NO. 10-2273

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

GARY GLENN; PASTOR LEVON YUILLE; PASTOR RENE B. OUELLETTE; PASTOR JAMES COMBS,
PLAINTIFFS-APPELLANTS,

V.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
HONORABLE THOMAS L. LUDINGTON
Civil Case No. 10-10429

APPELLANTS' BRIEF

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 6th Cir. R. 26.1, Plaintiffs-Appellants state the following:

Plaintiffs-Appellants are private individuals. There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and 6th Cir. R. 34(a), Plaintiffs respectfully request that this court hear oral argument. This case presents for review important questions involving the Article III jurisdiction of a federal court to hear a pre-enforcement challenge to a federal criminal statute that, according to Plaintiffs, violates the United States Constitution. Plaintiffs allege, *inter alia*, that the federal law chills the expression of protected religious speech in violation of the First Amendment and that the law is invalid because Congress lacked authority under the Commerce Clause to enact it. At the end of the day, this constitutional challenge presents pure legal questions that a federal court can and should decide.

Oral argument will assist this court in reaching a full understanding of the issues presented and the underlying facts. Moreover, oral argument will allow the attorneys for both sides to address any outstanding legal or factual issues that this court deems relevant.

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STATEMENT OF JURISDICTION

On February 2, 2010, Plaintiffs-Appellants Gary Glenn, Pastor Levon Yuille, Pastor Rene Ouellette, and Pastor James Combs ("Plaintiffs") filed a complaint against U.S. Attorney General Eric H. Holder, Jr. ("Attorney General"), challenging the constitutionality of Section 249(a)(2) of the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act ("Hate Crimes Act"). (R-1; Compl.). The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346.

On April 15, 2010, the Attorney General filed a motion to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, arguing that Plaintiffs do not have standing, that their claims are not ripe for review, and that the Hate Crimes Act does not violate the First Amendment, Fifth Amendment equal protection, the Tenth Amendment, or the Commerce Clause. (R-9; Mot. to Dismiss).

On September 7, 2010, the district court granted the Attorney General's motion on standing and ripeness grounds, dismissing the complaint for lack of jurisdiction. (R-23; Order).

On September 28, 2010, Plaintiffs filed a timely notice of appeal. (R-24; Notice of Appeal). This appeal is from a final order and judgment that disposes of all parties' claims. This court has jurisdiction pursuant to 28 U.S.C. § 1291.

PRELIMINARY STATEMENT

This case presents a constitutional challenge to Section 249(a)(2) of the Hate Crimes Act, which criminalizes so-called "bias" crimes motivated by a person's "actual or perceived" "sexual orientation" or "gender identity."

Because the Hate Crimes Act subjects Plaintiffs to government scrutiny, questioning, investigation, surveillance, intimidation, and prosecution on account of their deeply held religious beliefs and convictions, they have standing to challenge this federal law, which carries harsh criminal penalties. Indeed, a careful reading of the statute and its application to Plaintiffs' alleged course of conduct, its lack of any meaningful protection for First Amendment activity, its actual and intended chilling effect on such protected activity, and Congress' lack of authority under the Constitution to expand federal criminal jurisdiction to include a general police power of the sort retained by the States compel this court to reverse the district court.

STATEMENT OF THE ISSUES FOR REVIEW

I. Whether Plaintiffs have standing to advance this constitutional challenge to the Hate Crimes Act, a federal criminal statute which punishes and chills the exercise of Plaintiffs' religious speech activity and which Congress enacted without constitutional authority.

II. Whether Plaintiffs' constitutional claims, which present pure legal questions, are ripe for judicial review.

STATEMENT OF THE CASE

On February 2, 2010, Plaintiffs filed their complaint, challenging the constitutionality of the newly enacted Hate Crimes Act and seeking declaratory and injunctive relief. (R-1; Compl.). Plaintiffs alleged that § 249(a)(2) of the Act deters, inhibits, and chills their rights to freedom of speech, expressive association, and the free exercise of religion protected by the First Amendment; that § 249(a)(2) deprives them of the equal protection of the law under the Fifth Amendment; that Congress exceeded its authority under the Commerce Clause by enacting § 249(a)(2); and that pursuant to the Tenth Amendment, Congress was without authority to enact § 249(a)(2). (R-1; Compl.)

The Attorney General responded by filing a motion to dismiss the complaint pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, for lack of subject matter jurisdiction, or, in the alternative, pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted. (R-9; Mot. to Dismiss).

On September 7, 2010, the district court granted the Attorney General's motion to dismiss on standing and ripeness grounds, dismissing the complaint for lack of subject matter jurisdiction. The district court did not reach "the Attorney General's 'failure to state a claim' arguments." (R-23; Order). Plaintiffs filed a timely notice of appeal on September 28, 2010. (R-24; Notice of Appeal). This appeal follows.

STATEMENT OF FACTS

A. Plaintiffs' "Course of Conduct" Subjects Them to the Hate Crimes Act.

Plaintiffs take a strong public stand against homosexual activism, the homosexual lifestyle, and the homosexual agenda. (R-1; Compl. at ¶¶ 14-25). Plaintiffs engage in their public ministry in cities and towns throughout the United States, including San Francisco, California. (R-1; Compl. at ¶ 25). As a direct consequence of their public ministry, Plaintiffs have been accused of not only "willfully" *causing* "bodily injury" to persons (homosexuals) because of their sexual orientation, but also *intentionally* counseling, commanding, and inducing others to cause "bodily injury" to persons (homosexuals) because of their sexual orientation. (R-1; Compl. at ¶¶ 56-67). These accusations have come not only from large and influential public organizations, such as the National Gay and Lesbian Task Force and the Triangle Foundation, which have influence with this current administration and the U.S. Attorney's Office in Detroit, Michigan, but also from powerful and influential government officials. (*See* R-1; Compl. at ¶¶ 57-67; *see generally* R-21; Pls.' Sur-reply at Ex. 3). In fact, Plaintiff Glenn and his organization, the American Family Association, *have been identified by name as intentionally engaging in conduct that harms homosexuals on account of their sexual orientation*. (*See* R-1; Compl. at ¶¶ 58, 61) (emphasis added).

Plaintiffs engage in their public ministry based on their deeply held religious

belief and conviction that *the Bible is the unalterable and divinely inspired Word of God*. For Plaintiffs and other Christians, *the Bible is the ultimate authority for both belief and behavior*. (R-1; Compl. at ¶ 28) (emphasis added). As Christians, Plaintiffs are called to spread God's Word, including God's Word regarding homosexuality, *which they do as an integral part of their public ministry*. (R-1; Compl. at ¶ 38). Indeed, moral conscience requires that, in every occasion, Plaintiffs give witness to the whole moral truth. Consequently, they have an obligation to state clearly the immoral nature of homosexuality so as to safeguard public morality and, above all, to avoid exposing young people to erroneous ideas about sexuality and marriage. Clear and emphatic opposition to the homosexual agenda is a duty of all Christians, including Plaintiffs. (R-1; Compl. at ¶ 37).

According to the Bible, *which Plaintiffs promote through their religious activities*, homosexual acts are acts of grave depravity that are intrinsically disordered. The Apostle Paul, writing by inspiration of the Holy Spirit, declares that those who engage in homosexual acts "*shall not inherit the kingdom of God*," stating further, "And such were some of you." (1 Corinthians 6:9-11). (R-1; Compl. at ¶¶ 29, 30, 34-36) (emphasis added).

Plaintiffs 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). In every place that the Bible refers

to homosexuality, the emphasis is upon the perversion of sexuality. The person engaging in homosexual behavior is guilty of "leaving the natural use of the woman" (Romans 1:27), meaning that his behavior is "against nature" (Romans 1:26), and thus *contrary to God's will*. In Old Testament times in Israel, God dealt severely with those who engaged in homosexual behavior. He warned 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). (R-1; Compl. at ¶¶ 31-33) (emphasis added).

Consequently, Plaintiffs have "willfully" engaged in, and will continue to "willfully" engage in, conduct that is proscribed by the Hate Crimes Act because the Act does not limit its reach to *physical* acts of violence, but expressly includes within its reach so-called "hate" *speech* and "*hateful words*," thereby subjecting Plaintiffs to federal investigation and punishment.

Because there is no legitimate basis for the Act,[1] which elevates those who

[1] All crimes of violence are punished under existing State laws. (R-1; Compl. at ¶¶ 41, 77, 80). Indeed, Attorney General Holder candidly acknowledged during his Senate testimony that there was no need for the Act. (R-1; Compl. at ¶ 81). Senator Orrin Hatch recounts the Attorney General's testimony in the Congressional Record as follows:

> Indeed, a few months back, I asked the Attorney General—who supports this legislation, by the way, in a hearing whether there was any evidence of a trend that these crimes were going unpunished at the State level. He stated without reservation that there was no such evidence and that, in fact, the States were, by and large, doing a fine job in this area.

