." *Zwickler*, 394 U.S. at 109 (internal quotation marks and citation omitted). Even if a plaintiff has been prosecuted for particular conduct in the past, the plaintiff does not show a credible threat of prosecution unless the plaintiff is likely to engage in such conduct in the near future. See *id.* at 104-105 & n.2, 109-110 (plaintiff previously prosecuted under anonymous-handbilling law could not bring pre-enforcement suit where his "sole concern was literature relating to [a] Congressman" unlikely to run again).

In the context of a challenge to a criminal law that directly regulates expression, a plaintiff generally can establish a credible threat of prosecution by alleging an intent to engage in certain speech and conceding that the speech would violate the challenged law. In *Babbitt* v. *United Farm Workers National Union*, *supra*, for example, the Court found a credible threat of prosecution under a statute prohibiting false speech on labor-relations matters, because the plaintiffs alleged a desire to continue speaking on those matters and because inadvertently false speech "is inevitable in free debate." 442 U.S. at 301 (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964)). The

Court in that case also found a credible threat of prosecution when the plaintiffs alleged an intent to continue past conduct that a different aspect of the statute "now arguably prohibited," where it was the plaintiffs themselves who affirmatively argued that the statute covered that conduct. *Id.* at 302-303; see, *e.g.*, *Virginia* v. *American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (finding injury where plaintiffs interpreted statute to apply to their conduct).

A plaintiff who sufficiently alleges an intent to engage in expressive activity in the future, but does not concede that the speech would violate the challenged law, faces a more difficult hurdle. The plaintiff must allege sufficient "evidence" that, even though his speech may not violate the statute, there is a realistic prospect that government authorities would prosecute him. *Harris*, 401 U.S. at 42 (suggesting that a plaintiff described as "uncertain" about whether he would be prosecuted for certain conduct might be able to present "evidence" that he would be). A plaintiff likely could not clear that hurdle simply by alleging that government officials were investigating similar conduct in which the plaintiff had previously engaged, or that government officials had warned the plaintiff of their informal advisory view that the plaintiff had violated the law (particularly if the officials expressed willingness to discuss the matter further). In neither instance would the officials' tentative views or actions in themselves necessarily amount to a "specific threat * * * to arrest or prosecute." *Boyle* v. *Landry*, 401 U.S. 77, 81 (1971). But the hurdle is not insurmountable. In *Steffel* v. *Thompson*, 415 U.S. 452 (1974), for example, the Court found a credible threat of prosecution under a trespass statute based on the

fact that the plaintiff had "been twice warned to stop handbilling that he claim[ed was] constitutionally protected," had "been told by the police that if he again handbill[ed] at the shopping center and disobey[ed] a warning to stop he w[ould] likely be prosecuted," and had witnessed "the prosecution of his handbilling companion." *Id.* at 459.

2. To the extent that petitioners in this case are challenging Ohio's substantive criminal prohibitions on false electoral speech, they can establish an imminent injury by showing a "credible threat of prosecution" under those statutes. Petitioners have carried that burden here by alleging that they intend to "repeat" speech—namely, petitioners' characterization of the Affordable Care Act as "allow[ing] for taxpayer-funded abortions"—that a Commission panel found probable cause to be in violation of Ohio's false-electoral-speech laws. Pet. App. 15a; see *id.* at 3a-4a; see also J.A. 122, 149-150. That speech—which petitioners might direct at candidates who either voted for or supported the Affordable Care Act, see, *e.g.*, J.A. 149—is generalizable enough to create an "immedia[te] and real[]" prospect that "another occasion might arise" in which petitioners would repeat it. *Zwickler*, 394 U.S. at 109. And the Commission panel's probable-cause determination shows a sufficient likelihood of the requisite harm.

