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

BRIEF OF *AMICUS CURIAE* FIRST AMENDMENT LAWYERS ASSOCATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The First Amendment Lawyers Association ("FALA") is an Illinois-based, not-for-profit organization comprised of approximately 200 attorneys who routinely represent businesses and individuals that engage in constitutionally-protected expression. FALA's members practice throughout the United States and Canada in defense of the First Amendment and, by doing so, advocate against governmental forms of censorship. Member attorneys frequently litigate the facial validity of speech-restrictive legislation, often by way of anticipatory challenges that arise when a law is newly enacted and has not yet been enforced. In fact, many of the Court's recent pre-enforcement First Amendment cases were either argued by FALA attorneys or involved the participation of FALA attorneys in some capacity. *See, e.g., Ashcroft v. Free Speech Coalition, Inc.*, 535 U.S. 234 (2002) (successful challenge to Child Pornography Prevention Act argued by FALA member and former president H. Louis Sirkin); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (successful challenge to "signal bleed" portion of Telecommunications Act argued by FALA member and current president Robert Corn-Revere). In addition, FALA has a tradition of submitting *amicus* briefs to the Court on issues

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[1] This brief was authored by the counsel for *amicus curiae* First Amendment Lawyers Association ("FALA") as listed above. No other person or entity besides FALA has contributed to the costs of preparing and submitting this brief. Counsel for both Petitioner and Respondent have filed blanket consents to the filing of *amicus* briefs. This brief is therefore submitted pursuant to Supreme Court Rule 37.3(a).

pertaining to the First Amendment. *See, e.g., City of Littleton v. Z.J. Gifts D-4, LLC*, 2004 WL 199239 (Jan. 26, 2004) (*amicus* brief submitted by FALA); *United States v. 12,200-ft Reels of Super 8mm Film*, 409 U.S. 909 (1972) (order granting FALA's motion to submit *amicus* brief).

Given the nationwide span of their experience and the specialized nature of their practices, FALA attorneys can better comment upon the practical application of the Court's pre-enforcement standing jurisprudence than perhaps any other singular person, body, client, or corporate entity. To be sure, FALA's members have repeatedly witnessed the difficult choices speakers are required to make when faced with a law that possibly restricts or even criminalizes their expression. Absent the ability to challenge the validity of such laws prior to their threatened enforcement, the clients of FALA members would likely be required to engage in self-censorship or, worse, cease their expression altogether. Such a result not only adversely affects the clients of nearly every FALA attorney, but it also contravenes the First Amendment protections FALA and its members are dedicated to preserving. FALA can therefore offer a unique perspective on the valid role that pre-enforcement facial challenges serve in shaping the Court's free speech jurisprudence.

SUMMARY OF ARGUMENT

Pre-enforcement anticipatory challenges to laws that burden or criminalize protected expression have been the leading vehicle by which the Court has shaped its First Amendment doctrine. To be sure, lawsuits seeking to invalidate regulations that violate the First Amendment on their face have been successful across

a wide variety of content and a broad spectrum of speech categories. From the campaign speech at issue in *McConnell v. Federal Election Comm'n*, 540 U.S. 90 (2003), to the sexually oriented expression restricted by the Child Pornography Prevention Act in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the Court has preserved an immeasurable quantity of expression by striking down speech-restrictive laws in advance of their application.

The Sixth Circuit ruling in this case threatens to undermine the important role anticipatory challenges serve by restricting their filing to only those limited instances when prosecution under the challenged law is imminent. *See Susan B. Anthony List v. Driehaus*, 525 Fed. Appx. 415 (6th Cir. 2013). As discussed below, if permitted to stand, the Sixth Circuit's high standard would place an extraordinary burden on speakers and would lead to results that are antithetical to the First Amendment. For example, speakers may be unable to appropriately time the filing of a pre-enforcement challenge so as to avoid federal court abstention and may instead be unwittingly and improperly charged for violating the law. *See Younger v. Harris*, 401 U.S. 37 (1971). This forces those wishing to express themselves to shoulder the burden of defending themselves in criminal court, a costly and frightening proposition. *See Yeager v. United States*, 557 U.S. 110, 117-18 (2009). In addition, the loss of the ability to challenge a statute in advance of its application also creates an undue risk of self-censorship to avoid enforcement, as well as the increased likelihood that speakers will silence themselves altogether to avoid government interference. In each of these instances, constitutionally-protected expression is suppressed

that could have been preserved by way of an anticipatory challenge.

