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' REPLY BRIEF

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ARGUMENT

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

This court's review of the Hate Crimes Act must focus on the language chosen by Congress and not the Attorney General's improper interpretation and application of that language. (*See* Defs.' Br. at 10-11) (citing the testimony of the Attorney General, including his claim that the Act "has nothing to do with regard to speech"). Indeed, this court should follow the wise course taken by the U.S. district court judge in *ACLU v. Reno*, 929 F. Supp. 824, 857 (E.D. Pa. 1996) (Sloviter, J.), who rejected the "troubl[ing] suggest[ion] that the concerns expressed by the plaintiffs . . . reflect an exaggerated supposition of how [the Department of Justice] would apply the law, and that [the court] should, in effect, trust the Department of Justice to limit the [challenged law's] application in a reasonable fashion." Similarly, this court should reject the argument that "the First Amendment . . . should . . . be interpreted to require [the court] to entrust the protection it affords to the judgment of prosecutors." *See Id.*; (*See generally* Defs.' Br. at 10-11).

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

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

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

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

[3] The Rules of Construction can be found at Defense Authorization Act, Pub. L. No. 111-84, Div. E, § 4710 (1)-(6), 123 Stat. 2841 (Oct. 28, 2009) (hereinafter "§ 4710 (1)-(6)").

furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest" or if the "exercise of religion, speech, expression, or association . . . incite[s] an imminent act of physical violence against another").

Indeed, the Rules of Construction make it plain that Congress intended the Act to apply to *some* religious exercise, speech, expression, or association (i.e., expressive conduct that "causes bodily injury," that "counsels, commands, [or] induces . . . bodily injury," or that "incite[s] an imminent act of physical violence"). Compare, for example, 18 U.S.C. § 113, which prohibits "assaults within maritime and territorial jurisdiction."[4] There are no "Rules of Construction" discussing the application of this

[4] The entire statute reads as follows:

§ 113. Assaults within maritime and territorial jurisdiction

(a) Whoever, *within the special maritime and territorial jurisdiction of the United States*, is guilty of an assault shall be punished as follows:

(1) Assault with intent to commit murder, by imprisonment for not more than twenty years.

(2) Assault with intent to commit any felony, except murder or a felony under chapter 109A [18 U.S.C. §§ 2241 *et seq.*], by a fine under this title or imprisonment for not more than ten years, or both.

(3) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by a fine under this title or imprisonment for not more than ten years, or both.

(4) Assault by striking, beating, or wounding, by a fine under this title or imprisonment for not more than six months, or both.

(5) Simple assault, by a fine under this title or imprisonment for not more than six months, or both, *or if the victim of the assault is an individual who has not attained the age of 16 years*, by fine under this title or imprisonment for not more than 1 year, or both.

(6) Assault resulting in *serious bodily injury*, by a fine under this title or

statute to religious exercise, speech, expression, or association *because there is no need for it*. The statute plainly prohibits a *physical assault*, which, as the U.S. Supreme Court appropriately noted in *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993), "is not by any stretch of the imagination expressive conduct." Conversely, the Hate Crimes Act is not so limited and in fact includes "expressive conduct" within its reach. *See, e.g.*, § 4710 (3). Thus, *Wisconsin v. Mitchell* is not controlling, (*see* Defs.' Br. at 32-33), and, in fact, compels the conclusion that Plaintiffs have standing to challenge this unconstitutional act. As argued in Plaintiffs' opening brief,

> 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*.

(Pls.' Br. at 38) (emphasis added).

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imprisonment for not more than ten years, or both.

(7) Assault resulting in *substantial bodily injury* to an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 5 years, or both.

(b) As used in this subsection [section]

(1) the term "*substantial bodily injury*" means bodily injury which involves—

(A) a temporary but substantial disfigurement; or

(B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty; and

(2) the term "serious bodily injury" has the meaning given that term in section 1365 of this title [18 U.S.C. § 1365].

