No. 12-553

In the Supreme Court of the United States

GARY GLENN; PASTOR LEVON YUILLE;
PASTOR RENE B. OUELLETTE;
PASTOR JAMES COMBS,
Petitioners,

v.

ERIC H. HOLDER, JR.,
IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL
OF THE UNITED STATES,
Respondent.

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

PETITIONERS' REPLY BRIEF

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I. The Attorney General Cannot Refute the Plain Language of the Act, which Does Not Require the Commission of a Physical Assault or Any Physical Contact Whatsoever, and the Plain Language of the Rules of Construction, which Permits Application of the Act to Religious Exercise, Speech, Expression, and Association.

A court's review of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249 ("Hate Crimes Act"), must focus on the language chosen by Congress and not the Attorney General's interpretation and application of that language. *See* Resp. Br. at 8 (citing the testimony of the Attorney General). Indeed, the district court in *ACLU v. Reno*, 929 F. Supp. 824, 857 (E.D. Pa. 1996), wisely rejected the "troubl[ing] suggest[ion] that the concerns expressed by the plaintiffs . . . reflect an exaggerated supposition of how [the Department of Justice] would apply the law, and that [the court] should, in effect, trust the Department of Justice to limit the [challenged law's] application in a reasonable fashion." Consequently, the district court properly rejected the argument that "the First Amendment . . . should . . . be interpreted to require [the court] to entrust the protection it affords to the judgment of prosecutors." *See id*. The same is true here.

Indeed, the Attorney General cannot deny this indisputable fact: the challenged Act does not require the commission of a battery (an intentional and wrongful physical contact), nor does it expressly require "force" or even the "threat of force." *Compare*

Norton v. Ashcroft, 298 F.3d 547 (6th Cir. 2002) (upholding the Freedom of Access to Clinic Entrances Act against a First Amendment challenge and noting the requirement to prove "force" or the "threat of force"). Pursuant to the plain language of the Act, any conduct or act that "causes" [or counsels, commands, or induces a person to cause][1] "bodily injury"[2] to a person because of that person's "actual or perceived . . . sexual orientation [or] gender identity" is proscribed by this criminal statute and subjects the perpetrator to ten years in prison. 18 U.S.C. § 249(a)(2) & (a)(2)(A)(i). This includes "expressive conduct," as evidenced by the fact that the Rules of Construction expressly contemplate the application of the Act to the "exercise of religion, speech, expression, or association." *See, e.g.,* § 4710 (3) (permitting the Act to be "applied in a manner that substantially burdens a person's exercise of religion . . . speech, expression, or association" if "the Government demonstrates that the application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental

[1] *See* 18 U.S.C. § 2 (holding a person liable as a "principal" if he "counsels, commands, [or] induces" an offense punishable under the Act).

[2] According to the Act, "the term 'bodily injury' has the meaning given such term in section 1365(h)(4) of this title, but does not include solely emotional or psychological harm to the victim." 18 U.S.C. § 249(c)(1). However, "bodily injury," as used in the Act, does not *exclude* "emotional or psychological harm." And for purposes of the Act, the term "bodily injury" means: "(A) a cut, abrasion, bruise, burn, or disfigurement; (B) *physical pain*; (C) *illness*; (D) impairment of the function of a bodily member, organ, or *mental faculty*; or (E) any other injury to the body, *no matter how temporary*." 18 U.S.C. § 1365(h)(4) (emphasis added).

interest" or if the "exercise of religion, speech, expression, or association . . . incite[s] an imminent act of physical violence against another").

Indeed, the Rules of Construction make it plain that Congress intended the Act to apply to *some* religious exercise, speech, expression, or association (*i.e.*, expressive conduct that "causes bodily injury" or that "incite[s] an imminent act of physical violence"). Compare, for example, 18 U.S.C. § 113, which prohibits "assaults within maritime and territorial jurisdiction." There are no "Rules of Construction" discussing the application of this statute to religious exercise, speech, expression, or association because there is no need for them. The statute plainly prohibits a *physical assault*, which, as this Court appropriately noted in *Wis. v. Mitchell*, 508 U.S. 476, 484 (1993), "is not by any stretch of the imagination expressive conduct." Conversely, the Hate Crimes Act is not so limited and in fact includes "expressive conduct" within its reach. *See, e.g.,* § 4710 (3).

Therefore, unlike the chilling effect of the penalty enhancement provision at issue in *Mitchell*, which this Court found "too speculative" because it was "far more attenuated and unlikely than that contemplated in traditional 'over-breadth' cases," *Mitchell*, 508 U.S. at 488-89, the chilling effect of the Act is not "speculative" in any sense and is very much like the chilling effect found in "traditional" cases. Indeed, the Act involves more than the "evidentiary use of speech to establish the elements of a crime or to prove motive or intent," *id*. at 489, it proscribes the very expressive conduct for which the "speech" is used to establish. Thus, *Wis. v. Mitchell* is distinguishable, and, in fact, compels the

conclusion that Petitioners have standing to challenge this unconstitutional Act. As noted, if Congress wanted to limit the reach of the Act to violent *physical* assaults, it certainly knew how to do that. *See* 18 U.S.C. § 113. But that is not what it did, nor what it intended to do as a result. And that conclusion is supported by the language chosen by Congress.

