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 Illinoi s-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 challe

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 en tity. 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 abilit y 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

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

"real and immediate" threat of prosecution, an "indication of imminent enforcement," and that it is

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

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-

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

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 th e 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

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 ordi nance also required that a permit bearing the permit-holder's name be carried

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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-

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

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

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

Respectfully submitted,

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