18 U.S.C. § 113 (emphasis added).

As alleged in the Complaint, "hateful words" that are intentionally and willfully spoken or preached by Plaintiffs have caused [or counseled, commanded, or induced a person to cause] "bodily injury" to others on account of their "actual or perceived . . . sexual orientation [or] gender identity," thereby subjecting Plaintiffs to punishment under the Act and chilling their speech in the process. (*See* R-1; Compl. at ¶¶ 4, 6, 14-25, 28-41, 56-59, 61-62, 66-69; *see also* Compl. at ¶¶ 74-75). Thus, under the plain language of the Act and its Rules of Construction, expressive conduct that "causes bodily injury," such as Plaintiffs' speech, is considered "violent conduct" and thus proscribed.

Indeed, if Congress wanted to limit the reach of the Act to violent *physical* assaults, it certainly knew how to do that. *See* 18 U.S.C. § 113. But that is not what it did, nor what it intended to do. (*See* R-1; Compl. at ¶ 74 (claiming that the Act "protect[s] those potential victims who may be the recipients of hateful words"); *see also* Compl. at ¶ 75). And that conclusion is supported by the language chosen by Congress, not the spin the Attorney General wants to put on it to avoid the inevitable finding that the Act is unconstitutional.

In the final analysis, the Attorney General's entire argument "is based upon an interpretation of the Act that is contrary to its plain language," (*see* Defs.' Br. at 29), and must, therefore, be rejected.

II. Plaintiffs Have "Willfully" Engaged in and Will Continue to "Willfully" Engage in Conduct Proscribed by the Hate Crimes Act and therefore Have Standing to Advance Their Ripe Claims.

As an initial matter, the standing and ripeness requirements are *relaxed* in this case because it arises under the First Amendment. *See Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1034 n.18 (5th Cir. 1981) (stating that the injury-in-fact requirement for standing is properly relaxed for First Amendment challenges "because of the 'danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping an improper application'") (quotations in original, citations omitted); *Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997) ("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."); *Norton*, 298 F.3d at 554 (noting that the ripeness requirements are relaxed in the First Amendment context); *Cheffer v. Reno*, 55 F.3d 1517, 1523 n.12 (11th Cir. 1995) ("[T]he doctrine of ripeness is more loosely applied in the First Amendment context."). The Attorney General, however, seems intent on stiffening these requirements, which this court should reject.

Here, Plaintiffs have standing to challenge this federal criminal law, which was "aimed directly at [them,[5] and] *if their interpretation of the statute is correct*, will

[5] (*See, e.g.*, R-1; Compl. at ¶ 74 (stating that the Act is "need[ed] to protect those potential victims who may be the recipients of hateful words"); Compl. at ¶ 75 ("[T]he following question was posed in the House Judiciary Committee: '[I]f a minister

have to [forego constitutionally protected activity] or risk criminal prosecution." *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988) (emphasis added). Additionally, Plaintiffs' constitutional claims are ripe for review. *See Navegar, Inc. v. United States*, 103 F.3d 994, 1000 (D.C. Cir. 1997) ("[O]nly when litigants seek pre-enforcement review of antiquated laws of purely 'historical curiosity' [can the threat of prosecution be deemed speculative]."). And this is particularly so since the claims present pure legal questions that require no further factual development. *See Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 581 (1985) (holding challenge to regulatory provisions ripe where the issue presented was legal and would not be clarified by further factual development); *Peick v. Pension Benefit Guar. Corp.*, 724 F.2d 1247, 1261 (7th Cir. 1983) (same); (*compare* Defs.' Br. at 45) (making the erroneous argument that "because they have brought a facial challenge to the Act, plaintiffs' claims exist in a factual vacuum" and are therefore not ripe).

In *Norton v. Ashcroft*, 298 F.3d 547 (6th Cir. 2002), for example, the court held

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preaches that sexual relations outside of marriage of a man and woman is wrong, and somebody within that congregation goes out and does an act of violence, and that person says that that minister counseled or induced him through the sermon to commit that act, are you saying under your amendment that in no way could that ever be introduced against the minister?' A congressional supporter of the Hate Crimes Act responded bluntly, 'No.'"); (*see also* R-13; Pls.' Resp. to Mot. to Dismiss at Ex. 1) (Unsolicited letter from U.S. Congressman Steve King to Plaintiff Glenn dated April 16, 2010) ("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.").

that it lacked jurisdiction to decide plaintiffs' "*as-applied*" First Amendment challenge to FACE, 18 U.S.C. § 248, because the claim was not ripe for review. In so ruling, the court stated, "[A]ssuming plaintiffs have sufficiently alleged unconstitutional harm, they have not established that such alleged harm will ever come to pass." *Id*. at 554. The court found, for example, that the plaintiffs had not engaged in the proscribable "pattern of activity," and that they "professed an intention to comply with the Act." *Id*. Despite these findings, however, the court nonetheless undertook the important task of deciding Plaintiffs' facial challenges to this federal law arising under the First (freedom of speech) and Fifth (equal protection) Amendments and the Commerce Clause. *See id.* at 552-54, 555-59.

