No. _____

In the Supreme Court of the United States

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

v.

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

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a constitutional challenge to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249 ("Hate Crimes Act"), a federal criminal statute that facially violates the First Amendment pursuant to this Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

Petitioners include a family rights activist and three Christian pastors who claim that this federal law chills their right to freedom of speech. The Sixth Circuit dismissed Petitioners' challenge on standing grounds. App. 1-20.

Do Petitioners have standing to challenge a federal criminal statute that violates the First Amendment on its face, thereby chilling the exercise of free speech as a matter of law?

PARTIES TO THE PROCEEDING

The Petitioners are Gary Glenn, Pastor Levon Yuille, Pastor Renee B. Ouellette, and Pastor James Combs (collectively referred to as "Petitioners").

The Respondent is Eric H. Holder, Jr., in his official capacity as Attorney General of the United States (referred to as "Respondent").

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OPINIONS BELOW

The opinion of the court of appeals appears at App. 1-20 and is reported at 690 F.3d 417. The opinion of the district court appears at App. 21-54 and is reported at 738 F. Supp. 2d 718.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2012. App. 1-20. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Free Speech Clause of the First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

The Hate Crimes Act, 18 U.S.C. § 249, and relevant portions of the "Rules of Construction," which are found in the Defense Authorization Act, Pub. L. No. 11-84, Div. E, § 4710(1)-(6), 123 Stat. 2841(Oct. 28, 2009), are reprinted in the appendix to this petition. App. 87-95.

STATEMENT OF THE CASE

A. The Hate Crimes Act Inhibits, Deters, and Chills Expressive "Conduct."

The Hate Crimes Act is codified at 18 U.S.C. § 249. Section(a)(2), the provision at issue, 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 violates 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 emotional or psychological harm to the victim." 18 U.S.C. § 249(c)(1). Consequently, 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). 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 has committed a felony 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 has committed a felony 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 Petitioners are often accused of causing on account of their allegedly "hateful" speech directed toward homosexuality. *See* App. 69-74.

Thus, contrary to the Sixth Circuit's claim that the Hate Crimes Act "makes it a crime to batter a person," App. 2-3, 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." *Compare* 18 U.S.C. § 248(a)(1) ("Freedom of Access to Clinic Entrances Act"). Any conduct or act that "causes" [or counsels, commands, or

induces a person to cause[1]] "bodily injury" to a person because of that person's "actual or perceived . . . sexual orientation [or] gender identity" is proscribed. As a result, 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.

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. Indeed, 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, which Congress placed in § 4710 of the Defense Authorization Act,[2] bear this out.

One of the principle Rules of Construction states as follows: "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

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[1] 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.

[2] The Rules of Construction are 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)"). *See* App. 93-95.

Federal Rules of Evidence" can (and must) be used in a criminal trial for an offense charged under the Act.[3]

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 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").[4] 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 § 249(a)(2) forces law enforcement officials, including the Attorney General, to treat identical crimes differently depending upon the government's determination (and proof) of the political, philosophical, or religious beliefs of the accused offender.

Moreover, the claim that nothing in the Act "shall be construed or applied in a manner that infringes any

[3] 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." App. 42.

[4] This is one important fact that distinguishes this case from the sentence enhancement provision at issue in *Wis. v. Mitchell*, 508 U.S. 476 (1993). 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.

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 Petitioners. 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" under the Hate Crimes Act. § 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)).

Thus, the Rules of Construction provide cold comfort to Petitioners and, in fact, demonstrate that the Act is unconstitutional because it permits criminal sanctions for certain speech based on its content. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

The Act also contains a "certification requirement," which further illustrates Petitioners' 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 any 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 and its federal grand juries (with their broad subpoena powers) to investigate any and all *allegations* or *accusations* brought pursuant to the Act.

In short, any person who is suspected or accused of committing an offense under § 249(a)(2) is subject to federal jurisdiction and a federal investigation. Section 249(a)(2), therefore, expressly provides law enforcement with authorization and jurisdiction to conduct federal investigative and other federal law enforcement actions against Petitioners, irrespective of any authority to prosecute them under the Act. And the federal government does not have to prove any of the "Circumstances described" in § 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." App. 17, 67.

In the final analysis, the chilling effect of being accused of a "hate crime"—as Petitioners have been and continue to be—cannot be denied nor understated, and this chilling effect is sufficient to confer standing to challenge the constitutionality of the Act.

