ORAL ARGUMENT NOT YET SCHEDULED

NO. 22-5258

In the

United States Court of Appeals for the District of Columbia Circuit

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SALINE PARENTS, an unincorporated association, *et al.*,
Plaintiffs-Appellants

v.

MERRICK B. GARLAND, in his official capacity as Attorney General of the United States of America,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
HONORABLE DABNEY L. FRIEDRICH
CASE NO. 1:21-cv-2775-DLF

APPELLANTS' REPLY BRIEF

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GLOSSARY OF TERMS

Attorney General of the United States	AG
National School Boards Association	NSBA

INTRODUCTION

In his response brief, the Attorney General of the United States seeks to conceal his lawlessness by encouraging this Court to engage in its own form of lawlessness. The Federal Rules of Civil Procedure (and the cases construing these rules) that apply to all litigants also apply to the Attorney General. He is not above the law. It is perhaps this hubris that led him to believe that he could get away with weaponizing the Department of Justice to do the bidding of his political allies (the "AG Policy" at issue here). The question still remains, however, as to whether this Court has the courage to do something about it. The district court showed none. And the American people are growing tired of a judicial system that turns a blind eye to what is nothing short of government tyranny. Take, for example, a simple and obvious point of this case. Our Constitution grants the federal government limited and enumerated powers. So how is it that the Attorney General is meddling in the affairs of local school boards on behalf of the federal government to begin with? Where is his jurisdiction (*i.e.*, authority) to do so? To that end, the Attorney General wants this Court to believe the fiction that he is not labeling as "domestic terrorists" parents who speak out against the "progressive" agenda (his and the Biden administration's favored political view) at local school board meetings. So why are "threat tags" being created by the FBI, and why are the "FBI *Criminal* Investigation Division and *Counterterrorism* Division" (*see*

AG's Br. at 6 [emphasis added]) involved? The Attorney General either believes that this Court is blind and stupid or that it will simply go along with his bidding (having been a former judge in this very Court and likely colleague to many). Plaintiffs are hopefully confident that this Court will see through the Attorney General's efforts to obfuscate the facts of this case and will have the courage to do something about it by permitting this case to proceed to the merits. Our Constitution has failed if the courts are no longer the bulwarks for freedom but simply the enablers of government tyranny and abuse.

In the final analysis, it is important to highlight, yet again, that this case is at its *pleading* stage. Discovery has not commenced. Nonetheless, the Attorney General urges this Court, contrary to the law, to ignore Plaintiffs' factual allegations, reject all reasonable inferences drawn from those factual allegations, and accept his "innocent" alternative explanations. The Court must reject the Attorney General's mendacity—the law, including our Constitution, requires it.

STANDARD OF REVIEW

Before proceeding further, it is critical to review the standard applicable at *this* stage of the litigation. It is this standard that the Court must apply and not some false, heightened pleading standard the Attorney General urges.

To begin, the Court's review of the district court's standing decision is *de novo*. *Emory v. United Air Lines, Inc.*, 720 F.3d 915, 921 (D.C. Cir. 2013). And

more to the point, when reviewing the lower court's decision, this Court ***must*** "accept[] the factual allegations made in the complaint as true and giv[e] plaintiffs the benefit of ***all*** inferences that can reasonably be drawn from their allegations." *Id.* (internal quotations and citation omitted) (emphasis added).

"Because the district court dismissed this case at the complaint stage, [Plaintiffs] need only make a *plausible* allegation of facts establishing each element of standing." *Cutler v. United States HHS*, 797 F.3d 1173, 1179-80 (2015) (emphasis added). And when evaluating Plaintiffs' standing at this juncture of the litigation, the Court "must assume that [Plaintiffs are] correct on the legal merits of [their] claim[s], that a decision on the merits would be favorable[,] and that the requested relief would be granted."[1] *Id*. (internal citation and quotations omitted).

As stated by this Court in *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002), "where the defendant contests only the legal sufficiency of plaintiff's jurisdictional claims, [as in this case,] the standard is similar to that of Rule 12(b)(6), under which dismissal is warranted *if no plausible inferences can be drawn from the facts alleged* that, if proven, would

[1] The Attorney General criticizes Plaintiffs for discussing in detail the nature of their causes of action and not spending more ink on standing in their opening brief. (AG's Br. at 14). But standing is not decided in a vacuum. Understanding the nature of the legal claims is a necessary first step to properly resolving the standing issue.

provide grounds for relief." (emphasis added); *see also Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 278 (3d Cir. 2014) ("In the context of a motion to dismiss, we have held that the [i]njury-in-fact element is not Mount Everest. The contours of the injury-in-fact requirement, while not precisely defined, are very generous, requiring only that claimant allege [ ] some specific, identifiable trifle of injury.") (internal quotations and citation omitted).