In the particular context of this case, the relevant "prosecution" could be regarded as including the proceeding before the full Commission that adjudicates whether a violation of the false-electoral-speech statutes has occurred. See Ohio Rev. Code § 3517.155. Although the focus in evaluating the credible threat of prosecution under a criminal statute should normally

be on the potential for criminal proceedings, this Court has noted that civil-enforcement proceedings can at least sometimes present similar concerns. See *Ohio Civil Rights Comm'n* v. *Dayton Christian Sch., Inc.*, 477 U.S. 619, 626 n.1 (1986); *Farm Workers*, 442 U.S. at 302 n.13. Here, Commission proceedings not only are a precursor to possible criminal prosecution, but also themselves directly affect election-related speech. The State describes the Commission's proceedings as having their own "truth-declaring function" in respect to electoral speech, Br. in Opp. 6 (internal quotation marks and citations omitted), which could impose its own unique burdens in the electoral setting, even in the absence of any criminal prosecution. Cf. *Meese* v. *Keene*, 481 U.S. 465, 473-476 (1987). Indeed, someone found in violation by the Commission is considered "adversely affected" for purposes of seeking judicial review, reflecting the State's view that the Commission's action itself may have a concrete impact in the election context. Ohio Rev. Code § 3517.157(D); see Br. in Opp. 6.

There is no need in this case to decide whether the prospect of a Commission determination alone is sufficient to constitute the sort of "credible threat" necessary for standing. Rather, it is enough to say that the prospect of a Commission determination, combined with the increased prospect of a criminal prosecution following such a determination, is sufficient. It is significant that, under Ohio's statutory scheme, an official and public determination by the Commission, made after a hearing, to the effect that petitioners knowingly misinformed the electorate in the context of an ongoing election could reasonably be expected to reduce the effectiveness of petitioners' election-

related message. Cf., *e.g.*, Pet. App. 3a (noting that the threat of legal action led a billboard operator to refuse to display SBA List's message). It is also significant that Commission proceedings are not part of a broad commercial regulatory scheme in which agency determinations about the lawfulness of particular conduct are a necessary part of doing business. We do not suggest that mere pronouncements by government officials outside of the election context would in themselves be actionable.

The bare fact that someone once tried to initiate a full Commission proceeding against a plaintiff would not itself show a credible threat sufficient to establish standing. In the absence of evidence that another complaint might be filed, any threat of future prosecution would be speculative. See, *e.g.*, *Landry*, 401 U.S. at 80-81; *Zwickler*, 394 U.S. at 109. But the Commission panel's previous probable-cause determination renders the threat in this case sufficiently credible to create a justiciable controversy. Although the determination would not bind the Commission in future cases, it could embolden future complaints against similar speech (by SBA List or COAST) and indicates a sufficient likelihood that such speech would result in full Commission proceedings. Ohio Rev. Code § 3517.156(C)(2) (upon finding probable cause, the panel "*shall* refer the complaint to the full commission") (emphasis added).

In rejecting the significance of the Commission panel's probable-cause determination, the court of appeals relied on *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980). See Pet. App. 10a-11a. That reliance was misplaced. In *Standard Oil*, this Court held that the Administrative Procedure Act (APA), 5 U.S.C. 551 *et*

seq., did not permit a plaintiff to challenge the Federal Trade Commission's issuance of an administrative complaint alleging "reason to believe" that the plaintiff had violated federal law. 449 U.S. at 234-235, 243. The Court reasoned that the complaint was not the sort of "definitive statement of position" or "definitive ruling or regulation," *id.* at 241, 243, that would constitute "final agency action" within the meaning of the APA's authorization of judicial review, 5 U.S.C. 704. 449 U.S. at 238. This case, however, is not an APA action and thus is not subject to the "final agency action" limitation. In addition, unlike the plaintiff in *Standard Oil*, petitioners here are not directly challenging an agency's preliminary determination as such, but instead are relying on the Commission panel's probable-cause determination to demonstrate a credible threat of prosecution under Ohio's false-electoral-speech restrictions.

3. Petitioners' opening brief does not address the justiciability of their claims challenging the state disclaimer law and the Commission's investigatory procedures. See J.A. 125-127 (SBA List complaint Counts 5-6); J.A. 156-157 (COAST complaint Count 7). Even assuming a challenge to the dismissal of those claims were adequately preserved, however, petitioners did not sufficiently allege an imminent injury with respect to those claims.