B. Petitioners' "Course of Conduct" Subjects Them to the Proscriptions of the Hate Crimes Act.

Petitioners take a strong public stand against homosexual activism, the homosexual lifestyle, and the homosexual agenda. App. 5, 62. Petitioners engage in their public ministry in cities and towns throughout the United States. App. 62. As a direct consequence of their public ministry, Petitioners have been accused of not only "willfully" causing "bodily injury" to persons because of their sexual orientation, but also intentionally counseling, commanding, and inducing others to cause "bodily injury" to persons because of their sexual orientation. App. 70-73. 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,[5] which have influence with this current administration and the U.S. Attorney's Office in Detroit, Michigan, but also from government officials.

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

App. 70-73. In fact, Petitioner 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. App. 71-72.

Petitioners 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 Petitioners and other Christians, the Bible is the ultimate authority for both belief and behavior. App. 63. As Christians, Petitioners are called to spread God's Word, including God's Word regarding homosexuality, which they do as an integral part of their public ministry. App. 66.

Petitioners believe and profess that homosexuality is an illicit lust forbidden by God, who said to His people Israel, "Thou shalt not lie with mankind, as with womankind: it is abomination." (Leviticus 18:22). 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). App. 64.

Through their public ministry, Petitioners have and will continue to "willfully" engage in conduct 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 "hate" speech that "causes" "bodily injury," thereby subjecting Petitioners to federal investigation and punishment.

REASON FOR GRANTING THE PETITION

I. Petitioners Have Standing to Challenge the Constitutionality of the Hate Crimes Act, which Violates the First Amendment on Its Face.

The panel decided that Petitioners lack standing to advance a First Amendment challenge to a federal criminal statute that (1) is facially unconstitutional under the First Amendment based on *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), and, (2) chills Petitioners' exercise of their right to freedom of speech as a result. In short, the panel decided an important federal question regarding a party's standing to challenge a federal criminal law under the First Amendment in a way that conflicts with decisions from other United States courts of appeals and this Court. Consequently, the panel decided an important question of federal law regarding the constitutionality of the Hate Crimes Act that should be settled by this Court. Sup. Ct. R. 10(c).

A. The Hate Crimes Act Is Unconstitutional under *R.A.V. v. City of St. Paul.*

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. Even though "fighting words" are proscribable under the First Amendment, *see Chaplinsky v. N.H.,* 315 U.S. 568, 572 (1942), similar to speech that "incite[s] an imminent act" of lawless action, *see Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969), 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 "actual or perceived . . . sexual orientation [or] gender identity," is content (and viewpoint) based. *See* 18 U.S.C. § 249(a)(2).

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*. 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 here. 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 gay, lesbian, bi-sexual, and transgendered rights, as in this case], while placing special prohibitions on "those speakers' opponents." *Id.* at 391-92.

In sum, *R.A.V. v. City of St. Paul* compels a finding that the Hate Crimes Act is facially invalid.

B. Petitioners Have Standing to Challenge the Hate Crimes Act on First Amendment Grounds.

A criminal statute that is facially invalid under the First Amendment necessarily infringes upon the right to freedom of speech. Consequently, the chilling effect of the infringing statute is sufficient to confer standing to challenge it.

"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 a federal 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); *see also Broadrick v. Okla.*, 413 U.S. 601, 612 (1973) ("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial

prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.").

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 this 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 N.H. 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."); *G&V Lounge, Inc. v. Mich. 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"); *Minn. Citizens Concerned for Life v. Fed. 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, Petitioners 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." *Va. v. Am. Booksellers Ass'n, Inc*., 484 U.S. 383, 392 (1988).

In *Epperson v. Ark.*, 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 Court held that the plaintiff had standing to bring the First Amendment challenge. *Id*.

Similarly, the Court held that abortion providers 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 even the Sixth 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).

Moreover, when considering whether Petitioners have standing to challenge the Act on account of its chilling effect, the severity of the criminal sanctions permitted under the statute (10-year prison term) is also a factor. *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), which simply involved government surveillance and not the potential for criminal sanctions, as in this case.

In the final analysis, Petitioners have standing because they have alleged a "personal injury" to their rights protected by the First Amendment that is "fairly traceable" to the Act and is "likely to be redressed by the requested relief." And this is particularly the case here where the criminal statute violates the First Amendment on its face.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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