It is important to emphasize that the Federal Rules do not impose a heightened pleading standard. Imposing such a standard "can only be accomplished by the process of amending the Federal Rules, and not by judicial interpretation," *Bell Atl. v. Twombly*, 550 U.S. 544, 569 n.14 (2007) (internal quotations omitted), or the urging of the Attorney General. As the Supreme Court in *Twombly* stated, "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id*. at 570. As noted, this plausibility standard applies to the standing issue as well. *Price*, 294 F.3d at 93.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted). It is not a "probability requirement." *Id*.

In *Erickson v. Pardus*, 551 U.S. 89 (2007), a case decided shortly after *Twombly*, the Supreme Court reversed a dismissal granted under Rule 12(b)(6). In doing so, the Court reemphasized the liberal Rule 8 pleading standard, which "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id*. at 93. Furthermore, the Court stated, "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). Upon application of this standard, the Court held that it was error for the Court of Appeals to conclude that the allegations were "too conclusory" for pleading purposes. *Erickson*, 551 U.S. at 94.

Moreover, just because the Court (or the Attorney General) does not believe a fact to be true does not then convert the fact into a "threadbare recital" or "conclusory statement" that can or must be ignored. The Federal Rules do not permit dismissal based on this Court's or the Attorney General's disbelief of the factual allegations or a belief that Plaintiffs' ultimate success in this litigation is remote or unlikely. *See Nietzke v. Williams*, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations."); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)

(stating that a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").[2]

In his brief, the Attorney General improperly views each fact individually and out of context and then offers an alternative explanation for the facts as if this creates some kind of exception to the plausibility standard. That is, he argues that a set of facts otherwise plausibly alleging wrongdoing is defeated if he can address the facts in a piecemeal fashion and come up with some plausible, innocent, alternative explanation. But this is not what *Iqbal/Twombly* stand for, and it expressly contradicts this Circuit's precedent. (*See supra*). In short, this Court should not accept the Attorney General's invitation to ignore the law. *See, e.g.*, *Palin v. N.Y. Times Co.*, 940 F.3d 804, 815 (2d Cir. 2019) ("[I]t is not the district court's province to dismiss a plausible complaint because it is not as plausible as the defendant's theory. The test is whether the complaint is plausible, not whether it is less plausible than an alternative explanation.").

With the proper standard in mind, we turn now to summarize the relevant facts and inferences drawn from those facts—which the Court ***must*** construe in Plaintiffs' favor whether it wants to believe them true or not.

[2] *Nietzke* and *Scheuer* were both cited favorably by the Supreme Court in *Twombly*. *See Twombly,* 550 U.S. at 555.

SUMMARY OF RELEVANT FACTS AND INFERENCES

Plaintiffs are parents and concerned citizens who strongly and publicly object to the adoption and implementation of "progressive" curricula and policies by their local school boards in Loudoun County, Virginia and Saline, Michigan. These "progressive" curricula and polices are favored by "progressives" on the Left, including the Attorney General and the Biden administration for which the Attorney General works. (JA-7-18, 20-21, 24-25, 27, R-8, First Am. Compl. ("FAC") ¶¶ 9-67, 73-75, 81, 93-95, 100-103).

Plaintiffs have voiced their objections loudly and emphatically at school board meetings, being accused, at times, of harassing and intimidating school board members. It is this very behavior (expressive activity) that the Attorney General targets as intimidating, harassing, and threatening to school board members who advance "progressive" curricula and policies. In other words, Plaintiffs *are* the intended target of the AG Policy. (JA-9, 11-13, 18-21, R-8, FAC ¶¶ 20, 32-34, 38, 39, 65, 66, 68-71, 74, 79).

Plaintiffs' sincerely held religious beliefs compel them to raise and educate their children in accord with their faith and to strongly oppose these "progressive" policies and education programs in their children's schools as they are antithetical and contrary to Plaintiffs' faith. Plaintiffs' compliance with these religious beliefs is a religious exercise. (JA-14, R-8, FAC ¶¶ 44, 45).