(R-21; Pls.' Sur-reply at Ex. 2) (emphasis added).

engage in sexual deviance and sinful behavior to a special protected class of persons as a matter of federal law, Plaintiffs believe that the Act is an unjust and immoral law. (R-1; Compl. at ¶¶ 39-41).

B. The Hate Crimes Act Inhibits, Deters, and Chills Plaintiffs' Expressive "Conduct."

The Hate Crimes Act is codified at 18 U.S.C. § 249. Section 249(a)(2) states:

> (2) *Offenses involving actual or perceived* religion, national origin, gender, *sexual orientation, gender identity,* or disability. (A) In general. Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), willfully causes *bodily injury* to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, *because of the actual or perceived* religion, national origin, gender, *sexual orientation*, *gender identity*, or disability of any person [shall be imprisoned, fined, or both].

18 U.S.C. § 249(a)(2) (emphasis added).

In any case in which there are no express aggravating circumstances, a person who is liable for the commission of an offense under the Act "shall be imprisoned not more than 10 years, fined[, or] both." 18 U.S.C. § 249(a)(2)(A)(i).

According to the "Definitions" section, "the term 'bodily injury' has the meaning given such term in [18 U.S.C. § 1365(h)(4)], but does not include solely

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In fact, the percentage of "hate crimes" committed in 2007 and in 2008 that were *actual crimes of physical violence* "motivated by bias based upon sexual orientation" was a mere fraction of 1%. Nationally, that amounts to approximately 240 such crimes per year, and it is likely that those numbers are inflated. (R-1; Compl. at ¶¶ 92-94). Consequently, Section 249(a)(2), "is more about . . . marginalizing Biblical teachings against sexual immorality than it is about protecting people from acts of violence." (R-1; Compl. at ¶ 95).

emotional or psychological harm to the victim." 18 U.S.C. § 249(c)(1). Consequently, "bodily injury," as the term is 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). Thus, if person (A) "causes" person (B) "emotional" or "psychological" harm that is accompanied by some *physical pain* or *illness*, "no matter how temporary," such as a stomachache or a headache, on account of person (B)'s "actual or perceived . . . sexual orientation [or] gender identity," person (A) is punishable as a felon under the Act. Or, if person (A) "causes" person (B) to commit suicide on account of person (B)'s "actual or perceived . . . sexual orientation [or] gender identity," person (A) is punishable as a felon under the Act. There is nothing "hypothetical" about these examples; they are permitted by the plain language of the Act, and they illustrate types of "bodily injury" that Plaintiffs are accused of causing.

Indeed, the plain language of the Act does not require the commission of a battery (an intentional and wrongful *physical* contact), nor does it require "force" or the "threat of force." *See Norton v. Ashcroft*, 298 F.3d 547 (6th Cir. 2002) (upholding the Freedom of Access to Clinic Entrances Act ("FACE") against a First Amendment challenge and noting the requirement to prove "force" or the "threat of force"); *but see*

Planned Parenthood of the Columbia/Willaimette, Inc. v. American Coal. of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (en banc) (holding that FACE's "threat of force" provision applied to proscribe political speech of pro-life advocates). Any conduct or act that "*causes*" [or counsels, commands, or induces a person to *cause*] "bodily injury" to a person because of that person's "actual or perceived . . . sexual orientation [or] gender identity" is proscribed.[2] Thus, the government can investigate and prosecute a person under the Act even if the person does not commit (or counsel, command, or induce another to commit) a *physical* act of violence. Supporters of the Hate Crimes Act, including government officials, consider the uttering of "hateful words" to be an act of violence covered by this statute. (*See* R-1; Compl. ¶ 74). As demonstrated further below, words that are deemed "harmful," "violent," or "hateful," such as the Biblical teaching on homosexuality espoused by Plaintiffs, are punishable under the Act.

If Congress intended the Act to prohibit only *physical* assaults, it certainly knew how to draft a statute to do that. *See, e.g.*, 18 U.S.C. § 113 ("Assaults within maritime and territorial jurisdiction"). The Hate Crimes Act is not so limited, and, in fact, it proscribes Plaintiffs' expressive conduct. Thus, Congress understood what it was doing when it passed the Hate Crimes Act, and the plain language of the Act and its Rules of Construction bear this out. Indeed, Congressman Steve King sent an

[2] A person is liable as a "principal" under the Act if the person "counsels, commands, [or] induces" an offense punishable under the Act pursuant to 18 U.S.C. § 2.

unsolicited letter to Plaintiff Glenn dated April 16, 2010, illustrating the point. In this letter, Congressman King stated, in relevant part, "Not only will this Act create a class of people that are 'more equal than others,' it will hinder your ability to preach the gospel and openly teach biblical principles." (R-13; Pls.' Resp. to Mot. to Dismiss at Ex. 1).

The Act contains a "certification requirement," which further illustrates Plaintiffs' standing in this case. *See* 18 U.S.C., § 249(b). This requirement states generally that "[n]o prosecution of any offense [under the Act] may be undertaken by the United States, except under the certification" by the Attorney General (or his designee) of certain enumerated circumstances. One enumerated circumstance, for example, subjects a person tried (and not necessarily convicted) in State court under State law to a separate prosecution in federal court under the Act if the Attorney General (or his designee) considers the "verdict or sentence obtained pursuant to State charges" inadequate. 18 U.S.C. § 249(b)(1)(C). Moreover, the Attorney General can pursue <u>any</u> case that he or his designee deems to be "in the public interest and necessary to secure substantial justice." 18 U.S.C. § 249(b)(1)(D). Thus, the "certification requirement" places no real limits on the federal government's power to prosecute an alleged offense under the Act. Indeed, the "rule of construction" for the "certification requirement" states the following: "*Nothing* in this subsection shall be construed to limit the authority of Federal officers, or a Federal grand jury, to

investigate *possible* violations of this section." 18 U.S.C. § 249(b)(2) (emphasis added). This provision makes plain that the federal government retains the authority to use its federal law enforcement officers (FBI) and its federal grand juries (with their broad subpoena powers) to investigate any and all *allegations* or *accusations* brought pursuant to the Act.

In sum, any person who is *suspected* or *accused* of committing an offense under Section 249(a)(2) is subject to *federal jurisdiction* and a federal investigation. Section 249(a)(2) expressly provides law enforcement with authorization and jurisdiction to conduct federal *investigative* and other federal law enforcement actions against Plaintiffs, irrespective of any authority to *prosecute* them under the Act. (R-1; Compl. at ¶¶ 48, 49). And the federal government does not have to *prove* any of the "Circumstances described" in Section 249(a)(2)(B) to subject a person to a federal investigation under the Act, thereby making the Act "a great tool for the Justice Department" to promote its pro-gay agenda, as the Attorney General tacitly acknowledged. (*See* R-1; Compl. at ¶¶ 27, 44). Moreover, as noted in the Complaint, "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." (R-1; Compl. at ¶¶ 63, 64). Thus, Plaintiffs' fear of adverse law enforcement action under the Act is real, credible, and well founded.

In the final analysis, the chilling effect of being accused of a "hate crime"—as Plaintiffs have been and continue to be—cannot be denied nor understated.

C. The Hate Crimes Act Prohibits "Hate" Speech.

The Rules of Construction, which Congress placed in § 4710 of the Defense Authorization Act,[3] make plain that Plaintiffs' speech activity is subject to the proscriptions of the Hate Crimes Act.

One of the principle Rules of Construction states as follows: "IN GENERAL—Nothing in this division shall be construed to allow a court . . . to admit evidence of speech, beliefs, association, group membership, or expressive conduct *unless* that evidence is relevant and admissible under the Federal Rules of Evidence." § 4710 (1) (emphasis added). Stated differently, "evidence of speech, beliefs, association, group membership, or expressive conduct" that is "relevant" and otherwise "admissible under the Federal Rules of Evidence" can (and must) be used in a criminal trial for an offense charged under the Act.[4] Consequently, the speech, beliefs, associations, and group memberships of an accused *will* be admitted in a criminal trial for an offense charged under the Act because such evidence is not only *relevant*, but *necessary* to

[3] The Rules of Construction can be found at Defense Authorization Act, Pub. L. No. 11-84, Div. E, § 4710 (1)-(6), 123 Stat. 2841 (Oct. 28, 2009) (hereinafter "§ 4710 (1)-(6)").

[4] As the district court noted, "The Attorney General acknowledges that under the Hate Crimes Act, evidence of speech, expression, or association could be relevant and admissible in a prosecution against an individual who engaged in the prohibited violent actions to prove that individual's motive." (R-23; Order at 16).

prove an element of the offense (i.e., that the accused acted *because of* the person's "actual or perceived . . . sexual orientation [or] gender identity").[5] This same evidence will be used to prove that a person who "counsel[ed], command[ed], [or] induce[d]" an offense under the Act acted *with the requisite intent* to be liable as a principal pursuant to 18 U.S.C. § 2. Thus, speech, beliefs, and expressive conduct are *necessarily* targeted by the Act. Indeed, the plain language of Section 249(a)(2) forces law enforcement officials, including the Attorney General, to treat identical crimes differently depending upon the government official's determination (and proof) of the political, philosophical, or religious beliefs of the accused offender. (R-1; Compl. at ¶¶ 48-50).