Amici write separately to emphasize the critical role anticipatory challenges play in preserving freedom of speech and how such challenges have provided the mechanism for invalidating a wide swath of unconstitutional regulations that would otherwise silence protected expression. As these cases reflect, a more stringent standing requirement does not facilitate the justiciability of facial challenges. Indeed, allowing anticipatory challenges is critical to addressing unconstitutional laws *before* they have a chilling effect or cause injury in having to defend or respond to enforcement activities. To protect the core values of the First Amendment, and to ensure that no more speech than necessary is silenced by unlawful governmental regulation, the Court should reject the Sixth Circuit's approach and should instead maintain its tradition of permitting parties to challenge speech-restrictive laws before they are enforced.

ARGUMENT

I. Pre-Enforcement Anticipatory Challenges Have Served An Important Role In Crafting The Court's First Amendment Free Speech Doctrine.

The Court has enjoyed a long and storied history of permitting speakers to challenge laws restricting their speech in advance of criminal prosecution. As part of this tradition, parties wishing to challenge a statute before its enforcement need only demonstrate a "realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement."

O'Shea v. Littleton, 414 U.S. 488, 494 (1974). To be sure, speakers have never been required "to await the consummation of threatened injury to obtain preventive relief." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). Further, "[w]hen contesting the constitutionality of a criminal statute, 'it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.'" *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *see also Epperson v. Arkansas*, 393 U.S. 97 (1968). When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe v. Bolton*, 410 U.S. 179, 188 (1973). Indeed, plaintiffs bringing First Amendment challenges to criminal laws have never been required to "first expose [themselves] to actual arrest or prosecution." *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979). This standard enables a plaintiff to challenge the constitutionality of a criminal statute without being "required to await and undergo a criminal prosecution as the sole means of seeking relief." *Id.* (quoting *Doe*, 410 U.S. at 188).

If permitted to stand, the Sixth Circuit's ruling in this case – that plaintiffs must face an "imminent threat of prosecution" before filing suit to challenge speech-restrictive laws – endangers the valuable role that pre-enforcement challenges have played in shaping First Amendment doctrine. *See Susan B. Anthony List v. Driehaus*, 525 Fed. Appx. 415, 419-20 (6th Cir. 2013) (requiring plaintiff to demonstrate a

"real and immediate" threat of prosecution, an "indication of imminent enforcement," and that it is "likely" he or she will be "threaten[ed] with prosecution . . . soon" to establish First Amendment standing); *see also Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002). As discussed below, anticipatory challenges have provided the mechanism for invalidating a wide swath of unconstitutional regulations that would otherwise silence protected expression. It is precisely because pre-enforcement lawsuits have provided the vehicle by which the courts can safeguard First Amendment rights that the Court should reject the Sixth Circuit's restrictive approach and should instead retain its traditional relaxed standing principles in the free speech context.

A. Election Speech

By way of example, the Court's doctrine regarding core political speech has arisen in large part due to anticipatory challenges to laws restricting campaign contributions and political advertisements. The development of election speech doctrine through a triumvirate of recent cases – *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003); *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); and *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010) – demonstrates this point. As noted by the Court in *Citizens United*, "[p]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence…[because] [t]he right of a citizen to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-

government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339-340.