The Commission panel unanimously concluded that the disclaimer law is preempted by FECA (and thus unenforceable). Pet. App. 44a. Petitioners accordingly cannot demonstrate a realistic prospect that they will ever be subject to prosecution under that law. See *Poe* v. *Ullman*, 367 U.S. 497, 507 (1961) (plurality opinion) ("If the prosecutor expressly agrees not to

prosecute, a suit against him for declaratory and injunctive relief is not such an adversary case as will be reviewed here.") (citing *CIO* v. *McAdory*, 325 U.S. 472, 475 (1945)); *Humanitarian Law Project*, 130 S. Ct. at 2717.

SBA List's claim that the Commission's investigatory procedures "require[] disclosure of past expressions and associations to a political opponent" in violation of the First Amendment appears to be challenging the Commission's discovery procedures. J.A. 125-126; see Ohio Admin. Code 3517-1-09. Those procedures do not regulate primary conduct, compare *Earth Island Institute*, 555 U.S. at 493; it is wholly speculative whether, in some future hearing, discovery of "past expressions and associations" would be requested or that the Commission would allow such discovery, see *Clapper*, 133 S. Ct. at 1148-1150; and petitioners could challenge such discovery in the future if the occasion arises. See p. 27, *infra* (explaining that this claim is also unripe).

B. Only Petitioners' Claims Against The Commission Officials Satisfy Article III's Traceability And Redressability Requirements

In order for petitioners to satisfy all of the requirements for Article III standing, they must show that their injury from the threatened enforcement of the false-electoral-speech restrictions is "fairly traceable to the challenged action of the defendant" and that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Defenders of Wildlife*, 504 U.S. at 561 (alterations and citations omitted). Under the circumstances of this case, petitioners have satisfied those requirements with respect to their claims against the Com-

mission officials who are sued in their official capacities. Petitioners' alleged injury arises from the threat of proceedings before the Commission, which could in turn lead to criminal prosecution, and it appears that a judicial order precluding the Commission officials from undertaking such proceedings would remedy that injury.[1]

Petitioners cannot show traceability and redressability, however, for their claims against Driehaus and the Ohio Secretary of State. It is undisputed that in June 2011, Driehaus moved to Africa for a 30-month Peace Corps mission. Pet. App. 5a; see 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350, at 159-160 (3d ed. 2004) (noting that courts will, if necessary, look outside the pleadings on a motion to dismiss for lack of jurisdiction). The court of appeals correctly concluded that the evidence Driehaus will again run for Congress is "thin at best," and it is thus highly speculative that he would initiate a future Commission proceeding against petitioners. Pet. App. 14a; see *Zwickler*, 394 U.S. at 109 (finding assertion that Congressman might run again insufficient for justiciability).

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[1] Under Ohio Rev. Code § 3517.153(C), a prosecutor may not institute criminal proceedings unless a complaint has first been filed with the Commission and the Commission has completed its proceedings on the complaint. That provision does not expressly state that prosecution is barred if the Commission fails to find, by clear-and-convincing evidence, that a violation occurred. But that appears to be the intended effect of the provision; petitioners read it in that manner (Br. 47); and respondents have not said otherwise in this Court, see Br. in Opp. 6. We therefore proceed on the assumption that an injunction against the Commission officials would afford complete relief by barring *both* Commission proceedings *and* criminal prosecution.

The only potential basis for suing the Ohio Secretary of State is the Secretary's "statutory duty to file a Commission complaint if he 'has or should have knowledge of' an election-law violation." Pet. App. 13a (quoting Ohio Rev. Code § 3501.05(N)(2)). But it is purely speculative that the Secretary would file a complaint in response to statements like those at issue here. As the court of appeals pointed out (*ibid.*), the Secretary did not file a complaint when SBA List engaged in such speech in the past.[2]

II. PETITIONERS' FACIAL FIRST AMENDMENT CHALLENGE TO OHIO'S FALSE-ELECTORAL-SPEECH RESTRICTIONS IS RIPE FOR RESOLUTION

The ripeness doctrine provides an additional limitation on justiciability, "designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies [and] to protect * * * agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 807-808 (2003) (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148-149 (1967)). The doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Id.* at 808 (quoting *Reno* v. *Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)).