Moreover, the claim that nothing in the Act "shall be construed or applied in a manner that infringes any rights under the first amendment of the Constitution of the United States" or to "substantially burden[] a person's exercise of religion . . . speech, expression, or association," § 4710 (3), provides no protection to Plaintiffs. As the facts surrounding the passage of the Act demonstrate, its supporters (which includes the Attorney General) do not consider *all* speech worthy of protection under the First Amendment. In fact, they consider Plaintiffs' speech to be "hate" speech that not only

[5] This is one important fact that distinguishes this case from the sentence enhancement provision at issue in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). (*Compare* R-23; Order at 16 (citing *Mitchell*)). The Act, which is not merely a penalty enhancement for having committed a punishable offense, requires proof of the "speech, beliefs, association, [and] group membership" as an element of the underlying offense.

causes "bodily injury," but incites violence against homosexuals and is thus not protected under the First Amendment (or, equally as important, not excluded from the proscriptions of the Act), which is why Plaintiffs need *this court* to protect their First Amendment freedoms. *See ACLU v. Reno*, 929 F. Supp. 824, 857 (E.D. Pa. 1996) (Sloviter, J.) (rejecting the "troubl[ing] suggest[ion] that the concerns expressed by 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" and thus rejecting the argument that "the First Amendment . . . should . . . be interpreted to require [the court] to entrust the protection it affords to the judgment of prosecutors"). To say that Plaintiffs do not trust the Attorney General and his government prosecutors in Michigan to protect their "speech" from the accusations of homosexual activists (and the proscriptions of the Act) is an understatement. *See* § D, below.

Indeed, the Rules of Construction permit the prosecution of "speech" that the Attorney General believes will "incite an imminent act of physical violence against another" or involves "planning for, conspiring to commit, or committing an act of violence." § 4710 (3).

Furthermore, pursuant to the Rules of Construction, the Attorney General can trump any alleged rights to speech, association, and the exercise of religion by claiming a "compelling" reason for doing so, *see* § 4710 (3)—say, for example,

deterring the "crimes" proscribed by the Act, *see Monroe v. City of Charlottesville*, 579 F.3d 380, 390 (4th Cir. 2009) ("The government's interest in protecting the citizenry from crime is without question compelling.") (citing *Schall v. Martin*, 467 U.S. 253, 264 (1984)).

In the final analysis, the Rules of Construction provide cold comfort to Plaintiffs and, in fact, demonstrate that the Act is unconstitutional because it permits criminal sanctions for speech. Indeed, throughout the legislative process, supporters of the Act *rejected* efforts to specifically exclude expressive conduct such as Plaintiffs' public ministry on homosexuality from the proscriptions of the Act. (*See* R-1; Compl. at ¶¶ 70-75). The legislative history demonstrates that the Act was designed, in large part, "to protect those potential victims who may be the recipients of *hateful words*." (R-1; Compl. ¶ 74) (emphasis added). Consequently, pastors and other Christians, such as Plaintiffs, who preach and express God's Word on homosexuality are subject to the proscriptions of the Act, thereby causing a tangible and concrete deterrent, inhibitory, and chilling effect on Plaintiffs' rights to freedom of speech, expressive association, and the free exercise of religion. (R-1; Compl. at ¶¶ 4, 52, 64, 69, 74, 75, 82, 103, 107).

D. The Attorney General and His Michigan Prosecutors Are "Eager" and "Excited" to Enforce the Act.

As widely reported in the press, during a White House reception commemorating the passage and signing of the Hate Crimes Act, Attorney General

Holder described the Act as "a great tool for the Justice Department," claiming that it will "improve the quality of life for . . . gay and lesbian Americans." (R-1; Compl. at ¶ 44; R-21; Pls.' Sur-reply at Ex. 2). There was no mention of the Act "improving the quality of life" for heterosexuals, or Christians for that matter, demonstrating further that the Act has nothing to do with "[o]ffenses involving actual or perceived religion" and that the term "sexual orientation" refers specifically to "gay and lesbian Americans." This court need not turn a blind eye to the actual purpose of Section 249(a)(2) (or its history), nor check its common sense at the courthouse door. This statute is all about elevating certain persons (homosexuals) to a protected class under federal law based on nothing more than their choice to have sex with persons of the same gender, while marginalizing strong religious opposition to this immoral choice.

Unfortunately for Plaintiffs, enforcement threats—and the concomitant chilling effect of such threats—not only come from Washington, D.C. There is a vocal group of homosexual activists in Michigan—the very activists who have accused Plaintiffs of committing "hate crimes" punishable under the Act—who have enlisted the support of the local U.S. Attorney. Barbara McQuade, the U.S. Attorney for the Eastern District of Michigan, and her government attorneys responsible for enforcing the Act, recently attended a forum on the new federal law hosted by the ACLU of Michigan for "LGBT community members." (R-21; Pls.' Sur-reply at Ex. 3; *see also* R-23; Order at 24 (referencing the forum)). These "LGBT community members" consider

Plaintiffs' "anti-gay" conduct to be proscribed by the Act and are looking to McQuade and her prosecutors to enforce it as such.

As reported by *Between the Lines*, U.S. Attorney McQuade is engaged in "a vigorous effort to protect LGBT rights *as never seen before in the district*." As McQuade stated, "*We're very eager to bring cases under this act*." Assistant U.S. Attorney ("AUSA") Pam Thompson echoed the sentiment: "We are *so excited* about this new law and *the enforcement opportunities it provides for us*." As noted during this forum, "In a state like Michigan, *with no local hate crimes protections for sexual orientation*, this means that hate crimes cases against LGBT individuals can be prosecuted *under federal law*."[6] According to the report, AUSA Judith Levy, for whom "the case is both *personal* and constitutional," "reiterated the message *for hate crimes victims to come forward to the U.S. attorney's local office*," stating, "*Our office in Detroit is open for business* in enforcing and defending the Hate Crimes Prevention Act." Levy concluded her remarks by "encourag[ing] members of the LGBT community to show up [at the district court] hearing for the hate crimes lawsuit." (R-21; Pls.' Sur-reply at Ex. 3) (emphasis added).

In sum, the Attorney General and his loyal prosecutors in Michigan—the very government officials responsible for enforcing the Hate Crimes Act in the jurisdiction where Plaintiffs reside—have publicly abandoned their neutrality and become

[6] This fact further supports Plaintiffs' standing to challenge the Hate Crimes Act.

themselves activists with an agenda—to the detriment of Plaintiffs and the U.S. Constitution.

SUMMARY OF THE ARGUMENT

Controlling precedent firmly establishes that Plaintiffs have standing to bring this constitutional challenge to the Hate Crimes Act and that this challenge is ripe for review.

The essential question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. To invoke this court's jurisdiction, a plaintiff must allege a personal injury fairly traceable to the allegedly unlawful act and likely to be redressed by the requested relief. Plaintiffs meet all of these requirements.

A plaintiff's standing to make a pre-enforcement challenge to a criminal statute that chills the exercise of First Amendment freedoms is well established. Quite appropriately, the standing and ripeness requirements are relaxed in the First Amendment context. Because of the sensitive nature of constitutionally protected expression, the courts do not require all of those subject to overbroad regulations to risk prosecution to test their rights. Here, Plaintiffs have standing to challenge a federal law that 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. Indeed, Plaintiffs intend to "willfully" engage in a course of conduct that

is affected with a constitutional interest but proscribed by the Hate Crimes Act. Consequently, Plaintiffs have standing to advance their claims.

Plaintiffs' constitutional claims are also ripe for review for at least three reasons. First, by denying judicial review, Plaintiffs are suffering a present hardship. It is well established that the momentary loss of First Amendment liberties, which includes the chilling of those liberties, constitutes irreparable harm. Moreover, a pre-enforcement challenge to a criminal statute is ripe when that statute creates a pull toward self-censorship, as in this case. Second, there is nothing speculative about the harm caused by the Act. Plaintiffs' fear of prosecution is borne out by the plain language of the statute. And Plaintiffs' challenge concerns a federal law that is national in scope and is presently being enforced by the Attorney General, not a moribund statute that has been ignored for ages. Only when litigants seek pre-enforcement review of antiquated laws of purely "historical curiosity" can the threat of prosecution be deemed speculative. Finally, this case is fit for judicial resolution in that Plaintiffs' constitutional claims present pure legal questions that require no further factual development.

In the final analysis, this court has jurisdiction to hear and decide the merits of this important constitutional challenge.