In sum, because Petitioners have engaged in conduct proscribed by the Act—and want to continue to engage in such conduct free from any threat of government interference—they have standing to mount this constitutional challenge.

II. Petitioners Have "Willfully" Engaged in and Want to Continue to "Willfully" Engage in Conduct Proscribed by the Act and therefore Have Standing to Advance Their Ripe Claims.

As an initial matter, the standing and ripeness requirements are appropriately relaxed in this case because it arises under the First Amendment. *See Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1034 n.18 (5th Cir. 1981) (stating that the injury-in-fact requirement for standing is properly relaxed for First Amendment challenges "because of the 'danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping an improper application'") (quotations in original, citations omitted); *Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997) (noting that "the Court has relaxed the prudential limitations on standing to ameliorate the risk of washing away free speech protections"); *Norton*, 298 F.3d at 554 (noting that the ripeness requirements are relaxed in the First Amendment context); *Cheffer*

v. Reno, 55 F.3d 1517, 1523 n.12 (11th Cir. 1995) ("[T]he doctrine of ripeness is more loosely applied in the First Amendment context."). The Attorney General, however, seems intent on stiffening these requirements, which this Court should reject.

Here, Plaintiffs have standing to challenge this federal criminal law which was "aimed directly at [them, and] if their interpretation of the statute is correct, will have to [forego constitutionally protected activity] or risk criminal prosecution." *Va. v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988). Additionally, Petitioners' constitutional challenge to this extant criminal law is ripe for review. *See Navegar, Inc. v. United States*, 103 F.3d 994, 1000 (D.C. Cir. 1997) ("[O]nly when litigants seek pre-enforcement review of antiquated laws of purely 'historical curiosity' [can the threat of prosecution be deemed speculative]."). And this is particularly so since the claims present pure legal questions that require no further factual development. *See Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 581 (1985) (holding challenge to regulatory provisions ripe where the issue presented was legal and would not be clarified by further factual development); *Peick v. Pension Benefit Guar. Corp.*, 724 F.2d 1247, 1261 (7th Cir. 1983) (same).

Indeed, the allegations here establish that Petitioners have standing and that their meritorious challenge to the Act is ripe for review. As alleged in the Complaint, Petitioners have "willfully" engaged in and want to continue to "willfully" engage in expressive conduct—conduct that supporters of the Act describe as violent "hate" speech and "hateful words"—that is

proscribed by the Act because the Act does not limit its reach to physical acts of violence, but expressly includes any conduct, including religious exercise, speech, expression, and association, that causes "bodily injury," as that term is broadly defined by the Act or that "incite[s] an imminent act of physical violence." As a result, Petitioners are subject to federal investigation and punishment, thereby conferring standing to challenge the Act's constitutionality.

There is no question that Petitioners believe very strenuously that their "conduct" is protected by the U.S. Constitution and thus beyond the reach of any criminal law, which is why they are bringing this pre-enforcement challenge. Not everyone shares Petitioners' belief, however. In particular, that belief is not shared by the local gay community—the very community that the Michigan U.S. Attorney has publicly vowed to support through the enforcement of the Act. *See* App. 17 (noting that the local Michigan U.S. Attorney is "eager to bring cases under this [A]ct").

Moreover, as the Complaint alleges:

- Petitioners "have been accused by those who engage in homosexual behavior, supporters of the homosexual agenda, and supporters of § 249(a)(2) of the Hate Crimes Act of counseling, commanding, or inducing violent acts that are prohibited by and punishable under the Act." App. 70.

- Petitioners have been accused of "inducing violence against persons who engage in homosexual behavior." App. 70.

- "In the case of the death of Andrew Anthos—a 72-year-old Detroit man who was allegedly the victim of a 'hate crime' because of his 'sexual orientation,'. . . [Petitioner] Glenn's 'homophobic rants'" were cited as "causing his death." App. 71.

- "The death of Mr. Anthos was cited by Senator Carl Levin as evidence of the need to extend federal 'hate crimes' legislation to include 'sexual orientation' as a protected classification." App. 71.

- "The former director of policy for the Triangle Foundation, a Michigan-based homosexual lobby group that supported the Hate Crimes Act, publicly stated, 'We personally believe that the AFA [Plaintiff Glenn's organization] may support the murder of gay, lesbian, and bisexual people.'" App. 71.