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[2] COAST's claims against the Commission itself are barred by sovereign immunity. See *Cory* v. *White*, 457 U.S. 85, 90-91 (1982).

At its most basic level, the ripeness doctrine precludes federal courts from adjudicating claims involving "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-581 (1985) (citation omitted). The doctrine's focus on the likelihood of future events means that it overlaps to some degree with the imminent-injury element of Article III standing. Ripeness analysis, however, additionally requires a focus on "'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Id.* at 581 (quoting *Abbott Labs.*, 387 U.S. at 149); see, *e.g.*, *National Park Hospitality Ass'n*, 538 U.S. at 808. Petitioners' claims in this case satisfy those criteria to the extent petitioners contend that the challenged false-electoral-speech restrictions are wholly invalid under the First Amendment. Petitioners' other claims, however, are not fit for judicial review or have been forfeited.

A. Petitioners' First Amendment Claims Are Ripe To The Extent Petitioners Argue That The False-Electoral-Speech Restrictions Are Entirely Invalid

1. A claim is generally unfit for judicial review when its adjudication would require a court to address the application of law to an abstract factual scenario. In most cases, "[t]he operation of [a] statute is better grasped when viewed in light of a particular application." *Texas* v. *United States*, 523 U.S. 296, 301 (1998). Among other things, a court will often lack sufficient "imagination" to determine the various ways in which a law might operate in practice, *ibid.*; the operation of the law may depend upon the particularized details of agency implementation, see, *e.g.*, *Ohio*

Forestry Ass'n v. *Sierra Club*, 523 U.S. 726, 736 (1998); and for any number of reasons, even a plaintiff's own intended future conduct may not "occur as anticipated, or indeed may not occur at all," *Union Carbide*, 473 U.S. at 580-581. This Court has accordingly explained that where a plaintiff seeks "to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable," the suit "involves too remote and abstract an inquiry for the proper exercise of the judicial function." *International Longshoremen's Union, Local 37* v. *Boyd*, 347 U.S. 222, 224 (1954).

In *Renne* v. *Geary*, 501 U.S. 312 (1991), for example, the Court found a First Amendment challenge to a state law unripe in large part because the case presented "no factual record of an actual or imminent application" of the law "sufficient to present the constitutional issues in 'clean-cut and concrete form.'" *Id.* at 321-322 (quoting *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 584 (1947)). Although plaintiff political-party officials alleged that they wished to endorse candidates in nonpartisan elections, in the face of state law limiting endorsements in such elections, the Court observed that "[w]e do not know the nature of the endorsement," "how [the endorsement] would be publicized," or what "precise language" in the endorsement might lead to an objection from state officials. *Id.* at 322. The Court also noted a question about whether the challenged law even "applie[d] to" individuals like the plaintiffs and raised the possibility that further consideration by the state courts could "provide further definition" to the provision's "operative language." *Id.* at 323.

Even the adjudication of a claim styled as a facial challenge will frequently entail consideration of implementation details more readily evaluated in the context of an actual, as opposed to hypothetical, application of the law. In *National Park Hospitality Ass'n* v. *Department of the Interior*, *supra*, for example, the Court concluded that a "facial challenge" to a regulation about concession contracts should "await a concrete dispute about a particular concession contract," because the parties were "rely[ing] on specific characteristics of certain types of concession contracts to support their positions." 538 U.S. at 812. Similarly, in *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967), the Court reasoned that adjudicating a challenge to an agency's authority to promulgate regulations permitting inspection of certain business facilities would "depend not merely on an inquiry into statutory purpose, but concurrently on an understanding of what types of enforcement problems are encountered by the [agency], the need for various sorts of supervision in order to effectuate the goals of [the governing statute], and the safeguards devised to protect legitimate trade secrets." *Id.* at 163-164. The Court concluded that "judicial appraisal of these factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here." *Id.* at 164.