An early pre-enforcement challenge to Section 203 of the Bipartisan Campaign Reform Act of 2002 ("BRCA"), which extended restrictions on independent corporate expenditures, was unsuccessful in *McConnell*. *Id*. Nevertheless, the same provision was attacked in an as-applied challenge in *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 546 U.S. 410 (2006), a challenge which the Court held could be maintained. *Id*. A year later, in *Federal Election Commission v. Wisconsin Right to Life*, *Inc*., 551 U.S. 449 (2007) ("*WRTL II*"), the Court sustained an as-applied challenge raising a similar claim to the validity of BCRA Section 203. *Id*. In a careful attempt to simultaneously avoid overruling *McConnell* and to vindicate the First Amendment claims made by the *WRTL II* parties, the controlling opinion in *WRTL II* refrained from invalidating the statute, except as applied to the facts immediately before it. *Id*. This series of holdings ultimately led to the *Citizens United* majority's specific admonition that consideration of a facial challenge was absolutely necessary, as "[a]ny other course of decision would prolong the substantial, nationwide chilling effect caused by…prohibitions on corporate expenditures." *Citizens United*, 558 U.S. at 333. Thus, although *McConnell* did not result in the facial invalidation of the BRCA, it laid the foundation for subsequent as applied and constitutional challenges to the provision. As a result, even where unsuccessful, anticipatory challenges laid the groundwork for future decisions that protect and preserve political expression.

B. Commercial Speech and Related Corporate Expression

Although the Court reviews laws curtailing commercial speech under a somewhat more relaxed standard than other forms of protected expression, *Edenfield v. Fane*, 507 U.S. 761, 767 (1993), pre-enforcement challenges are allowed in this context in order to preserve First Amendment values. As the Court has previously stated, "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996). Yet, in order to treat as skeptical those regulations that potentially curtail the First Amendment guarantee to free speech, the courts must have the opportunity to review provisions as they affect the messages contained in protected commercial expression, not after the Government has drawn its sword.

For example, at issue in *Edenfield v. Fane* was a provision of Florida's administrative code that prohibited certified public accountants (CPA's) from "direct, in-person, uninvited solicitation." *Id.* at 764. The plaintiff, a CPA who regularly made unsolicited telephone calls and scheduled individual meetings with businesses, was prohibited from promoting his CPA practice under this administrative rule. *Id.* at 763. Before the Rule was enforced against him, Fane sued in federal district court, claiming that the anti-solicitation rule violated the First Amendment, arguing that it was difficult to persuade a business to change accounting services without first having a "detailed

discussion of the client's needs and the CPA's expertise, services and fees." *Id.* at 764. The Court agreed that Fane's solicitation activities constituted protected commercial speech. *Id.* at 765. Acknowledging that commercial solicitation "may have considerable value," the Court emphasized the benefits of allowing "direct and spontaneous communication between buyer and seller." *Id.* at 766.

The risks to Fane in proceeding with his speech absent the ability to challenge the restriction in court were daunting. He could have been perceived as a law-breaker in the eyes of both current and potential clients, thereby undermining the exact purpose his speech was intended to serve. In a profession that significantly benefits from a "[p]ersonal interchange [that] enables a potential buyer to meet and evaluate the person offering the product or service," *id.* at 766, the negative association with violating the law would all but destroy Fane's ability to propose his services to potential clients. Likewise, if Fane had chosen to acquiesce to Florida's unconstitutional anti-solicitation ban, he would have been severely crippled in attempting to build his practice. *See id.* at 763. Thus, Fane's ability to challenge the law prior to its enforcement against him was critical to preserving his First Amendment rights.

Pre-enforcement challenges are critical to enforcing the right to speech by corporate purveyors across many spectrums. For example, in *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011)[2], organizations who

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[2] Although not technically a commercial speech case, *Brown* emphasizes that anticipatory challenges can preserve speech that

represented both the "video-game and software industries," brought a pre-enforcement challenge to a California law prohibiting the sale or rental of "violent video games" to minors and requiring the packaging to contain the label "18." *Id.* at 2732-33. The district court concluded the California law violated the First Amendment on its face. *Id.* The Court of Appeals affirmed, and after granting certiorari, the Court affirmed the lower court's decision. *Id.*