ARGUMENT

I. Standard of Review.

This court reviews *de novo* the district court's dismissal of Plaintiffs' complaint under Rule 12(b)(1) of the Federal Rules of Civil Procedure. *Hertz v. United States*, 560 F.3d 616, 618 (6th Cir. 2009). And when "reviewing a 12(b)(1) motion, the court may consider evidence outside the pleadings." *Nichols v. Muskingum Coll.*, 318 F.3d 674, 677 (6th Cir. 2003)

II. Plaintiffs Have Standing to Advance Their Constitutional Claims.

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). In order to invoke the jurisdiction of this court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

A party's standing to make a pre-enforcement challenge to a criminal statute that chills the exercise of First Amendment liberties is well established. Quite appropriately, the standing requirement is relaxed in the First Amendment context. *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) ("When the First Amendment is in play . . . the Court has relaxed the prudential limitations on standing to ameliorate the risk of washing away free speech protections."). As the U.S. Supreme Court has often acknowledged, "The *threat of sanctions* may deter . . . almost as potently as the actual application of sanctions." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (emphasis added). And this fundamental principle is echoed throughout the case law. *See G&V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994) (recognizing that "a chilling effect on one's constitutional rights constitutes a present injury in fact"); *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996) ("[A]n actual injury can exist when the plaintiff is chilled from exercising her right to free expression or foregoes expression in order to avoid enforcement consequences."); *Hoffman v. Hunt*, 126 F.3d 575, 582 (4th Cir. 1997) ("It is well settled that a genuine threat of enforcement is sufficient to confer standing to obtain a declaratory judgment concerning *whether the threatened application would violate the First Amendment*.") (emphasis added); *Minnesota Citizens Concerned for Life v. Federal Election Comm'n*, 113 F.3d 129, 132 (8th Cir. 1997) ("Sufficient hardship is usually found if the regulation . . . chills protected First Amendment activity."). Indeed, even minimal infringement upon First Amendment values

constitutes irreparable injury sufficient to justify judicial review. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). And when the government chills a citizen's First Amendment rights, the citizen need not wait for some adverse consequence before challenging the action. *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*, 380 U.S. at 486 ("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.").

Section 249(a)(2) authorizes federal law enforcement action that unquestionably involves coercion, persuasion, and intimidation, resulting in the loss of First Amendment rights. In *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989), for example, the plaintiff churches brought an action against the federal government and some of its officers for violating their constitutional rights by conducting covert surveillance on members of their congregations. The Ninth Circuit allowed the case to proceed, stating, in relevant part:

> When congregants are chilled from participating in worship activities, when they refuse to attend church services because *they fear the government is spying on them and taping their every utterance*, all as alleged in the complaint, we think a church suffers organizational injury because its ability to carry out its ministries has been impaired. . . . *A judicial determination that the INS surveillance of the churches'*

> *religious services violated the First Amendment would reassure members that they could freely participate in the services without having their religious expression being recorded by the government and becoming part of official records*.

Id. at 522-23 (emphasis added).

Here, the chilling effect is substantially greater since this case involves not merely "surveillance," but the potential for harsh criminal penalties.

Indeed, Plaintiffs have standing to challenge a federal law that 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." *Virginia v. American Booksellers Ass'n, Inc*., 484 U.S. 383, 392 (1988). In *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), the Court held that a plaintiff has standing to challenge a criminal statute by alleging "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute, and there exists a credible threat of prosecution thereunder." In this case, Plaintiffs have alleged an intention to engage in a course of conduct that is affected with a constitutional interest, but yet proscribed by the Hate Crimes Act, which government prosecutors in the very jurisdiction where Plaintiffs reside are "eager" and "excited" to enforce. As further alleged in the complaint, "On account of [Section 249(a)(2)], Plaintiffs are targets for government scrutiny, questioning, investigation, surveillance, and other adverse law enforcement actions and thus seek judicial reassurance that they can freely participate in their speech and related religious

activities without being investigated or prosecuted by the government or becoming part of official records because of their Christian beliefs." (R-1; Compl. at ¶ 53). Thus, Plaintiffs' standing is well established.

In *Epperson v. Arkansas*, 393 U.S. 97, 101-02 (1968), the plaintiff had not been charged under the challenged statute, "no record of any prosecutions in Arkansas" under the challenged statute existed, and the statute was no more than a "curiosity." Yet, the Supreme Court held that the plaintiff had standing to bring the First Amendment challenge. *Id.* Similarly, the Supreme Court held that abortionists had standing to challenge a state's abortion statutes even though "the record [did] not disclose that any one of them [had] been prosecuted, or threatened with prosecution." *Doe v. Bolton*, 410 U.S. 179, 188 (1973). And this Circuit has held 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. *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1395 (6th Cir. 1987). Consequently, under controlling precedent Plaintiffs clearly have standing to bring this pre-enforcement action.

Moreover, when considering whether Plaintiffs have standing to challenge the Act on account of its chilling effect, the court should not disregard the severity of the *criminal* sanctions (10-year prison term) permitted under the statute. *See Reno v. ACLU*, 521 U.S. 844, 872 (1997) ("The severity of criminal sanctions may well cause

speakers to remain silent rather than communicate even arguably unlawful words [or] ideas. . . ."); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) (noting that "even minor punishments can chill protected speech"). Undoubtedly, the gravity of these criminal sanctions magnifies the statute's chilling effect. And it is objectively reasonable to conclude that the threat of a federal investigation and a potential 10-year prison term would chill the exercise of constitutionally protected rights. Consequently, this case is distinguishable from *Laird v. Tatum*, 408 U.S. 1 (1972), and *ACLU v. National Sec. Agency*, 493 F.3d 644 (6th Cir. 2007), both of which simply involved government surveillance and not the potential for criminal sanctions, as in this case. (*Compare* R-23; Order at 15-16 (relying on *Laird* and *ACLU v. National Sec. Agency*)).

In the final analysis, the district court's conclusion that "Plaintiffs do not allege that they intend to 'willfully cause' any 'bodily injury,'" (R-23; Order at 21)—a conclusion which served as the basis for its decision to dismiss Plaintiffs' claims for lack of standing—is simply not true. Plaintiffs have alleged that they intend to engage in conduct that, according to the Act's terms, "willfully causes bodily injury," thereby subjecting Plaintiffs to investigation and prosecution under the Act. (*See, e.g.*, R-1; Compl. at ¶¶ 4, 6, 7, 48, 49, 52, 53, 65, 68, 69). Thus, Plaintiffs have standing because they have alleged a "personal injury" that is "fairly traceable" to the Act and

is "likely to be redressed by the requested relief."[7]

III. Plaintiffs' Constitutional Claims Are Ripe for Review.

Long ago the Supreme Court frankly acknowledged:

> The difference between an abstract question and a "controversy" . . . is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality. . . .

Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

Consistent with this case-by-case approach, courts have identified a number of factors to consider when making the ripeness determination. In *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 531 (6th Cir. 1998), the court acknowledged three such factors: "[1] the hardship to the parties if judicial review is denied at the pre-enforcement stage, [2] the likelihood that the injury alleged by the plaintiff will ever come to pass, and [3] the fitness of the case for judicial resolution at this stage." The consideration of Plaintiffs' claims in light of these and other relevant factors demonstrates that they are ripe for review.

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[7] In *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006), the Court was asked to decide the appropriate remedy in a *pre-enforcement challenge* to a federal statute that the plaintiffs claimed was unconstitutional because it placed improper restrictions on abortion. The Court noted that it prefers to enjoin the unconstitutional application of a statute while leaving other applications in force, but that consistency with legislative intent may require invalidating the statute *in toto*. *See id*. at 328-29, 332. The Court remanded the case to determine the appropriate remedy, even though the statute contained a "severability clause." *See id*. at 331-32.

A. Hardship to Plaintiffs.

By failing to recognize the obvious hardship to Plaintiffs, the district court ignored the longstanding rule of law that even a momentary loss of First Amendment rights constitutes irreparable harm. *Elrod*, 427 U.S. at 373; *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (quoting *Elrod*); *Dombrowski*, 380 U.S. at 486 (same); *New Hampshire Right to Life Political Action Comm.*, 99 F.3d at 13 (same); *Minnesota Citizens Concerned for Life*, 113 F.3d at 132 (same). Section 249(a)(2) chills the exercise of Plaintiffs' constitutionally protected rights, resulting in irreparable injury and hardship.