Aside from his political motivations, the Attorney General has a personal stake in silencing parental opposition to "progressive" policies and curricula. As set forth in the First Amended Complaint, the AG Policy is being used as a political weapon to appease the Attorney General's "progressive" allies and to promote his and his family's personal political and pecuniary interests. (*See, e.g.,* JA-14, 18, 19, 26-28, R-8, FAC ¶¶ 48, 49, 65-68, 98, 100-04).

More specifically, the Attorney General has a family financial conflict of interest as he directs the FBI to investigate parents and other private citizens who are protesting against the use of public schools to indoctrinate children in Critical Race Theory and other "progressive" dogma. The conflict stems from the fact that the Attorney General's son-in-law, Alexander "Xan" Tanner, the co-founder and president of Panorama Education, has a lucrative business promoting some of the objectional indoctrination materials—materials purchased by public school districts throughout the country.[3] (JA-27, R-8, FAC ¶ 100).

The AG Policy is the direct result of *collusion* between the Biden administration and the "progressive" members of the National School Boards Association (NSBA), which submitted a letter to the White House on which the Attorney General relied in creating the AG Policy. In fact, the Biden administration, which includes the Attorney General, *orchestrated the creation of*

[3] The AG is deafly silent about this fact.

this letter in order to develop and adopt the AG Policy. (JA-20, R-8, FAC ¶ 73). The NSBA letter was the *sole basis* for the AG Policy and for the issuance of the October 4 memorandum. And the NSBA letter was drafted *in cooperation and conjunction* with the Biden administration in order *to create the pretext for the AG Policy*. (JA-20, 21, R-8, FAC ¶¶ 73-81). The Attorney General's and the district court's factual conclusions to the contrary *must* be rejected. In other words, it would violate the Federal Rules for this Court to credit the contrary assertion that this was simply an innocent letter sent by an independent, private organization. (*See* AG's Br. at 30-31). It was not.[4]

It is important to note and emphasize that the *focus* of the AG Policy is on *speech*. And the Attorney General's representation that he is *only* targeting "true

[4] Not only is the Attorney General's counter assertion contrary to the allegations in the First Amended Complaint, it is contrary to the facts that Plaintiffs will ultimately prove at a trial on the merits. As reported by *The Federalist*, "AG Merrick Garland admitted that the basis for targeting parents concerned about what their children are learning in schools was a letter from the NSBA," https://thefederalist.com/2021/10/21/ag-merrick-garland-admits-federal-war-on-parentssprang-from-school-boards-letter-not-evidence (last visited on Apr. 3, 2023); "House GOP calls on Garland to withdraw DOJ schools memo after NSBA apologized for 'domestic terrorism' letter," https://www.washingtonexaminer.com/news/house-gop-calls-on-garland-to-withdraw-doj-schools-memo-after-nsba-apologized-for-domestic-terrorism-letter ("Because the NSBA letter was the basis for your memorandum and *given that your memorandum has been and will continue to be read as threatening parents and chilling their protected First Amendment rights*, the only responsible course of action is for you to fully and unequivocally withdraw your memorandum immediately.") (emphasis added).

threats" is materially false.[5] (*See* AG's Br. at 33-34). *Nowhere* in any of the documents disclosed to date (*i.e.*, the documents available through public sources as discovery has yet commenced) does the Attorney General *limit* the actions of the Department of Justice, including the FBI, to just "true threats"—a very narrow category of speech that is not protected by the First Amendment.[6] In fact, the AG Policy expressly targets those individuals that the government/school board members claim engage in "intimidation" and "harassment," including speech that

[5] (*See, e.g.*, JA-20, R-8, FAC ¶ 71 [quoting the Attorney General stating that the "Department of Justice 'is committed to using *its authority and resources* to *discourage* these threats . . . ***and other forms*** *of intimidation and harassment*'"] [emphasis added]; *see also* JA-19, R-8, FAC ¶ 70 [quoting the Attorney General stating that the Constitution does not protect "'threats of violence ***or*** efforts to intimidate individuals based on their views'"] [emphasis added]).