In some cases, doctrinal considerations will also counsel against pre-enforcement judicial review of a law's facial validity. In *Geary*, for example, the Court emphasized that "[i]t is not the usual judicial practice, . . . nor do we consider it generally desirable, to proceed to an overbreadth issue * * * before it is

determined that the statute would be valid as applied. Such a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws." 501 U.S. at 324 (quoting *Board of Trs., State Univ.* v. *Fox*, 492 U.S. 469, 484-485 (1989)).

2. Applying those principles here, several of petitioners' claims are unripe. First, petitioners' claims challenging the Commission's procedures—SBA List's claim that the Commission's discovery procedures are unconstitutional, J.A. 125-126 (SBA List complaint Count 5), and COAST's claim that Commission officials' nonlegal backgrounds and probable-cause-hearing procedures violate due process, J.A. 158-159 (COAST complaint Count 8)—would be unfit for judicial review, even if a challenge to their dismissal had been preserved. See p. 21, *supra* (explaining that SBA List in any event lacks standing to raise its procedural claim). Assessing these claims in the abstract would require speculation about whether or how certain procedures might, if employed in certain ways in some hypothetical proceeding, violate a party's rights. Review should thus await a case in which "the consequences ha[ve] been 'reduced to more manageable proportions,' and where the 'factual components [are] fleshed out, by some concrete action.'" *Ohio Forestry Ass'n*, 523 U.S. at 736-737 (quoting *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990)).

Second, petitioners' as-applied First Amendment challenges to the false-electoral-speech laws are also unfit for judicial review. See J.A. 123-125 (SBA List complaint Counts 2 and 4); J.A. 154-155 (COAST com-

plaint Counts 2 and 4). The descriptions of the groups as to which application of the laws is alleged to be unlawful—"lobbyists taking positions on political issues" and "citizens and organizations taking positions on political issues," J.A. 123-125, 154—are broad and unclear. It therefore may be difficult, in a pre-enforcement context, for a court to adequately appreciate the contours of petitioners' claims. In addition, petitioners' reference to such groups suggests a belief that the false-electoral-speech restrictions affect those groups differently from how they affect the public at large. That type of argument would benefit from a concrete factual context. See *National Park Hospitality Ass'n*, 538 U.S. at 812.

3. The court of appeals erred, however, in concluding that petitioners' facial First Amendment claims are categorically unfit for judicial review. See Pet. App. 16a-17a; see J.A. 122-124 (SBA List complaint Counts 1 and 3); J.A. 153-154 (COAST complaint Counts 1 and 3). The court reasoned that adjudication of those claims "would require [a court] to guess about the content and veracity of SBA List's as-yet unarticulated statement, the chance an as-yet unidentified candidate against whom it is directed will file a Commission complaint, and the odds that the Commission will conclude the statement violates Ohio law." Pet. App. 16a. To the extent the court of appeals focused on the likelihood of future Commission proceedings, it repeated the errors it made in declining to find a credible threat of prosecution.

The court's concern about the lack of certainty as to the precise content of petitioners' future speech does have some validity. It is not clear, for example, when and how SBA List might engage in the speech it

asserts would be "substantially similar" to the statement criticizing Driehaus, J.A. 122, or when and how COAST might engage in speech criticizing other candidates for their support of the Affordable Care Act, J.A. 149. But to the extent that petitioners' facial First Amendment claims do not depend on any disputed construction of the statutes at issue or any particular application of them, it appears that further factual development "would not * * * significantly advance [a court's] ability to deal with the legal issues presented nor aid [it] in their resolution." *Duke Power Co.* v. *Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 81-82 (1978).