B. Likelihood of Injury.

At the most fundamental level, Plaintiffs' effort to enjoin the enforcement of Section 249(a)(2) rests on a credible fear of enforcement that renders their claims justiciable. It is well established that Plaintiffs need not await prosecution under the statute in order to challenge its constitutionality. *See Steffel*, 415 U.S. at 459 (finding the plaintiff's pre-enforcement challenge to a statute "that he claims deters the exercise of his constitutional rights" ripe for review); *Dombrowski*, 380 U.S. at 486 (finding pre-enforcement challenge ripe for review "[b]ecause of the sensitive nature of constitutionally protected expression"); *see also Bolton*, 410 U.S. at 188 (finding challenge to State's abortion statutes ripe for review even though none of the plaintiffs had been prosecuted or threatened with prosecution). There is no question that

Plaintiffs' constitutional challenge to Section 249(a)(2) is ripe when evaluated in light of this case law. Plaintiffs' challenge concerns a federal law that is national in scope and is presently being enforced by the Attorney General (and his U.S. Attorney in Michigan, who is "very eager to bring cases under this act"), not a moribund statute that has been ignored for ages. As the court in *Navegar, Inc. v. United States*, 103 F.3d 994, 1000 (D.C. Cir. 1997), observed, "[O]nly when litigants seek preenforcement review of antiquated laws of purely 'historical curiosity' [can the threat of prosecution be deemed speculative]." *Cf. Epperson*, 393 U.S. at 101-02 (holding that the plaintiff had standing to make a pre-enforcement challenge to a statute considered no more than a "curiosity" and for which no record of prosecutions existed). Furthermore, supporters of the Act have made it clear that Plaintiffs' conduct is the very sort of conduct that this federal criminal law is aimed at suppressing. The enforcement history of similar criminal statutes further demonstrates the credibility of Plaintiffs' claims. This court should not turn a blind eye toward the political climate within which this statute was enacted—a climate that considers those persons, such as Plaintiffs, who engage in "hate speech" (Biblical teaching about homosexuality) or who utter "hateful words" to be liable for causing "bodily injury" to persons because of their "actual or perceived . . . sexual orientation [or] gender identity." (*See* Compl. at ¶¶ 56-69). Indeed, the plain language of the statute and its duly enacted Rules of Construction make clear that Plaintiffs are subject

to the proscriptions of the Act.

These circumstances demonstrate that Plaintiffs' challenge—a challenge designed to ensure that they can speak and act consistent with their constitutional rights without fear of investigation or prosecution—is based on a well-founded belief that the statute will be enforced (or threatened to be enforced) in ways that deter and inhibit their activities. At every turn during the legislative process, supporters of the Act defeated efforts designed to ensure that it would not—and could not—be enforced as Plaintiffs allege. (*See* R-1; Compl. at ¶¶ 70-75). There is nothing hypothetical or speculative about Plaintiffs' conduct or Defendant's willingness to enforce Section 249(a)(2) to deter and inhibit such conduct, particularly in light of the tremendous private and public pressure to do so.

In the final analysis, well established and controlling case law compels this court to conclude that Plaintiffs' "fear of prosecution" is reasonably founded in fact and sufficient to find their claims ripe for review. *See Planned Parenthood Ass'n* , 822 F.2d at 1394-95 (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").

C. Fitness for Judicial Resolution.

This case is fit for judicial resolution because, as set forth more fully in § IV below, Plaintiffs' constitutional 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 Ben. Guar. Corp.*, 724 F.2d 1247, 1261 (7th Cir. 1983) (same); *see also Norton*, 298 F.3d at 547 (finding as-applied First Amendment challenge not ripe for review, but deciding First Amendment facial and Commerce Clause challenges).

D. Other Factors.

Courts have also identified a number of other factors that demonstrate the ripeness of Plaintiffs' claims. For example, as noted previously, courts find ripeness where the plaintiff's contemplated course of action falls within the scope of a statute and the statute chills or otherwise limits the plaintiff's current actions. *See American Booksellers Ass'n, Inc.*, 484 U.S. at 393 (holding that the plaintiff had standing to bring a pre-enforcement challenge to a regulation of booksellers and that the claim was ripe given that the statute created a pull towards self-censorship); *Zielasko v. State of Ohio*, 873 F.2d 957 (6th Cir. 1989) (emphasizing that the fear of a legal penalty can constitute an actual harm or injury sufficient to present a ripe claim); *Michigan State Chamber of Commerce v. Austin*, 788 F.2d 1178, 1184 (6th Cir. 1986) (holding that the plaintiffs presented a ripe challenge to restrictions on campaign activity given the plaintiffs' intent to pursue a course of action prohibited by statute, but for fear of prosecution).

Quite appropriately, similar to standing, the ripeness requirements are typically relaxed where the plaintiff's claims concern fundamental First Amendment rights, as in this case. *See 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.").

Bolton, *supra*, and countless cases like it demonstrate that one reason courts entertain pre-enforcement challenges is fundamental fairness—the notion that a plaintiff should not be forced to choose between compliance with a statute and the potential for legal penalties. *See, e.g.*, *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noises, Inc.*, 501 U.S. 252, 265 n.13 (1991) (stating that the claim was ripe where the challenged veto power "hangs . . . like the sword over Damocles, creating a 'here-and-now subservience'"); *Steffel*, 415 U.S. at 462 (holding challenge ripe given that a contrary finding "may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (holding challenge ripe where respondents were "faced with a Hobson's choice" of compliance with the law or penalty); *Navegar Inc.*, 103 F.3d at 998-99 (holding challenge ripe because a threat of prosecution can put the threatened

party "between a rock and a hard place").

Some courts—including this Circuit—have also recognized that allowing such pre-enforcement challenges promotes the rule of law. *See, e.g.*, *Peoples Rights Organization*, 152 F.3d at 530 (holding the plaintiffs' challenge to the assault-weapons ban ripe and stating that "we believe a citizen should be allowed to prefer official adjudication to public disobedience") (quotations omitted); *Bland v. Fessler*, 88 F.3d 729, 737 (9th Cir. 1996) (stating that the plaintiff's decision to obey the statutes and bring a declaratory action challenging their constitutionality, rather than violate the law, "was altogether reasonable and demonstrates a commendable respect for the rule of law").

Indeed, adjudicating a pre-enforcement challenge reduces the "social costs" of the "considerable burden (and sometimes risk) of vindicating . . . rights through case-by-case litigation." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *Bolton*, 410 U.S. at 188 (stating that where a plaintiff alleges an intention to engage in a course of conduct proscribed by a statute then he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief"). "[T]he opportunity to raise constitutional defenses at a criminal trial is inadequate to protect the underlying constitutional rights" in the face of a possible criminal conviction because of the practical burden of "becoming enmeshed in protracted criminal litigation," *Perez v. Ledesma*, 401 U.S. 82, 119 (1971)—not to mention "the opprobrium and stigma" that

accompanies a criminal prosecution and conviction, *Reno v. ACLU*, 521 U.S. at 872. Plaintiffs' claims are ripe for all of these reasons.

In conclusion, Plaintiffs' claims implicate constitutional rights of the highest order, and the determination of the scope of those rights presents legal questions that the court can and should resolve in this litigation.

IV. Plaintiffs' Challenge to the Hate Crimes Act Raises Important Issues of Substantive Constitutional Law that the Court Should Resolve.

A. Plaintiffs' Course of Conduct Is Protected by the First Amendment.

"[S]preading one's religious beliefs" and "preaching the Gospel" are activities protected by the First Amendment. *Murdock v. Pennsylvania*, 319 U.S. 105, 110 (1943). And "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995). This includes expressive conduct. *See Texas v. Johnson*, 491 U.S. 397, 406 (1989). Accordingly, the First Amendment protects Plaintiffs' "religious proselytizing" and "acts of worship," *Capitol Square Rev. & Adv. Bd.*, 515 U.S. at 760 (citations omitted), even if they "cause bodily injury" under the Act.

Moreover, "[a]mong the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." *Healy v. James*, 408 U.S.

169, 181 (1972) (citations omitted). This Circuit echoes this fundamental understanding of the First Amendment: "Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of freedom of speech." *Connection Distributing Co. v. Reno*, 154 F.3d 281, 295 (6th Cir. 1998) (citing *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)). "[I]mplicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, . . . religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Thus, Plaintiffs' conduct is also protected by "the First Amendment's expressive associational right." *See Boy Scouts of America v. Dale*, 530 U.S. 640, 650 (2000) ("[A]n association that seeks to transmit . . . a system of values engages in expressive activity.").

Furthermore, there is no dispute that Christianity is a "religion" under the First Amendment, and preaching God's Word is protected by the Free Exercise Clause, *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (finding that Santeria is a "religion" under the First Amendment and that the practice of animal sacrifice is protected by the Free Exercise Clause), which embraces two concepts: the freedom to believe and the freedom to act, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Consequently, the government may not impose special restrictions or disabilities on the basis of religious beliefs. *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) ("The Free Exercise Clause categorically prohibits government from

regulating, prohibiting, or rewarding religious beliefs as such."). "The principle that government may not enact laws that suppress religious belief or practice is . . . well understood." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 523.

In sum, it cannot be gainsaid that Plaintiffs' conduct, which subjects them to federal law enforcement action under the Hate Crimes Act, is "arguably affected with a constitutional interest." *See Babbitt*, 442 U.S. at 298. Thus, Plaintiffs have standing to advance this ripe challenge to the Act.