- "The former executive director of the Triangle Foundation publicly stated the following regarding 'hate crimes': 'The vocal anti-gay activists [which includes Petitioners] should be held accountable as accessories to these crimes because, many times, it is their rhetoric that led the perpetrators to believe that their crimes are OK. . . . If a criminal borrows a gun and then uses it to kill someone, the law considers the gun owner an accessory to the crime. So, too, are the people who own the words that incite violence.'" App. 71-72.

- "The Triangle Foundation has established 'The Triangle Foundation Reporting Line' to report 'hate crimes.' The Triangle Foundation also provides 'staff and trained volunteers' to assist 'in filing a report' for an alleged 'hate' or 'bias' crime." App. 72.

Thus, not only have Petitioners alleged that they have engaged in and want to continue to engage in conduct that is proscribed by the Act, they have set forth specific instances in which they have been accused of engaging in such conduct by the very community the Act was intended to protect.

In sum, the chilling effect of the Act on Petitioners' expressive conduct is hardly "subjective," and it certainly qualifies as a "specific objective harm or a threat of a specific future harm" to confer standing. *See Laird v. Tatum*, 408 U.S. 1, 13-14 (1972). Indeed, there is a precise connection between the Act and its chilling effect on Petitioners' expressive conduct.

Moreover, in *United States v. Pomponio*, 429 U.S. 10, 11-12 (1976), this Court made clear that the term "willfully" does not require proof of any evil motive or bad purpose other than the intention to violate the law. And it is well established that the Attorney General need not use direct evidence to prove a defendant's state of mind (*i.e.*, whether he acted willfully or intended to violate the law) in a prosecution for violating the Act. Consider, for example, the following sample jury instruction approved by the Sixth Circuit regarding the evidence a prosecutor may present in a criminal trial to prove a defendant's mental state (*i.e.*, that the defendant "intend[ed] to cause bodily injury"):

> Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and done or

> omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind. You may consider it reasonable to draw the inference and find that the person intends the natural and probable consequences of acts knowingly done, or knowingly omitted.

United States v. Thomas, 728 F.2d 313, 321 (6th Cir. 1984) (emphasis added). Consequently, contrary to the Attorney General's suggestion, Petitioners cannot grant themselves immunity from prosecution under the Act by simply claiming that they did not in fact intend to cause (willfully or otherwise) bodily injury by their conduct. *See* Resp. Br. at 8-9. Instead, as this instruction makes plain and as the Act expressly allows, *see* § 4710 (1), the Attorney General will be permitted to present evidence at trial of the beliefs, statements, and associations of Petitioners to prove intent, including Petitioners' beliefs and statements that homosexual acts are acts of grave depravity that are intrinsically disordered. *See* App. 63. He will be permitted to present evidence of Petitioners quoting Apostle Paul, who, writing by inspiration of the Holy Spirit, declared that those who engage in homosexual acts "shall not inherit the kingdom of God." (1 Corinthians 6:9-11). App. 63-64. The Attorney General will be permitted to present evidence that Petitioners believe and profess that homosexuality is an illicit lust forbidden by God, who said to His people Israel, "Thou shalt not lie with mankind, as with womankind: it is abomination." (Leviticus 18:22). App. 64. He will be permitted to present evidence of Petitioners' beliefs and speech that persons engaging in homosexual behavior are guilty of "leaving the natural use of the woman" (Romans 1:27), meaning that their behavior is illicit,

"against nature" (Romans 1:26), and thus contrary to God's will. App. 64. He will be permitted to present evidence that Petitioners believe that the Bible is the unalterable and divinely inspired Word of God, and the ultimate authority for both belief and behavior. App. 63. And based on this professed belief, the Attorney General will be permitted to present evidence that, according to the Bible, in Old Testament times in Israel, God dealt severely with those who engaged in homosexual behavior, warning His people through Moses, "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them." (Leviticus 20:13). App. 64.

In sum, the Attorney General's attempt to defeat standing by claiming that Petitioners do not intend to engage in conduct proscribed by the Act is contrary to the plain language of the Act and the means available to the government to prove the elements of a crime. And the fact that Petitioners' constitutionally protected conduct subjects them to punishment under a federal criminal law is sufficient to confer standing to challenge this law. *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1395 (6th Cir. 1987) (holding that where a plaintiff "would be subject to application of the [challenged] statute," that alone is sufficient to provide the "fear of prosecution . . . reasonably founded in fact" to confer standing). Therefore, under controlling precedent, Petitioners have standing to bring this ripe, pre-enforcement challenge to the Hate Crimes Act, which chills expressive conduct in violation of the U.S. Constitution. *See id.*; *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose

himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights.").

In the final analysis, the Court should grant review, find that Petitioners have standing to challenge the Act, and ultimately strike down the Act as unconstitutional under *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down an ordinance on First Amendment grounds that prohibited "conduct" that amounted to "fighting words" because the ordinance was content-based in that it prohibited only "fighting words" that were "bias-motivated" on account of the victim's "race, color, creed, religion or gender").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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