It may be the case that not every objection petitioners might advance in support of their facial First Amendment claims would be fit for judicial review. Petitioners variously contend, for example, that the challenged statutes are vague, overbroad, or lack a required element of actual malice. J.A. 122-124, 153-154. Some or all of those contentions may benefit from awaiting a concrete controversy (which might, for example, bring necessary context to a vagueness argument); allowing the Commission or state courts additional opportunity to construe the state laws (which might shed light on the statutory elements), see *Farm Workers*, 442 U.S. at 307-312 (finding abstention appropriate to allow state courts to construe ambiguous state law);[3] or following the "usual judicial

[3] Just as a federal court can abstain from adjudicating a constitutional challenge to a state statute that would benefit from an authoritative interpretation by a state agency or court, a federal court in certain circumstances can similarly decline as a matter of equitable discretion to consider declaratory or injunctive relief with respect to the constitutionality of a federal statute that is

practice" of avoiding the adjudication of an overbreadth challenge "before it is determined that the statute would be valid as applied," *Geary*, 501 U.S. at 324. But at least to the extent that petitioners argue (see, *e.g.*, Br. 10) that the challenged laws fail strict scrutiny simply because the laws criminalize false statements in an electoral campaign, Pet. 33, and permit a state agency "to serve as arbiter of political truth," Pet. 6, a court could review petitioners' argument even in the absence of an actual application of the challenged laws. See 5 *Federal Practice & Procedure* § 1219, at 281-284 (observing that courts generally permit a plaintiff to augment or supplement the legal theories listed in a complaint).

4. Had COAST preserved any challenges to the dismissal of its claims that the false-electoral-speech provisions are preempted by FECA, see J.A. 155-156 (COAST complaint Counts 5-6), those claims (in contrast to the preemption claim about the separate disclaimer law) likely would have been justiciable. Unlike, for example, the question whether an agency has authority to promulgate a regulation (which often will depend on a number of subsidiary factual considerations, see, *e.g.*, *Toilet Goods Ass'n*, 387 U.S. at 164), the question whether 2 U.S.C. 453(a) (which generally preempts "any provision of State law with respect to election to Federal office") wholly preempts Ohio's false-electoral-speech laws in the context of federal campaigns would not likely benefit from further rec-

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ambiguous with respect to its application in particular circumstances. That approach could, for example, allow an agency with responsibility for taking administrative or other enforcement action to construe and apply the statute in the first instance or to bring an actual enforcement proceeding.

ord development. It would be inappropriate, however, to reverse the dismissal of COAST's preemption claims when petitioners have not raised any specific argument contesting their dismissal. Cf. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 224 (1997) (declining to address issue that received "scant argumentation").

B. The Hardship To Petitioners From Chilling Election-Related Speech Favors Review

In analyzing the "hardship to the parties of withholding court consideration" for purposes of determining ripeness, this Court has also looked to "whether delayed review would cause hardship to the plaintiffs" and "whether judicial intervention would inappropriately interfere with further administrative action." *Ohio Forestry Ass'n*, 523 U.S. at 733 (citation omitted). In the particular context of petitioners' challenge to Ohio's restrictions on electoral speech, the hardship analysis favors a finding of ripeness.

1. A plaintiff generally has suffered "'hardship' as this Court has come to use that term" only when the plaintiff's primary conduct is directly affected. *Ohio Forestry Ass'n*, 523 U.S. at 733-734; see *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 386 (1999) (explaining that in the absence of an "immediate effect on [a] plaintiff's primary conduct, federal courts normally do not entertain pre-enforcement challenges to agency rules and policy statements"); see, *e.g.*, *Toilet Goods Ass'n*, 387 U.S. at 164 (finding insufficient hardship where the case did not present "a situation in which primary conduct [was] affected"). As a general rule, however, a plaintiff cannot satisfy the hardship requirement merely by alleging that, in the management of its affairs, it faces "uncertainty" as to the meaning

or validity of a legal rule, for otherwise "courts would soon be overwhelmed with requests for what essentially would be advisory opinions." *National Park Hospitality Ass'n*, 538 U.S. at 810-811; see *International Longshoremen's Union*, 347 U.S. at 224. And a plaintiff cannot show "hardship" simply by alleging that it would profit from branching out into some new type of conduct in which it has never tried to engage before (say, the marketing of a new product) that might violate some preexisting legal rule with which the plaintiff has previously been able to comply. Cf., *e.g.*, *Ohio Forestry Ass'n*, 523 U.S. at 734 (focusing in hardship analysis on whether agency action would "force" a plaintiff "to *modify* its behavior") (emphasis added); *National Wildlife Fed'n*, 497 U.S. at 891 (explaining that ripeness under the APA generally requires "concrete action" except when "a substantive rule * * * requires the plaintiff to *adjust* his conduct immediately") (emphasis added). In that situation, too, courts and agencies could be inundated with suits seeking advisory opinions.