[6] The Attorney General should know the difference between "true threats" (which are not protected by the First Amendment) and speech that others may consider intimidating, harassing, and even threatening (*i.e.*, speech that is the express target of the AG Policy), which *is* protected, particularly in the context of this case (petitioning government officials and complaining about their policies). *Compare Va. v. Black*, 538 U.S. 343, 359 (2003) (narrowly defining "true threats" to "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals") *with Watts v. United States*, 394 U.S. 705, 708 (1969) (instructing that only a contextually *credible* threat to kill, injure, or kidnap the President constitutes a "true threat" that is punishable under the law and noting that "[t]he language of the political arena . . . is often vituperative, abusive, and inexact," but nonetheless protected by the First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886 (1982) (holding that the threatening rhetoric employed to ensure compliance with a boycott against racial discrimination was speech protected by the First Amendment).

the government/school board members believe is intended "to intimidate individuals based on their views." In other words, the AG Policy *targets Plaintiffs*, who are part of the class of persons the Attorney General intends to silence.[7] (*See* (JA-9, 11-13, 18-21, R-8, FAC ¶¶ 20, 32-34, 38, 39, 65, 66, 68-71, 74, 79). It is false to claim otherwise.

As a former judge and the highest-ranking law enforcement official in the country, the Attorney General should know the difference between a "true threat" and "intimidation," "harassment," and other forms of "threats." (*See* Pls.' Opening Br. at 24-30; *see supra* n.6). His and his counsel's efforts to obfuscate this point must be rejected lest we disregard Supreme Court precedent and water-down the First Amendment in the process.

Finally, the only plausible conclusion from the alleged facts is that the Attorney General, via the AG Policy, has labeled, designated, identified, considered, declared, adjudged (choose the verb—they all convey the same point) Plaintiffs and those who engage in similar expressive activity as *criminal* threats and domestic terrorists. There is <u>*no*</u> other reasonable conclusion. Indeed, there are at least five reasons why this factual allegation easily satisfies the "plausibility" standard. First, the NSBA letter, *which was drafted in collusion with the Biden administration and the Attorney General*, expressly used the term "domestic

[7] It is important to note and emphasize yet again that the focus of the AG Policy is on *speech*. It is not focused on violent acts, such as arson, bombings, or shootings.

terrorist," and the Attorney General relied specifically on this letter as the basis for the AG Policy. Second, in order for the Attorney General to get involved in local school board matters (*i.e.*, to invoke federal jurisdiction), he would have to conclude that individuals (*i.e.*, people expressing opposition to "progressive" curricula and policies at school board meetings) were engaging in *federal crimes*, such as *domestic terrorism*. Third, the Attorney General/FBI would have no jurisdiction and thus no basis for creating "threat tags" to aid their investigation/surveillance efforts involving local school boards and officials if there were no basis for federal involvement. In other words, there is no federal jurisdiction in the absence of a federal crime such as domestic terrorism. Fourth, the divisions of the FBI operating this "threat tag" investigation/surveillance are the FBI's *Criminal* Investigation Division and *Counterterrorism* Division. And finally, the presence (pursuant to the AG Policy) of federal law enforcement agents and a marked Homeland Security vehicle at a school board meeting in Fairfax, Virginia is consistent with Plaintiffs' version of the facts. (JA-23, R-8, FAC ¶ 87). In other words, it is yet more evidence supporting the fact that the Attorney General has unleashed the overwhelming resources of federal law enforcement to suppress speech that he and his "progressive" allies dislike.

SUMMARY OF THE ARGUMENT

Plaintiffs have made *plausible* allegations of facts establishing each element of standing in light of the substantive claims advanced. That is, Plaintiffs are suffering an injury in fact that is fairly traceable to the actions of the Attorney General and that can be redressed by a court order.

Furthermore, Plaintiffs' claims are ripe as the challenged actions of the Attorney General have occurred and continue to occur, and these actions chill the exercise of Plaintiffs' fundamental rights.

ARGUMENT IN REPLY

I. An Official Law Enforcement Policy that Targets Plaintiffs for Engaging in Protected Speech Activity Is Unconstitutional.

Like the challenger in *Meese v. Keene*, 481 U.S. 465 (1987), Plaintiffs face a "Hobson's choice" between forgoing protected activity (speaking out at school board meetings in opposition to "progressive" policies and curricula—the very activity the Attorney General claims is threatening, harassing, and intimidating) and suffering not only injury to reputation as they are now deemed "domestic terrorists" and criminal threats for engaging in such activity, but also subjecting themselves to federal investigation, surveillance, and record keeping on account of this activity.