The allegations here present a far more compelling basis for finding that Plaintiffs have standing and that their meritorious challenge to the Act is ripe for review. (*See* Pls.' Br. at 33-55; *see also* Sec. III, *infra*). As alleged in the Complaint, Plaintiffs have "willfully" engaged in and will continue to "willfully" engage in expressive conduct—conduct that supporters of the Act describe as violent "hate" *speech* and "*hateful words*"—that is *proscribed by the language of* the Act because the Act does not limit its reach to *physical* acts of violence, but expressly includes within its reach any conduct, including religious exercise, speech, expression, and association, that causes "bodily injury," as that term is broadly defined by the Act, (*see* n.2, *supra*) (or that "counsels, commands, [or] induces . . . bodily injury" or that

"incite[s] an imminent act of physical violence"). As a result, Plaintiffs are subject to federal investigation and punishment, thereby conferring standing to challenge the Act's constitutionality. (*See, e.g.*, R-1; Compl. at ¶¶ 56-59, 61-62).

There is no question that Plaintiffs believe very strenuously that their "conduct" is protected by the U.S. Constitution and thus beyond the reach of any criminal law, *which is why they are bringing this pre-enforcement challenge*. Not everyone shares Plaintiffs' belief, however. In particular, that belief is not shared by the "LGBT community"—the very community that the local Michigan U.S. Attorney has publicly vowed to support through the enforcement of the Hate Crimes Act. (*See, e.g.*, Pls.' Br. at 15-18) (quoting a public report claiming that the local Michigan U.S. Attorney is engaged in "a vigorous effort to protect LGBT rights *as never seen before in the district*," and quoting the U.S. Attorney as stating, "*We're very eager to bring cases under this act*").

Moreover, the Rules of Construction make it clear that Plaintiffs can be prosecuted under the Act based on their "exercise of religion, speech, expression, or association" if such expressive conduct "causes bodily injury," "counsels, commands, [or] induces . . . bodily injury," or if it "incite[s] an imminent act of physical violence against another." § 4710 (3). As the Complaint alleges:

- "Plaintiffs have been accused by those who engage in homosexual behavior, supporters of the homosexual agenda, and supporters of § 249(a)(2) of the

Hate Crimes Act of counseling, commanding, or inducing violent acts that are prohibited by and punishable under the Act." (R-1; Compl. at ¶ 56).

- Plaintiffs have been accused of "inducing violence against persons who engage in homosexual behavior." (R-1; Compl. at ¶ 57);
- "In the case of the death of Andrew Anthos—a 72-year-old Detroit man who was allegedly the victim of a 'hate crime' because of his 'sexual orientation,'. . . Plaintiff Glenn's 'homophobic rants'" were cited as "causing his death." (R-1; Compl. at ¶ 58);
- "The death of Mr. Anthos was cited by Senator Carl Levin as evidence of the need to extend federal 'hate crimes' legislation to include 'sexual orientation' as a protected classification." (R-1; Compl. at ¶ 59);
- "The former director of policy for the Triangle Foundation, a Michigan-based homosexual lobby group that supported the Hate Crimes Act, publicly stated, 'We personally believe that the AFA [Plaintiff Glenn's organization] may support the murder of gay, lesbian, and bisexual people.'" (R-1; Compl. at ¶ 61);
- "The former executive director of the Triangle Foundation publicly stated the following regarding 'hate crimes': 'The vocal anti-gay activists [which includes Plaintiffs] should be held accountable as accessories to these crimes because, many times, it is their rhetoric that led the perpetrators to

believe that their crimes are OK. . . . If a criminal borrows a gun and then uses it to kill someone, the law considers the gun owner an accessory to the crime. So, too, are the people who own the words that incite violence.'" (R-1; Compl. at ¶ 62); and

- "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).