Reviewing the law under strict scrutiny, the Court determined that "California has singled out the purveyors of video games for disfavored treatment–at least when compared to booksellers, cartoonists, and movie producers–and has given no persuasive reason why." *Id.* at 2740. Absent a compelling justification for this differential treatment, California's "effort to regulate violent video games" failed to survive the strict scrutiny analysis. *Id.* at 2741. Yet, if instead of challenging the statute in federal court, the plaintiffs had voluntarily violated the statute and risked enforcement, they could have been penalized up to $1,000 for each separate offense. *See* Cal. Civ. Code § 1746.3 (West 2006). Considering that more than 298 million new video games are sold in the United States each year, the cost of violating the statute was simply too prohibitive to risk. *See* Stephen E. Siwek, *Video Games in the 21st Century: The 2010 Report*, Entertainment Software Association (2010), available at http://www.theesa.com/facts/pdfs/VideoGames21stC

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is related to or an integral part of a significant corporate industry. *Playboy Entertainment*, 529 U.S. 803, is instructive on this point as well.

entury_2010.pdf. Thus, without the opportunity to bring a pre-enforcement challenge, the video game and software industries would potentially have been silenced by an unduly burdensome restriction on their freedom of commercial expression.

Similar restrictions on commercial speech have been invalidated in pre-enforcement challenges brought in this Court by the pharmacy industry, *Thompson v. W. States. Med. Ctr.*, 535 U.S. 357, 360 (2002); the alcohol industry, *44 Liquormart*, 517 U.S. 484; the utility industry, *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980); and, most recently, in the lower federal courts by the tobacco industry, *see, e.g., R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, 696 F.3d 1205 (D.C. Cir. 2012) (vacating cigarette labeling requirement and remanding to FDA). Thus, anticipatory challenges have played a significant role in preserving the right of commercial speech across a wide range of enterprise.

C. Sexually Explicit Speech

In *Reno v. American Civil Liberties Union*, 521 U.S. 844, 861 (1997), the Court allowed a group of twenty plaintiffs to bring a First Amendment challenge to two provisions of the Communications Decency Act of 1996 "immediately after the President signed the statute." Those provisions prohibited the knowing: 1) transmission of obscene images to anyone under 18 years of age, and 2) "sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age." *Id.* at 859. The Court permitted the plaintiffs' First Amendment challenge to proceed without requiring proof that they faced imminent, real, and likely prosecution. In reaching the

merits of the plaintiffs' First Amendment claim, the Court recognized that the statute at issue was a "matter of special concern" because it was a "criminal statute," and noted that "[t]he severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *Id.* at 872. The plaintiffs' ability to challenge the statute prior to its enforcement was significant, because the Court ultimately invalidated the provisions in question, thereby preserving a vast quantity of speech on the Internet. *Id*. at 885 ("The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."); *see also Playboy Entertainment*, 529 U.S. at 826-27.

Similarly, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 243 (2002), the Court permitted a group of plaintiffs, ranging from an adult-entertainment trade association to a photographer specializing in erotic images, to bring a First Amendment facial challenge against certain provisions of the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2251 *et seq.* ("CPPA"). The provisions at issue in *Free Speech Coalition* prohibited the possession or distribution of sexually explicit images that appeared to depict minors, even if the images were in fact produced without using minors. *Id.* at 239. The Court allowed the plaintiffs to proceed with their challenge – without having to prove an imminent threat of prosecution – because "a law imposing criminal penalties on protected speech is a stark example of speech suppression." *Id.* at 244. And as the Court pointed out, "few legitimate . . . speakers . . . would risk distributing [material] in or near the uncertain reach of this law."

Id. As was the case with *Reno v. ACLU*, the Court granted the Free Speech Coalition's challenge to the law and invalidated the CPPA on overbreadth grounds. *Id*. at 258.

In both the *ACLU* and *Free Speech Coalition* cases, online expression was protected from government censorship directly because the plaintiffs were permitted to sue before the laws in questions were enforced against their members.