The Attorney General's attempt to distinguish *Meese* is unavailing. (*See* AG's Br. at 32). Indeed, the facts in this case are far more egregious. Keene

simply wanted to exhibit films that the government labeled as "political propaganda." No one was forcing him to show the films. No one was preventing him from showing the films. No one was subjecting him to federal investigation and surveillance for showing the films. And the "political propaganda" label was, as the Supreme Court ultimately concluded, rather innocuous.[8] Consequently, there was nothing in *Meese* that "regulate[d], constrain[ed], or compel[led] any action on [his] part." (*Compare* AG's Br. at 20 [citing cases]). There was nothing that Keene intended to do (showing the films at issue) that was "proscribed" by any law (and thus no imminent arrest, prosecution, or enforcement action). (*Compare id*.). Nothing. Yet, the Supreme Court found that Keene had standing (despite ultimately ruling against him on the merits). *Meese*, 481 U.S. at 472-77.

Moreover, Keene chose to enter into the rough and tumble world of politics where labels such as "political propaganda" are prevalent. On the other hand, Plaintiffs are simply concerned parents (and private citizens) who care about their children and who now find themselves in the cross-hairs of the Attorney General and his Department of Justice because of it.

In sum, the Attorney General cannot square *Meese* with his (and the district

[8] Because the Court believed that the term "political propaganda" was "neutral," "evenhanded," and without any "pejorative connotation," it concluded that the act placed "no burden on protected expression" and was thus constitutional. *Meese*, 481 U.S. at 480. The same cannot be said about being designated a "criminal threat" or "domestic terrorist."

court's) narrow and incorrect view of standing.

Moreover, courts readily find standing when a challenger is subject to law enforcement actions such as investigations and surveillance that dampen the right to free speech even though the actions are not *per se* "regulatory, proscriptive, or compulsory." Being the target of government law enforcement actions such as investigations and surveillances on account of protected speech activity is in fact compulsory by its very nature. What is it about this fundamental principle of First Amendment jurisprudence that the Attorney General and the district court fail to comprehend? *See 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."); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983) ("[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."); *Bates v. Little Rock*, 361 U.S. 516, 523 (1960) ("Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."); *NAACP v. Button*, 371 U.S. 415, 433 (1963) (stating that 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. Ala.*, 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."). There is a reason why we do not live in a police state—it is contrary to fundamental freedoms such as the right to free speech.

The Supreme Court has repeatedly acknowledged the constitutional infirmities (and thus related injuries) associated with government surveillance and investigations that threaten First Amendment rights, as in this case. *DeGregory v. Atty. 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. Fla. Legislative Comm.*, 372 U.S. 539, 560-61 (1963) ("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.") (Douglas, J., concurring); *Barenblatt v. United States*, 360 U.S. 109, 126 (1959) ("The provisions of the First Amendment . . . of course reach and limit . . . investigations."); *Socialist Workers Party v. Att'y 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*, 750 F.2d 89 (applying

strict scrutiny in a case challenging the federal government's investigation into an employee's political beliefs and associations).

In the final analysis, the district court has jurisdiction to hear and decide this case challenging the Attorney General's unlawful targeting of private citizens based on the content and viewpoint of their speech.

II. Plaintiffs Have Standing to Challenge an Official Law Enforcement Policy that Targets Them for Engaging in Protected Speech Activity.

"[T]he 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). 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). Plaintiffs are not simply private citizens observing government action with which they disagree. In other words, this is not an abstract or theoretical disagreement; Plaintiffs are the very targets of the government action they are challenging. *Compare Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 482-83 (1982) (stating that "standing [is] not satisfied by the abstract injury in nonobservance of the Constitution asserted by . . . citizens" in general) (internal quotations and citation omitted).

A. Plaintiffs Are Suffering Personal Injuries.

The chilling effect of the AG Policy on Plaintiffs' constitutional rights causes an injury in fact that is redressable by a court order. Plaintiffs need not wait for an actual arrest or prosecution to occur to be injured by government action that deters protected speech. *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"); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("The threat of sanctions may deter . . . almost as potently as the actual application of sanctions."); *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."); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) ("[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat.").