B. The Hate Crimes Act Infringes Plaintiffs' First Amendment Liberties.

Section 249(a)(2) authorizes federal law enforcement action that unquestionably involves coercion, persuasion, and intimidation, resulting in the loss of First Amendment rights. There is also no question that prosecuting a person based on conduct protected by the First Amendment violates the U.S. Constitution. *Free Speech Coal.*, 535 U.S. at 244 (acknowledging that "a law imposing criminal penalties on protected speech is a stark example of speech suppression"). Moreover, indirect discouragements or threats of legal sanctions based on conduct protected by the First Amendment similarly violate the U.S. Constitution. *See American Communications Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 402 (1950) (recognizing that "indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions, or taxes"); *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) ("Informal measures, such as 'the threat of

invoking legal sanctions and other means of coercion, persuasion, and intimidation,' can violate the First Amendment also.") (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963)); *see also Presbyterian Church*, 870 F.2d at 518 (finding that plaintiffs, who were chilled from participating in religious worship activities based on their fear of a federal investigation, satisfactorily alleged a constitutional claim).

First Amendment "freedoms are delicate and vulnerable, as well as supremely precious in our society," and "[b]ecause [these] freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). For official acts that infringe First Amendment liberties, the Supreme Court has "long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983). "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. Little Rock*, 361 U.S. 516, 523 (1960). As the Court stated in *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958), "[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." Indeed, using the power and authority of the federal government to investigate and prosecute private citizens, such as Plaintiffs, because of their dissident views on the issue of homosexuality does not promote a legitimate interest of

government, and it has the calculated *and intended* effect of suppressing constitutional freedoms in violation of the First Amendment. *Cf. NAACP v. Alabama*, 357 U.S. at 461 ("In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, *even though unintended*, may inevitably follow from varied forms of governmental action.") (emphasis added).

Here, the Hate Crimes Act expands the jurisdiction of federal law enforcement agencies to not only prosecute, but to investigate private citizens on account of their dissident religious and political views. The Supreme Court has repeatedly acknowledged the constitutional infirmities associated with government investigations that threaten to dampen the exercise of First Amendment rights. *DeGregory v. Attorney Gen. of N.H.*, 383 U.S. 825, 829 (1966) ("Investigation is a part of lawmaking and the First Amendment, as well as the Fifth, stands as a barrier to state intrusion of privacy."); *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 560-61 (1963) (Douglas, J., concurring) ("We deal here with the authority of a State to investigate people, their ideas, their activities. . . . When the State or Federal Government is prohibited from dealing with a subject, it has no constitutional privilege to investigate it."); *NAACP v. Alabama*, 357 U.S. at 449; *Barenblatt v. United States*, 360 U.S. 109, 126 (1959) ("[T]he provisions of the First Amendment . . . of course reach and limit . . . investigations."); *Socialist Workers Party v. Attorney*

Gen., 419 U.S. 1314, 1319 (1974) (noting the dangers inherent in investigative activity that "threatens to dampen the exercise of First Amendment rights"); *Clark v. Library of Congress*, 750 F.2d 89, 94 (D.C. Cir. 1984) ("Exacting scrutiny is especially appropriate where the government action is motivated solely by an individual's lawful beliefs or associations, for government action so predicated is imbued with the potential for subtle coercion of the individual to abandon his controversial beliefs or associations.").

Moreover, *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), does not resolve the issues raised in this challenge. (*Compare* R-23; Order at 16). *Mitchell* involved a penalty-enhancement to an aggravated battery conviction. *See id.* at 484 (noting that "a physical assault is not by any stretch of the imagination expressive conduct"). The Hate Crimes Act, however, does not require a physical assault, and it permits the punishment of expressive conduct. Thus, unlike the chilling effect of the penalty enhancement provision at issue in *Mitchell*, which the Court found "too speculative" because it was "far more attenuated and unlikely than that contemplated in traditional 'over-breadth' cases," *id.* 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.

In fact, nowhere below does the district court (or the Attorney General for that matter) refute Plaintiffs' claim that the Hate Crimes Act does not require the commission of a battery (i.e., a *physical* assault).[8] And the reason is simple: the court and the Attorney General cannot refute the plain language of the statute. By its own terms, the Act proscribes any conduct, including hate speech or hateful words, that "causes" a "bodily injury"[9] to a person because of the person's "actual or perceived . . . sexual orientation [or] gender identity," 18 U.S.C. § 249(a)(2). And 18 U.S.C. § 2 expressly permits the prosecution of hate speech that "counsels, commands, [or] induces" a person to commit an offense proscribable by the Act.

Plaintiffs' argument is further supported by the Rules of Construction, which expressly contemplate the application of the Act to expressive activity. *See* § 4710 (3). And the fact that the speech proscribed by the Act might "incite an imminent act" of lawless action and therefore fall within the category of speech proscribable under *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969), does not save the Act from constitutional challenge. In fact, as discussed further below, *R.A.V. v. City of St. Paul*,

[8] The district court sidesteps the issue by echoing the same refrain of the Attorney General that the Act only prohibits "violent conduct." (R-23; Order at 14, 16). However, under the Act, speech that "causes bodily injury" is "violent conduct" and thus proscribed. (R-1; Compl. at ¶ 74) (claiming that the Act "protect[s] those potential victims who may be the recipients of hateful words").

[9] The term "bodily injury" for purposes of the Act includes emotional or psychological distress accompanied by some illness or physical pain, "no matter how temporary." *See* 18 U.S.C. § 1365(h)(4). As explained more fully above, "bodily injury" need not be caused by a physical act of violence; "hateful" or "harmful" words are capable of causing an "injury" prohibited by the Act.

505 U.S. 377 (1992), compels the conclusion that the Hate Crimes Act is unconstitutional.[10]

C. *R.A.V. v. City of St. Paul* Compels a Finding that the Hate Crimes Act Is Facially Invalid.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court was asked to review the constitutionality of an ordinance that prohibited "*conduct* that amounts to 'fighting words' *i.e.*, '*conduct that itself inflicts injury or tends to incite immediate violence*. . . ,'" so as to protect "the community against *bias-motivated* threats to public safety and order." *Id*. at 380-81 (emphasis added). Even though "fighting words" are proscribable under the First Amendment, *see Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), similar to speech that "incite[s] an imminent act" of lawless action, *see Brandenburg*, 395 U.S. at 449, the Court struck down the ordinance because it only applied to prohibit such conduct "on the basis of race, color, creed, religion or gender" and was therefore content based. *R.A.V.*, 505 U.S. at 391. For similar reasons, the Hate Crimes Act, which only applies to prohibit *conduct* on the basis of a person's "actual or perceived . . . sexual orientation [or] gender identity," is content (and viewpoint) based.

[10] With regard to Plaintiffs' Free Exercise claim, the Supreme Court has affirmed that "[l]egislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 547 (striking down a facially neutral ordinance that targeted a disfavored ritual practice of the Santeria religion). Similarly here, the Act was passed to target the disfavored religious beliefs and associations of those, including Plaintiffs, who take a strong public position against homosexuality in violation of the Free Exercise Clause.

In striking down the ordinance at issue in *R.A.V.*, the Court stated, "The First Amendment does not permit [the government] to impose *special prohibitions* on those speakers who express views on disfavored subjects." *Id*. (emphasis added). As the Court noted, one of the primary evils of content discrimination is that it "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Id.* at 387. That "primary evil" is present in this case in spades. (In fact, one could reasonably conclude that this was the primary goal of Congress for passing the Act.) The Court also noted that the unconstitutional ordinance, similar to the Hate Crimes Act, "goes even beyond mere content discrimination, to actual viewpoint discrimination" by not restricting those "arguing in *favor* of racial, color, etc., tolerance and equality" [or in favor of so-called "gay, lesbian, bi-sexual, and transgendered" (GLBT) rights, as in this case], while placing special prohibitions on "those speakers' opponents." *Id.* at 391-92; (R-1; Compl. at ¶ 115). In sum, *R.A.V. v. City of St. Paul* compels a finding that the Hate Crimes Act is facially invalid.

D. Congress Lacked Authority to Pass the Hate Crimes Act.

Similar to Plaintiffs' First Amendment challenge, the Commerce Clause challenge presents a legal question that is dispositive of the entire case, *see United States v. Morrison*, 529 U.S. 598, 614 (2000) ("[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be

settled finally only by this Court.") (citations and quotations omitted), and Plaintiffs have standing to advance this claim, *see Norton*, 298 F.3d at 547 (finding as-applied First Amendment challenge not ripe for review, but deciding facial and Commerce Clause challenges).

Here, Congress was without authority to enact Section 249(a)(2) of the Act pursuant to its Commerce Clause authority.[11] *See United States v. Lopez*, 514 U.S. 549 (1995); *Morrison*, 529 U.S. at 598. That police power is expressly reserved to the States pursuant to the Tenth Amendment. U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); (R-1; Compl. at ¶¶ 122-25).