This case does not require the Court to determine precisely when an alleged chilling of speech constitutes hardship, because it presents that issue in a unique election-related context that makes the hardship to petitioners particularly clear. Petitioners have sufficiently alleged that a credible threat of prosecution will chill them from engaging in speech relating to elections for public office, the very type of speech to which the First Amendment "has its fullest and most urgent application." *Eu* v. *San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971)). As petitioners explain (Br. 40), under Ohio law, candi-

dates who are the subject of such speech can try to silence it by complaining to the Commission and thereby tying up the speaker in administrative litigation during the short window of time in which the electoral speech would be most effective.[4]

The court of appeals largely disregarded these considerations in favor of focusing on evidence suggesting that the Commission proceedings did not actually deter SBA List from disseminating its message. Pet. App. 17a-18a. The court correctly recognized that evidence of how agency action has affected a plaintiff's conduct is an important factor in the hardship analysis. In this case, however, SBA List's particular reaction to the Commission proceedings during the 2010 election cycle does not eliminate the objectively credible threat of prosecution that petitioners face if they engage in similar speech in future election cycles.

2. A pre-enforcement suit is not ripe where it would "inappropriately interfere with further administrative action." *Ohio Forestry Ass'n*, 523 U.S. at 733. As this Court has recognized, judicial review should not "hinder [an agency's] efforts to refine its policies" or "interfere with the system that [the legislature] specified for the agency to reach * * * decisions." *Id.* at 735-736. Where, for example, case-by-case

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[4] Ohio law does allow a potential speaker to seek an advisory opinion from the Commission that can immunize the speaker from future prosecution. See Ohio Rev. Code § 3517.153(D). In the short timeframe of an election cycle, however, it may not be feasible to obtain such an opinion. Petitioners here presumably have had ample time to seek an advisory opinion during the pendency of this litigation. But such an advisory opinion would effectively be a Commission determination about the truthfulness of SBA List's prior speech, and it would thus in itself present hardship concerns. See pp. 18-19, *supra*.

adjudication by an agency protects the public from tangible harms, such as the sale of unsafe products on the market, a pre-enforcement challenge may be inappropriate. The Court has also long rejected the notion that plaintiffs can get out ahead of an agency by asking a court "to rule that a statute the sanctions of which had not been set in motion against individuals on whose behalf relief was sought, because an occasion for doing so had not arisen, would not be applied to them if in the future such a contingency should arise." *International Longshoremen's Union*, 347 U.S. at 223-224.

Here, however, so long as petitioners' suits are restricted to their facial First Amendment challenges to Ohio's false-electoral-speech laws, those particular considerations do not counsel in favor of delaying judicial review. Limited to those claims, the suits would not interfere with the Commission's ability to make case-by-case determinations about the legality of particular practices under state law. Rather, the suits would simply challenge Ohio's authority to prescribe criminal sanctions for certain types of false electoral speech at all. Such a challenge would not unduly interfere with agency decisionmaking and, in particular, does not present any concerns sufficient to overcome petitioners' strong interest in immediate resolution of their electoral-speech-related claims.[5]

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[5] The district court erred in concluding (Pet. App. 34a-37a) that SBA List's claims are moot. Although the events of the 2010 election that originally led to the suit have now passed, SBA List's claims for injunctive relief are live with respect to future election cycles. See, *e.g.*, *Davis* v. *FEC*, 554 U.S. 724, 735-736 (2008).

CONCLUSION

The Court should reverse the court of appeals' judgment with respect to petitioners' claims against the Commission officials seeking to preclude enforcement of Ohio's false-electoral-speech provisions on facial First Amendment grounds. The Court should otherwise affirm that judgment.

Respectfully submitted.

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