In addition to the injury to Plaintiffs' right to freedom speech, Plaintiffs have alleged reputational harm. "As a matter of law, reputational harm is a cognizable injury in fact." *NCAA v. Governor of N.J.*, 730 F.3d 208, 220 (3d Cir. 2013) (citing *Meese*). As stated by this Court, "Case law is clear that where reputational injury derives directly from an unexpired and unretracted government action, that

injury satisfies the requirements of Article III standing to challenge that action."[9] *Foretich v. United States*, 351 F.3d 1198, 1213 (D.C. Cir. 2003); *Gully v. NCUA Bd.*, 341 F.3d 155, 161 (2d Cir. 2003) (stating that "[t]he Supreme Court has long recognized that an injury to reputation will satisfy the injury element of standing"); *Parsons v. United States DOJ*, 801 F.3d 701, 712 (6th Cir. 2015) ("Stigmatization also constitutes an injury in fact for standing purposes."); *see also Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 542-43 (3d Cir. 2007) (finding standing to challenge a sanction that "affect[s] [the plaintiff's] reputation").

As the facts and all reasonable inferences drawn from those facts plainly show, the AG Policy labels/designates/identifies/considers/declares/adjudges (choose the verb—they all convey the same message to the public, which is why it is "reputational" harm)[10] Plaintiffs as criminal "threats" and "domestic terrorists." Why else would the FBI's Criminal Investigation Division and Counterterrorism Division be involved? Indeed, why is the Attorney General involved at all if this has nothing to do with federal crimes, including domestic terrorism? To claim that

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[9] As noted by the *New York Post*, the Attorney General "owe[s] America's 'domestic terrorist' parents an apology." *See* https://nypost.com/2021/10/25/ag-merrick-garland-white-house-owe-americas-domestic-terrorist-parents-an-apology-and-an-explanation/ (last visited Apr. 4, 2023). In short, even if the Attorney General (and the federal courts) choose to remain willfully blind about what is going on here, the American people can see it. It is quite transparent once you step out of the fog of Washington, D.C.

[10] Reputation is defined as "[t]he general opinion or judgment *of the public* about a person or thing." *The American Heritage Dictionary of the English Language* (5th ed) (emphasis added).

there is no reputational harm at issue is patently false. And this harm, as noted above, is sufficient to establish Plaintiffs' standing to advance this challenge. *See also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139 (1951) (holding that charitable organizations designated as "Communist" by the Attorney General had standing to challenge their designations because of, *inter alia*, "damage [to] the reputation of those organizations in their respective communities"); *Doe v. Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999) (holding that a student had standing to challenge a rule requiring that he be identified as disabled because such a label could sour the perception of him by "people who can affect his future and his livelihood").

In sum, Plaintiffs are currently suffering a cognizable injury in fact. As stated by this Court:

> "[S]uits for declaratory and injunctive relief against the threatened invasion of a constitutional right do not ordinarily require proof of any injury other than the threatened constitutional deprivation itself." *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998). Thus, "[a]lthough a plaintiff seeking equitable relief must show a threat of substantial and immediate irreparable injury, a prospective violation of a constitutional right constitutes irreparable injury for these purposes." *Id*. (internal citation omitted).

Gordon v. Holder, 721 F.3d 638, 653 (D.C. Cir. 2013).

B. Plaintiffs' Injuries Are Fairly Traceable to the Challenged Conduct.

The "fairly traceable" requirement essentially asks whether "the asserted

injury was the consequence of the defendants' actions" or whether "prospective relief will remove the harm." *Warth*, 422 U.S. at 505. In this case, the answer to both inquiries is "yes." Moreover, as stated by this Court:

> The "fairly traceable" and "redressibility" requirements for Article III standing ensure that the injury is caused by the challenged action and can be remedied by judicial relief. When, as in this case, the relief requested is simply the cessation of illegal conduct, the Court has noted that the "fairly traceable" and "redressibility" analyses are identical.

Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 793 F.2d 1322, 1334 (D.C. Cir. 1986). As set forth above and noted further below, the alleged injuries are the direct consequence of the challenged conduct and the relief requested will remedy the harm. In other words, the "fairly traceable" and "redressability" requirements are met.