As the Supreme Court emphatically stated in *United States v. Morrison*:

> The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the [Commerce] Clause was adopted. The regulation and punishment of intrastate violence that is ***not directed at the instrumentalities, channels, or goods involved in interstate commerce*** has always been the province of the States. Indeed, ***we can think of no better example of the police power, which the***

[11] Plaintiffs do not challenge Congress' *authority* to regulate conduct committed "because of the actual or perceived race, color, religion, or national origin of any person." (*See* 18 U.S.C. § 249(a)(1)). Arguably, Congress has authority under the enforcement provisions of the Thirteenth and/or Fourteenth Amendments to do so. *See* U.S. Const. amend. XIII, § 2; U.S. Const. amend. XIV, § 5. However, because Congress was uncertain about its authority under either amendment to regulate conduct committed on account of the "actual or perceived religion [or] national origin" of a person, Congress added these categories to Section 249(a)(2), invoking its Commerce Clause authority. Thus, there is no question that the *only basis* for Congress to enact Section 249(a)(2) is its authority under the Commerce Clause.

> ***Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims***.

Id. at 617-18 (internal quotations and citations omitted) (emphasis added).

Section 249(a)(2) is "not directed at the instrumentalities, channels, or goods involved in interstate commerce"; it is directed at non-commercial, non-economic, intrastate conduct: causing or attempting to cause (or counseling, commanding, or inducing a person to cause or attempt to cause) "bodily injury" to a person because of the person's "actual or perceived . . . sexual orientation [or] gender identity." It is a criminal statute that purports to suppress crime and vindicate its victims—a "no better example of the police power . . . the Founders denied the National Government and reposed in the States."

As the *Morrison* Court observed, "[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613 (emphasis added). Congress cannot circumvent this threshold requirement by attempting to aggregate the secondary economic effects of the conduct regulated by the Act. Consequently, Congress' findings regarding the ways in which the regulated conduct "substantially affects interstate commerce" are not sufficient to invoke its Commerce Clause powers. *Morrison* explicitly notes that such findings are only relevant to sustain a regulation

when "the regulated activity was of an apparent commercial character."[12] *Morrison*, 529 U.S. at 611, n.4; *see also Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that the federal government may regulate "local conduct that does not, when viewed in isolation, have a significant impact on interstate commerce" so long as the regulated activity is "economic" in character). Here, there is no question that the "regulated activity" has no economic or commercial character. The Act is a criminal statute that by its own terms is non-commercial and non-economic. It does not regulate any good, service, or instrumentality, nor does it regulate the production, distribution, or consumption of any commodity. *See Raich*, 545 U.S. at 25-26. Just as "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity," *Morrison*, 529 U.S. at 613, "bias-motivated" crimes are likewise not economic or commercial activity. Thus, Congress has no authority to regulate the non-commercial, non-economic, intrastate conduct proscribed by the Act.

In the watershed *Lopez* decision reaffirming the limits on Congress' Commerce Clause authority, the U.S. Supreme Court held that Congress does not possess "a

[12] In *Morrison*, the Court stated,

> In contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 [the provision at issue] *is* supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."

Morrison, 529 U.S. at 614.

general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

Drawing on the *Lopez* decision, in *Morrison* the Court set forth four factors to consider whether a federal statute regulating intrastate activity falls within the limits of Congress' Commerce Clause power: (1) whether the law is "a criminal statute that by its terms has nothing to do with 'commerce'"—in other words, whether the regulated activity is itself economic; (2) whether the statute contains an "express jurisdictional element which might limit its reach"; (3) whether there are express legislative findings "regarding the effects upon interstate commerce"; and (4) whether the link between the regulated activity and interstate commerce is so "attenuated" that it fails to place any real limit on Congress' power to regulate.[13] *See Morrison*, 529 U.S. at 610-13; *Lopez*, 514 U.S. at 559-68. In light of these factors and as discussed more fully below, Congress was without authority to pass the Hate Crimes Act.

1. The Act Does Not Regulate Commercial or Economic Activity.

In deciding whether a regulated activity affects interstate commerce sufficient to invoke Congress' Commerce Clause authority, the *Lopez/Morrison* framework first requires a court to determine whether that activity is <u>itself</u> economic in nature. *Morrison*, 529 U.S. at 611 ("*Lopez* . . . demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's

[13] Under the Commerce Clause, Congress can regulate three areas of activity: (1) the channels of interstate commerce; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59.

substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.") (citing *Lopez*, 514 U.S. at 559-560)). This consideration is central to the substantial effects analysis, and is the threshold inquiry. *Morrison*, 529 U.S. at 610-611 (stating that "the noneconomic, criminal nature of the conduct at issue was central to our decision in [*Lopez*]") (citing *Lopez*, 514 U.S. at 551, 560, 561, 567 (striking down the Gun Free School Zones Act because it does not "regulate a commercial activity")).

Section 249(a)(2) does not regulate commercial or economic activity. Instead, much like the statute at issue in *Morrison*, it regulates non-commercial, non-economic, intrastate conduct of an individual that the government has targeted for criminal sanctions. This fact cannot be avoided by claiming a nexus between hate crimes and interstate commerce. *Morrison* establishes that it is the economic nature of the regulated activity itself, not whether the activity affects commerce that matters for Commerce Clause purposes. *Morrison*, 529 U.S. at 611 (noting that the federal regulation of intrastate activity has been upheld only when the activity regulated is itself "some sort of economic endeavor"). Neither *Lopez* nor *Morrison* provides any basis for a shift in focus away from the individual conduct actually regulated by the Act to its secondary economic effects. To the contrary, both cases look explicitly to the commercial or economic nature of the regulated activity itself. *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 560 ("Even *Wickard* [*v. Filburn*, 317 U.S. 111

(1942)], which is perhaps the most far-reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not.").

The fact that the conduct targeted by the Act may also have financial effects does not transform it into commercial or economic activity. Possession of guns in school zones and gender-motivated crimes of violence both have secondary economic effects, *see Morrison*, 529 U.S. at 635 (Souter, J., dissenting) (noting that gender-motivated crimes of violence have cost this Nation billions of dollars), but such derivative consequences do not transform criminal laws proscribing such conduct into commercial regulations authorized by the Commerce Clause. *See Lopez*, 514 U.S. at 561 (striking down the Gun Free School Zone Act because it was "a criminal statute that by its terms has nothing to do with 'commerce'"); *Morrison*, 529 U.S. at 613.

2. The Act's "Jurisdictional Element" Fails to Place Any Real Limit on Congress' Power to Regulate.

Lopez and *Morrison* both hold that Congress does not have a general police power. *Lopez*, 514 U.S. at 567; *Morrison*, 529 U.S. at 618. As *Lopez* and *Morrison* suggest, a "jurisdictional element" that does not place any real limit on Congress's power to regulate, such as the one at issue here, does not ensure the constitutionality of the statute. *See Morrison*, 529 U.S. at 612 ("Such a jurisdictional element *may* establish that the enactment is in pursuance of Congress' regulation of interstate commerce.") (emphasis added); *Lopez*, 514 U.S. at 561 (implying that jurisdictional

elements are useful only when they can ensure, through a case-by-case inquiry, that the regulated activity substantially affects interstate commerce). As the Third Circuit quite appropriately observed in *United States v. Rodia*, 194 F.3d 465, 473 (3d Cir. 1999), "A hard and fast rule that the presence of a jurisdictional element automatically ensures the constitutionality of a statute ignores the fact that the connection between the activity regulated and the jurisdictional hook may be so attenuated as to fail to guarantee that the activity regulated has a substantial effect on interstate commerce." *See also United States v. Corp*, 236 F.3d 325, 331 (6th Cir. 2001) (agreeing with the reasoning in *Rodia*), *abrogated on other grounds by United States v. Bowers*, 594 F.3d 522, 523 (6th Cir. 2010); *United States v. Morales-DeJesus*, 372 F.3d 6, 13-14 (1st Cir. 2004) (agreeing with *Rodia*'s "observation" and noting that a "jurisdictional element" may "not be up to the task" "for establishing that the impact of the regulated activity on interstate commerce is substantial or direct"). That is precisely the situation here. *See* 18 U.S.C. 249(a)(2)(B) (setting forth the "jurisdictional element").

This case presents the perfect opportunity for the court to affirm that Congress cannot circumvent the Constitution by simply reciting a talismanic phrase (i.e., a jurisdictional element) in an effort to create for itself a general police power. As the Supreme Court noted, "Under our written Constitution . . . the limitation of congressional authority is not solely a matter of legislative grace." *Morrison*, 529 U.S. at 616. Indeed, the constitutional limitations imposed by our Founding Fathers

on Congress' authority to regulate are not mere inconveniences or simple "pushovers" that can be so readily bypassed as to make them practically meaningless.[14] Here, it is implausible to argue that Section 249(a)(2) was enacted "in pursuance of Congress' regulation of interstate commerce." It is not a criminal statute "directed at the instrumentalities, channels, or goods involved in interstate commerce" by any measure. *See Morrison*, 529 U.S. at 617-18.