It is important to bear in mind that the Triangle Foundation is an influential organization within the "LGBT community" in Michigan—the very "community" to which the local U.S. Attorney made a pledge "to bring cases under this act." (R-21; Pls.' Sur-reply at Ex. 3). Thus, not only have Plaintiffs alleged that they have engaged in and will continue to engage in conduct that is proscribed by the Act, they have set forth *specific* instances in which they have been accused of engaging in such conduct by the very "community" the Act was intended to protect. (*See* Defs.' Br. at 10) (acknowledging that the Act protects "members of the LGBT community").

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

Plaintiffs' expressive conduct.

In defense of his position, the Attorney General makes the following claim:

> It is not sufficient for plaintiffs to allege that they intend to engage in conduct that might cause emotional distress, and to argue that that emotional distress might, in turn, result in bodily injury. To allege that they intend to violate the statute, plaintiffs must allege that *they* intend to cause bodily injury. They have made no such allegation. Thus they have not alleged that they intend to engage in any conduct that would violate Section 249(a)(2).

(Defs.' Br. at 24).

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

> *Intent ordinarily may not be proved directly*, because there is no way of fathoming or scrutinizing the operations of the human mind. But *you may infer the defendant's intent from the surrounding circumstances*. You may consider *any statement made* and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind. *You may consider it reasonable to draw the inference and find that the person intends the natural and probable consequences of acts knowingly done, or knowingly omitted*.

United States v. Thomas, 728 F.2d 313, 321 (6th Cir. 1984) (emphasis added). Consequently, contrary to the Attorney General's suggestion, Plaintiffs cannot grant themselves immunity from prosecution under the Act by simply claiming that they did not in fact intend to cause (willfully or otherwise) bodily injury by their conduct. If it were that simple, any defendant could avoid prosecution and conviction, and there would be far fewer criminal trials and far more acquittals. Instead, as this instruction makes plain and as the Act expressly allows, *see* § 4710 (1) (permitting "evidence of speech, beliefs, association, group membership, or expressive conduct" if "that evidence is relevant and admissible under the Federal Rules of Evidence"), the Attorney General will be permitted to present evidence at trial of the beliefs, statements, and associations of Plaintiffs to prove intent, including Plaintiffs' beliefs and statements that homosexual acts are acts of grave depravity that are intrinsically disordered. (*See* R-1; Compl. at ¶ 29). He will be permitted to present evidence of Plaintiffs quoting Apostle Paul, who, writing by inspiration of the Holy Spirit, declared that those who engage in homosexual acts "*shall not inherit the kingdom of God*." (1 Corinthians 6:9-11) (R-1; Compl. at ¶ 30) (emphasis added). The Attorney General will be permitted to present evidence that 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). (R-1; Compl. at ¶ 31). He will be permitted to present evidence of Plaintiffs' beliefs

and speech that persons engaging in homosexual behavior are guilty of "leaving the natural use of the woman" (Romans 1:27), meaning that their behavior is illicit, "against nature" (Romans 1:26), and thus *contrary to God's will*. (R-1; Compl. at ¶¶ 31-32). He will be permitted to present evidence that Plaintiffs believe that the Bible is the unalterable and divinely inspired Word of God, and the ultimate authority for both belief and behavior. (R-1; Compl. at ¶ 28). And based on this professed belief, the Attorney General will be permitted to present evidence that, according to the Bible, in Old Testament times in Israel, God dealt severely with those who engaged in homosexual behavior, warning His people through Moses, "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: *they shall surely be put to death; their blood shall be upon them*." (Leviticus 20:13). (R-1; Compl. at ¶ 33) (emphasis added).

In sum, the Attorney General's attempt to defeat standing by erroneously claiming that Plaintiffs do not intend to engage in conduct that "willfully causes bodily injury to any person . . . because of the actual or perceived . . . sexual orientation [or] gender identity . . . of any person" is without merit and represents a fundamental misunderstanding (or misrepresentation) of the criminal law, the plain language of the Act, and the means available to the government to prove the elements of a crime.