C. The Harm to Plaintiffs Is Redressable by a Court Order.

There is no question that the harm of which Plaintiffs complain is redressable by a court order. A case from the Ninth Circuit conclusively makes this point. In *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989), the plaintiff churches brought an action against the federal government and some of its officers for violating their First and Fourth Amendment 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).[11]

As set forth in the First Amended Complaint:

> A judicial determination that the AG Policy violates the Constitution and federal statutory law as set forth in this First Amended Complaint would reassure Plaintiffs (as well as other similarly situated parents and concerned citizens) that they can freely participate in their constitutionally protected activities without being denigrated and labeled as a criminal threat or domestic terrorist by the government, appearing in government records as criminal threats or domestic terrorists, or being threatened by the government with investigation because their constitutionally protected activity is deemed threatening, harassing, or intimidating simply because public officials oppose the content and viewpoint of Plaintiffs' message.

(JA-28, R-8, FAC ¶ 107).

Thus, a judicial determination that the AG Policy violates Plaintiffs' fundamental rights, including the right to freedom of speech, would assure them (and other similarly situated private citizens) that they could freely participate in school board meetings without having their expressions being surveilled and

[11] The Attorney General failed to cite, let alone distinguish, *Presbyterian Church*, which was also cited in Plaintiffs' opening brief. (Pls.' Br. at 43-44).

recorded by the government and becoming part of official records.[12] *See also United States v. Accra Pac, Inc.*, 173 F.3d 630, 633 (7th Cir. 1999) (stating that "being put on a blacklist . . . is treated as immediately redressible harm because it diminishes (or eliminates) the opportunity to practice one's profession even if the list . . . does not impose legal obligations").

In sum, redressability is not an issue.

III. Plaintiffs' Claims Are Ripe.

The doctrines of ripeness and standing "originate" from the same Article III limitation. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014). Quite often, Article III standing and ripeness issues "boil down to the same question." *MedImmune, Inc.*, 549 U.S. at 128 n.8. For reasons that Plaintiffs have standing in this case, the ripeness requirement is satisfied as well.

The basic rationale of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580 (1985) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). "The problem is best seen in a twofold aspect, requiring [the courts] to evaluate both the fitness of the issues for

[12] (*See, e.g.*, JA-33, R-8, FAC Prayer for Relief, ¶ F [requesting an order "enjoin[ing] the creation or maintenance of files or databases containing information about Plaintiffs, Plaintiffs' protected expressive activities, or the protected expressive activities of other similarly situated persons as set forth in this First Amended Complaint"]).

judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149. We begin with the hardship prong.

As *Meese, et al.,* make plain, the injury to Plaintiffs' reputations has already occurred, and it will continue without relief from this Court. Moreover, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*); *Gordon*, 721 F.3d at 653 ("Although a plaintiff seeking equitable relief must show a threat of substantial and immediate irreparable injury, a prospective violation of a constitutional right constitutes irreparable injury for these purposes.") (internal quotations, brackets, and citation omitted). The hardship prong is met.

This case is also fit for judicial review. "In considering the fitness of an issue for judicial review, the court must ensure that a record adequate to support an informed decision exists when the case is heard." *NRA of Am. v. Magaw*, 132 F.3d 272, 290 (6th Cir. 1997). Given the posture of this case (motion to dismiss at the pleading stage), the record is more than sufficient for the Court to rule on the issues of standing and ripeness.

At the end of the day, justiciability requirements, including ripeness, are relaxed (for good reason) in the First Amendment context. *See Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002); *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"). *Cheffer v. Reno*, 55 F.3d 1517, 1523 n.12 (11th Cir. 1995) ("We note that the doctrine of ripeness is more loosely applied in the First Amendment context."); *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1033 n.18 (5th Cir. 1981) (relaxing the injury-in-fact requirement for standing in First Amendment challenges); *Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997) (same). The case is ripe for review.

CONCLUSION

In the final analysis, what Justice Douglas stated in his concurrence in *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 570 (1963), rings true here:

> For the views a citizen entertains, the beliefs he harbors, the utterances he makes, the ideology he embraces and the people he associates with are no concern of government. That article of faith marks indeed the main difference between the Free Society which we espouse and the dictatorships both on the Left and on the Right.

Due in large part to the watchful eye of the judiciary, the government has not been allowed to abridge—whether directly, indirectly, forcefully, or subtly—the precious and vulnerable First Amendment freedoms of law-abiding citizens,

regardless of political ideology. A private citizen's first defense against such governmental abuse is the Constitution. Consequently, the challenged policy at issue here, which takes us a step closer to "dictatorship," cannot exist in the Free Society described by Justice Douglas.

Plaintiffs respectfully request that the Court reverse the district court and remand the case so it may proceed to the merits.

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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 6,334 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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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