D. Licensing and Permitting Regulations on Speech

Anticipatory challenges have also played a significant role in shaping the First Amendment analysis that is applied to licensing and permitting regulations. In fact, one of the Court's leading pronouncements on First Amendment standing – *City of Lakewood v. Plain Dealer*, 486 U.S. 750 (1988) – arose in a pre-enforcement capacity. The procedural history of the case is instructive. *See Plain Dealer Publishing Co. v. City of Lakewood*, 794 F.2d 1139 (6th Cir. 1986). At issue in the case was the distribution of *The Plain Dealer* newspaper - which at the time had the largest circulation of any daily paper in Ohio - within the City of Lakewood, a Cleveland suburb with a population of approximately 60,000 people. *Id*. at 1141. The newspaper company notified the City that it wished to distribute its newspapers to the public through news racks placed on public rights of way within Lakewood and sought the City's cooperation in allowing news racks at 18 locations along three major roads. *Id*. Relying on an ordinance that prohibited the private placement of any structure on public property, the City denied the newspaper's requests and refused

a meeting with Plain Dealer officials. *Id*. The City appeared to be singling out the newspaper for disparate treatment, because it simultaneously allowed telephone booths, bus shelters, mail boxes and utility appliances on its public ways in spite of the ordinance. *Id*. at 1147. Because the City foreclosed negotiations, the newspaper filed an action in the Northern District of Ohio seeking injunctive relief and a declaration that the ordinance violated the First and Fourteenth Amendments of the Constitution. *Id*. at 1141. The district court found the prohibition unconstitutional, but delayed entry of a permanent injunction for 60 days to give the city time to amend its law. *Id*. In response, Lakewood adopted two ordinances allowing the placement of structures on city property under certain conditions. Lakewood, Ohio Codified Ordinance §§ 901.18, 901.181 (1984) (cited in *Plain Dealer*, 486 U.S. at 753). One ordinance gave the mayor authority to grant or deny annual news rack permit applications, subject to several conditions, including: 1) approval of news rack design by the Lakewood Architectural Review Board; 2) an indemnification agreement, guaranteed by a $100,000 insurance policy, to protect the City against liability for use and placement of the news racks; and 3) any "other terms and conditions deemed necessary and reasonable by the Mayor." *Id*. at § 901.18. The newspaper chose not to seek a permit under the revised ordinances. Instead, the newspaper amended its federal complaint to assert a facial challenge to the amended enactments. *Plain Dealer*, 794 F.2d at 1143. After the district court rejected the newspaper's claims, the case was appealed to the Sixth Circuit, which upheld the news rack prohibition on one

of the three major thoroughfares, but found the three licensing conditions to be unconstitutional. *Id*. at 1146.

In affirming and remanding the Sixth Circuit's decision, the Court held that the newspaper had standing to bring a facial challenge to the ordinance without first applying for and being denied a permit. *Plain Dealer*, 486 U.S. 750. As the Court explained, a licensing statute that gives government officials unbridled discretion over the permission or denial of expressive activity constitutes a prior restraint. *Id*. at 757. Alleviating such a regime may actually require a facial challenge because "the mere existence of a licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *Id*. Moreover, as the Court explained, when a licensing regime lacks standards limiting the licensor's discretion, it is difficult for courts to discern whether the licensor is engaged in impermissible content-based discrimination. *Id*. The delay and challenges "inherent in the 'as applied' challenge can itself discourage litigation," making any eventual relief "too little too late." *Id*. at 758. In this event, opportunities for speech will have been permanently lost. *Id*.

Had the restrictive approach to pre-enforcement review taken by the Sixth Circuit in this case been imposed in *Plain Dealer*, newspaper publishers, distributors, and readers alike would have been subjected to a licensing regime that indefinitely burdened their First and Fourteenth Amendment rights and created a distinct risk of prolonged government censorship. Such an outcome would also

have undermined long-standing First Amendment jurisprudence designed to limit the government's ability to suppress expression before it has been communicated, namely the doctrines of prior restraint, overbreadth, and vagueness.