In the final analysis, the fact that Plaintiffs' constitutionally protected conduct

subjects them to punishment under a federal criminal law is alone sufficient to confer standing to challenge this law. *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1395 (6th Cir. 1987) (holding that where a plaintiff "would be subject to application of the [challenged] statute," that alone is sufficient to provide the "fear of prosecution . . . reasonably founded in fact" to confer standing). Therefore, under controlling precedent, Plaintiffs have standing to bring this ripe, pre-enforcement challenge to the Hate Crimes Act, which chills expressive conduct in violation of the U.S. Constitution. *See id*.; *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights."). As a result, this court must reject the contrary arguments of the Attorney General and reverse the dismissal of this important First Amendment challenge.

III. The District Court Has Jurisdiction to Declare the Hate Crimes Act Unconstitutional under *R.A.V. v. City of St. Paul*.

As noted above, the Attorney General's claim that "Plaintiffs do not allege that they intend to engage in any conduct prohibited by the Act," (Defs.' Br. at 3), is without merit. And this erroneous claim is the sum and substance of the Attorney General's arguments. Consequently, the Attorney General's plea that Plaintiffs should

be denied the right to have a federal court decide whether the Hate Crimes Act violates the U.S. Constitution, which, under *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), it does, is based on a false premise.

The Attorney General concedes at least this much: "[The Rules of Construction] simply acknowledge[] that there are limited circumstances *in which speech may be proscribed* without violating the First Amendment." (Defs.' Br. at 27) (emphasis added). This concession, however, directly contradicts the Attorney General's testimony that the Act "has *nothing* to do with regard to speech." (Defs.' Br. at 11) (emphasis added). Moreover, the problem with the Attorney General's "simpl[e] acknowledge[ment]" is that the Hate Crimes Act is not one of these "limited circumstances." *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down an ordinance on First Amendment grounds that prohibited "conduct" that amounted to "fighting words" because the ordinance was content-based in that it prohibited only "fighting words" that were "bias-motivated" on account of the victim's "race, color, creed, religion or gender").

Indeed, conspicuously missing from the Attorney General's brief is any mention of *R.A.V. v. City of St. Paul*. And the reason is obvious: this case compels the conclusion that the Hate Crimes Act is unconstitutional, notwithstanding *Cox v. Louisiana*, 379 U.S. 536 (1965), *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that it is constitutionally permissible to prohibit speech "directed to inciting or

producing imminent lawless action"), (*see* Defs.' Br. at 27), or even *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (holding that it is constitutional to prohibit "fighting words").

The exception carved out for "fighting words" in *Chaplinsky* is, using the Attorney General's phrase, a "black letter recitation[] of familiar First Amendment principles." (*See* Defs.' Br. at 27). Nevertheless, the U.S. Supreme Court struck down on its face an ordinance similar to the Hate Crimes Act that prohibited "*conduct* that amounts to 'fighting words' *i.e.*, '*conduct that itself inflicts injury or tends to incite immediate violence*. . . .'" *R.A.V.*, 505 U.S. at 380-81 (emphasis added). The objective of this unconstitutional ordinance, similar to the objective of the Hate Crimes Act (*see* Defs.' Br. at 10), was to protect "the community against *bias-motivated* threats to public safety and order." *Id.* (emphasis added). Thus, even though it is "black letter" law that "fighting words" are proscribable under the First Amendment, *see Chaplinsky*, 315 U.S. at 572, similar to speech that "incite[s] an imminent act" of lawless action, *see Brandenburg*, 395 U.S. at 449, which the Hate Crimes Act proscribes, *see* § 4710 (3) (permitting the prosecution of the "exercise of religion, speech, expression, or association" under the Act if it "incite[s] an imminent act of physical violence against another"), 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,*

precisely the same reason, the Hate Crimes Act is content based and unconstitutional. *See* 18 U.S.C. § 249(a)(2) (prohibiting such conduct on the basis of a person's "actual or perceived . . . sexual orientation [or] gender identity").

In the final analysis, it is evident that the Attorney General wants this case dismissed on standing and ripeness grounds because he knows that the Hate Crimes Act will fall if Plaintiffs are permitted to have their constitutional claims heard by a federal court. As demonstrated above, this court should give Plaintiffs that opportunity and reverse the district court.

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, this court should 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 4,789 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

THOMAS MORE LAW CENTER

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

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2011, 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.

THOMAS MORE LAW CENTER

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