United States v. Wang, 222 F.3d 234 (6th Cir. 2000), is instructive. In *Wang*, the court invalidated, *inter alia*, the Hobbs Act conviction of the defendant because Congress was without authority under the Commerce Clause to punish the conduct at issue. The facts of the case reveal that the defendant and his accomplice broke into the home of the husband and wife owners of a Chinese restaurant and waited for their arrival so they could rob them. *Id*. at 236. The wife arrived first and was physically attacked by the defendant, who struck her on the head with an object and handcuffed her. *Id*. When the husband arrived, he too was struck with an object and handcuffed. *Id*. The defendant's accomplice showed the husband a gun, loaded it in his presence, and pointed it at his head, threatening to kill him if he didn't tell them where he kept the money. *Id*. The robbers ultimately took approximately $4,200 from their victims;

[14] It is a "permanent and indispensable feature of our constitutional system" that "the federal judiciary is supreme in the exposition of the law of the Constitution." *Miller v. Johnson*, 515 U.S. 900, 922-23 (1995) (quotations and citation omitted). Congress' Commerce Clause power is not exempt from this "cardinal rule of constitutional law." *Morrison*, 529 U.S. at 616, n.7.

$1,200 of which belonged to the victims' restaurant, which was engaged in interstate commerce. *Id*. at 240. The robbers also stole their victims' automobile—a Toyota Corolla—and used it to flee the scene of the crime. *Id*. at 236. Despite these facts,[15] the court reversed the Hobbs Act conviction, stating, "Indeed, upholding federal jurisdiction over Wang's offense would, in essence, acknowledge a general federal police power with respect to the crimes of robbery and extortion." *Id*. at 240. The court noted that "[t]he Supreme Court has . . . reminded us that . . . [t]he regulation and punishment of intrastate violence that is *not directed* at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Id*. (internal quotations omitted) (emphasis added).

The court did not strike down the Hobbs Act *in toto*. However, unlike the Hate Crimes Act, the Hobbs Act itself is "directed at the instrumentalities, channels, or goods involved in interstate commerce." The Hobbs Act provides that "[w]hoever in any way or degree *obstructs, delays, or affects commerce or the movement of any article or commodity in commerce*, by robbery or extortion" is subject to punishment. 18 U.S.C. § 1951(a) (emphasis added). Here, the language of the Hate Crimes Act,

[15] In sum, the defendant in *Wang* (1) targeted restaurant owners (persons engaged in interstate commerce) for his crime; (2) stole money that came directly from a commercial establishment; (3) interfered with the commercial and economic activity of his victims (stealing their finances, including their business profits); (4) used "instrumentalities" in commerce in the commission of the offense, including a firearm and handcuffs; (5) and sped away in a stolen vehicle—a "facility" or an "instrumentality" in commerce used for travel. *Wang*, 222 F.3d at 236-40.

including its "jurisdictional element," does not remotely provide for the *substantial* connection with interstate commerce required as a threshold matter—nor could it because Congress sought to regulate non-commercial, non-economic, intrastate activity that is wholly unrelated to interstate commerce. The Hate Crimes Act is an example of the federal government seeking to create for itself the general police powers that our Constitution expressly reserved to the States.

Comparing the Hate Crimes Act with other federal statutes illustrates the point. For example, the Act does not require the "transportation of persons across state lines," *see* 18 U.S.C. § 2421 (prohibiting anyone from knowingly transporting any individual in interstate or foreign commerce for illegal sexual activity), it does not require forcing someone to cross state lines on account of a proscribed act, nor does it even require a person to travel interstate *with the intent* to commit a proscribed act, *compare* 18 U.S.C. § 2261(a) (prohibiting travel across State lines with the intent to commit interstate domestic violence or causing another person to cross State lines on account of a proscribed act) *with* 18 U.S.C. § 249(a)(2)(B)(i) (proscribing the commission of an offense "during the course of, or as the result of, the travel"). Under the Act, if person (A), a Michigan resident, was on vacation in San Francisco (or, for that matter, in Nevada on his way to his vacation stop in San Francisco) and caused "bodily injury" to person (B) because of person (B)'s "actual or perceived . . . sexual orientation [or] gender identity," person (A) is liable for a federal crime even

though his travel was wholly unrelated to the proscribed offense. Thus, it is implausible to argue that the Act regulates interstate travel in any way.

The murder-for-hire statute is another example. *See* 18 U.S.C. § 1958(a). This statute is *directed* at commerce because it is, at its core, a regulation of a commercial transaction (albeit an illegal one).[16] The statute further requires proof that an instrumentality of interstate commerce was used to facilitate the transaction. *See United States v. Weathers*, 169 F.3d 336 (6th Cir. 1999) (finding sufficient nexus between cellular phone calls and the criminal transaction since the calls were used to plan and facilitate the murder-for-hire).

Federal laws *directed* at regulating the manufacture, sale, distribution, delivery, or possession of a product, good, or commodity in interstate commerce—for example, firearms, *see* 18 U.S.C. § 922—similarly provide no basis for criminalizing under federal law the *substantive offense* proscribed by the Act. *See* 18 U.S.C. § 249(a)(2)(B) (prohibiting conduct if, "in connection with [it,] the defendant employs a firearm"); *see Wang*, 222 F.3d at 234.

Finally, the federal arson statute, which makes it a crime to damage or destroy "by means of fire or an explosive, any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," provides no

[16] 18 U.S.C. § 1958(a) (declaring it unlawful "to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed . . . as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value").

support for upholding the Hate Crimes Act because the arson statute is expressly *directed* at commerce. 18 U.S.C. § 844(i); *see also Jones v. United States*, 529 U.S. 848 (2000) (holding that the federal arson statute could not be applied to an owner-occupied residence that was not itself "used in" commerce even though the government presented evidence that the crime "affected" commerce). Consequently, the firebombing of a "gay bar" might fall within the prohibitions of the federal arson statute. However, because Congress has authority to enact legislation *directed* at prohibiting the destruction of *property* that is *used* for interstate commercial activity does not mean that it has authority to pass the Hate Crimes Act (which is not, by any stretch of the imagination, directed at property used in interstate commerce or any other commercial activity)—any more than it would have authority to enact local trespassing laws because some of the local property happens to be commercial. Such a conclusion would completely blur the distinction between what is truly national and what is truly local. *See Morrison*, 529 U.S. at 617-18. In sum, the link between the regulated activity and interstate commerce is so "attenuated" that it fails to place any real limit on Congress' power to regulate. *See id.* at 610-13; *Lopez*¸ 514 U.S. at 559-68.

3. The Act Raises Significant Federalism Concerns.

Finally, both *Lopez* and *Morrison* seek to reinvigorate the "distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18. This

distinction does not rest on whether a regulated activity has local or national effects, but whether local or national government traditionally regulates the activity. *See Morrison*, 529 U.S. 617-18; *Lopez*, 514 U.S. at 567-68. The fact that the States traditionally and routinely proscribe the conduct regulated by the Act goes to the heart of these federalism concerns. As the Supreme Court observed in *Lopez*, "Under our federal system, the States possess primary authority for defining and enforcing the criminal law. When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction." *Lopez*, 514 U.S. at 561, n.3 (internal quotations and citations omitted).

Persons who cause or attempt to cause "bodily injury" to another person are subject to criminal penalties in all fifty States. (R-1; Compl. at ¶¶ 80, 90). Indeed, the perpetrators of the criminal acts against Matthew Shepard, for whom the Act was named in part, were subject to severe criminal penalties under existing State law. (R-1; Compl. at ¶ 77). As noted previously, when Attorney General Holder, who supported the passage of the Act, was asked by Senator Orrin Hatch during a hearing whether there was any evidence of a trend that "hate crimes" were going unpunished at the State level, the Attorney General stated without reservation that there was no such evidence and that, in fact, States were, by and large, doing a fine job in this area. (R-1; Compl. at ¶ 81).

In short, Section 249(a)(2) interferes with the rights of States to exercise the police powers entrusted to them by the Constitution. It exceeds Congress' authority by regulating local, non-commercial, non-economic activity; and it involves the federal government in an area of traditional local concern in violation of the Tenth Amendment.

CONCLUSION

Plaintiffs have standing to challenge the constitutionality of the Hate Crimes Act, and their claims present legal questions that are ripe for review. Consequently, Plaintiffs respectfully request that the court reverse the district court's order dismissing this case for lack of jurisdiction.

Respectfully submitted,

THOMAS MORE LAW CENTER

s/Robert J. Muise
Robert J. Muise (P62849)

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 13,980 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

THOMAS MORE LAW CENTER

s/Robert J. Muise
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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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ADDENDUM: DESIGNATION OF RELEVANT

DISTRICT COURT DOCUMENTS

Record Entry No.	Description
R-1	Complaint
R-9	Attorney General's Motion to Dismiss
R-13	Plaintiffs' Response to Motion to Dismiss
	Exhibit 1–Letter from Congressman Steve King to Gary Glenn, dated April 16, 2010
R-21	Plaintiffs' Sur-reply in Opposition to Motion to Dismiss
	Exhibit 1—Congressional Record Excerpts
	Exhibit 2—News Article from Advocate.com
	Exhibit 3—News Article from *Between the Lines*
R-23	Order Granting Attorney General's Motion to Dismiss and Dismissing Complaint for Lack of Jurisdiction
R-24	Notice of Appeal