In like manner, had the Sixth Circuit's restrictive approach to pre-enforcement review been imposed on the petitioners in *Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002), religious organizations and their individual members would have been forced to choose between violating either a criminal ordinance or expressing their deeply-held moral beliefs. The *Watchtower* case involved a Village of Stratton ordinance which made it a misdemeanor to engage in door-to-door advocacy for any "cause" without first registering for and receiving a permit from the office of the mayor. Village of Stratton, Ohio Ordinance § 1998-5; *Watchtower Bible*, 536 U.S. at 165-66. The ordinance also required that a permit bearing the permit-holder's name be carried on one's person and be produced upon demand by police or residents. *Id*.

The regulation was challenged in federal court by a group of Jehovah's Witnesses "who consider[ed] it part of their individual responsibility before Jehovah God to follow Jesus' example and obey his commandment to go from house to house to speak to the people about the Kingdom of God." Brief for *Watchtower* Petitioners, 2001 WL 1576397, at *2. The suit was filed against a backdrop of hostility between municipalities and the Jehovah's Witnesses regarding their door-to-door

ministry.[3] *Id*. Believing they derived their authority from scripture and that seeking a permit from a municipality to preach would amount to "an insult to God," the Petitioners did not apply for a permit. *Watchtower Bible*, 536 U.S. at 157-58. Instead, the Witnesses mounted a pre-enforcement facial challenge on First Amendment grounds, alleging that the ordinance interfered with their protected free speech and exercise rights. *Id.* at 153. The Court agreed. *Id*. at 150. Considering the ordinance as it applied to religious proselytizing, anonymous political speech, and the distribution of handbills, the Court found: 1) that the ordinance necessarily resulted in surrender of anonymity; 2) that the permitting requirements imposed an objective burden on religious and political speech; 3) that the ordinance effectively banned a significant amount of spontaneous speech; and 4) that the ordinance was not narrowly tailored to the village's interest in protecting the privacy of residents or preventing fraud and crime. *Id*.

Stratton is by no means the first municipality that has attempted to use permitting schemes to prohibit or regulate protected expressive activities of Jehovah's Witnesses and others. However, the breadth of First Amendment interests burdened by the Stratton ordinance is particularly noteworthy. The scope of the ordinance was so overly broad that it impinged not only the protected religious activities of Jehovah's Witnesses, but also the rights of those not before the

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[3] Difficulties between ministers associated with a particular congregation of Jehovah's Witness in Wellsville, Ohio and Village of Stratton officials dated back to at least 1979. *See* Brief for *Watchtower* Petitioners, 2001 WL 1576397.

Court, including other religious and political advocates and all potential listeners. As the Court explained, "[i]t is offensive – not only to the values protected by the First Amendment, but to the very notion of a free society – that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so." *Watchtower Bible*, 536 U.S. at 165. The ability of the Jehovah's Witness Petitioners in *Watchtower* to challenge the licensing ordinance before it was enforced therefore preserved the right of countless speakers to present and consume protected expression.

II. Absent The Ability To Raise A Pre-Enforcement Challenge To The Facial Validity Of Laws Restricting Speech, Speakers Will Be Forced To Engage In Decision-Making That Is Antithetical To The First Amendment.

In light of the significant role anticipatory challenges have played in preserving free expression across a wide range of content, the elimination of pre-enforcement facial challenges would pose significant risks to both the quality and quantity of speech available in the marketplace of ideas. For example, in the commercial speech context, speakers proposing business transactions may be reluctant to place their professional reputations and livelihoods at stake by waiting until prosecution is imminent to file suit. As highlighted by the *Fane* case, it is imperative that commercial speakers have advance knowledge of whether their speech is constitutionally protected and therefore permitted or otherwise subject to governmental regulation. *Fane*, 507 U.S. at 763, 766.

Absent the ability to seek a declaratory judgment prior to enforcement, companies are not likely to invest financial and human resources in advertisements and solicitations that may result in criminal charges or hefty civil fines. As such, commercial speech will likely disintegrate if the Sixth Circuit's heightened standing requirements are upheld. And of course, curtailing speech proposing commercial transactions is likely to have an overall impact on commerce as well. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

Moreover, as was the case with the statute invalidated in *Free Speech Coalition*, 535 U.S. 234, speakers could fail to time the filing of their lawsuits appropriately and could instead wind up being criminally prosecuted under unconstitutional laws. Prior to the Court's *Free Speech Coalition* decision striking down the CPPA, several individuals had been charged with and convicted of federal felonies for violating the Act. *See, e.g., United States v. Fox*, 248 F.3d 394, 398-99 (5th Cir. 2001) (sustaining defendant's CPPA conviction and 46-month prison sentence); *United States v. Mento*, 231 F.3d 912 (4th Cir. 2000) (upholding constitutionality of defendant's CPPA conviction). These individuals shouldered the weighty burden of defending themselves against unconstitutional criminal charges, as well as serving prison sentences for invalid convictions, before the law was declared invalid. *See Yeager*, 557 U.S. at 117-18 (noting that criminal prosecution subjects defendant to "embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty"). If

permitted to stand, the Sixth Circuit's decision below increases the likelihood that speakers, like Fox and Mento, who lose the race to court to aggressive prosecutors will wrongfully face criminal sanctions for their speech. And once an individual faces criminal charges, it is unlikely that he will be able to separately challenge the facial validity of the law in a civil suit or to otherwise obtain relief from prosecution. *See Younger v. Harris*, 401 U.S. 37 (1971) (requiring federal courts to abstain from ruling upon constitutional issues with state criminal prosecutions while the state criminal charges are pending). Thus, the elimination of anticipatory challenges as a vehicle for vindicating First Amendment rights would likely lead to the filing of more and more criminal charges against protected speech.

In the face of this possibility, it is also possible that speakers who are unwilling to risk imminent prosecution will censor their speech in burdensome ways or eliminate it altogether. While there is little case law to cite as actual proof of the chilling effect a speech-restrictive law imposes, that fact is self-fulfilling. Speakers who chose not to present expression because it may trigger a criminal or civil penalty do not wind up in court; rather, their First Amendment injury by its very nature occurs privately, quietly, and outside the view of the judiciary. Each of these outcomes is fundamentally antithetical to the ideal of free expression protected by the First Amendment. As such, the Sixth Circuit's restrictive standing approach cannot be permitted to stand.

CONCLUSION

For the reasons set forth in this brief, the Court should maintain its traditional standing doctrine and permit speakers to raise facial challenges to laws restricting their expression, without regard to whether an actual prosecution is imminent. As discussed above, anticipatory challenges have played an important role in shaping the Court's First Amendment jurisprudence. To be sure, the Court's leading cases involving election speech, commercial speech, sexually explicit speech, and licensing of speech-related conduct and expression have all arisen out of anticipatory challenges to facially invalid laws. By permitting speakers to raise these issues prior to prosecution, the Court has preserved a vast amount of constitutionally protected expression that would otherwise be subject to unlawful government restriction.

The potential consequences to a requirement that speakers wait to sue until they are threatened with prompt prosecution are dire. Speakers could censor their speech in order to comply with invalid laws, thereby artificially reducing the quality of protected expression available in the free speech marketplace. Speakers could also refuse to censor their speech and instead face actual criminal prosecution, in which case they would be unable to bring a facial challenge in federal court. *See Younger v. Harris*, 401 U.S. 37 (1971). In this event, those whose expression should never have been criminalized in the first place will be unfairly forced to bear the high burden of defending themselves against criminal allegations. Even worse, speakers could stop speaking altogether, reducing not only the quality of speech available on a particular

topic, but the quantity of speech as well. These outcomes are fundamentally inconsistent with the notion of free speech protected by the First Amendment.

To preserve the right of free expression, and to ensure that the government restricts no more speech than is constitutionally permissible, the Court should retain the ability to raise pre-enforcement anticipatory challenges to laws that restrict First Amendment freedoms. As *amicus curiae*, the First Amendment Lawyers Association urges reversal.

March 3, 2014

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