No. 10-2273

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY GLENN, PASTOR LEVON YUILLE, PASTOR RENEE 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

BRIEF FOR THE DEFENDANT AS APPELLEE

BARBARA McQUADE
United States Attorney

THOMAS E. PEREZ
Assistant Attorney General

TONY WEST
Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

JUDITH E. LEVY
Assistant United States Attorney
Eastern District of Michigan
211 W. Fort Street, Ste. 2001
Detroit, MI 48226
Telephone: (313) 226-9727

JESSICA DUNSAY SILVER
LINDA F. THOME
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
P.O. Box 14403
Ben Franklin Station
Washington, D.C. 20044-4403
Telephone: (202) 514-4706

MARK B. STERN
MATTHEW M. COLLETTE
Attorneys, Appellate Staff
Civil Division, Room 7212
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 514-4214

STATEMENT REGARDING ORAL ARGUMENT

Appellant has requested oral argument. The United States believes that argument will assist the Court in its consideration of this case.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

LEGISLATIVE HISTORY:

LEGISLATIVE HISTORY (continued): **PAGE**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 10-2273

GARY GLENN, PASTOR LEVON YUILLE, PASTOR RENEE 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

BRIEF FOR THE DEFENDANT AS APPELLEE

JURISDICTION

This is an appeal from a final order dismissing plaintiffs-appellants' complaint for lack of jurisdiction. The district court lacked subject matter jurisdiction over plaintiffs' claims. The district court's order dismissing the case was entered September 7, 2010. Plaintiffs-appellants timely filed their notice of appeal September 28, 2010. This court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether plaintiffs have standing to challenge the constitutionality of the Shepard-Byrd Hate Crimes Act when they do not allege that they intend to engage in any conduct that would violate the Act and there is no credible threat that they will be prosecuted for violating the Act.

2. Whether plaintiffs' claims are ripe for review.

STATEMENT OF THE CASE

This is a pre-enforcement challenge to one of the criminal provisions of the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (the Shepard-Byrd Hate Crimes Act or the Act).[1] The Act imposes criminal penalties upon any person who "willfully causes bodily injury" to a person (or attempts to cause bodily injury "through the use of fire, a firearm, an explosive, or other dangerous weapon"), "because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person." 18 U.S.C. 249(a)(2). The Act applies evenhandedly to all who commit bias-motivated acts, regardless of ideology or religious belief. The Act does not proscribe protected speech. It prohibits only violent conduct. And it includes specific provisions

[1] A copy of relevant portions of the Act is attached to this brief as Attachment B to the Addendum.

ensuring that it may not be applied to infringe any rights guaranteed by the First Amendment.

Plaintiffs do not allege that they intend to engage in any conduct prohibited by the Act, that they have been prosecuted under the Act, or that they have been threatened with such prosecution. Nonetheless, plaintiffs, speculating that the Act may be enforced against them because of their strong public views, brought this action claiming that the Act is facially invalid in violation of the First Amendment, that it violates the Equal Protection guarantees of the Fifth Amendment, that it exceeds Congress's authority under the Commerce Clause, and that it violates the Tenth Amendment.

The district court dismissed plaintiffs' complaint for lack of jurisdiction, holding that plaintiffs lack standing and that their claims are not ripe because plaintiffs have not alleged an intention to violate the Act, and therefore have no credible fear of prosecution.

STATEMENT OF FACTS

1. The Shepard-Byrd Hate Crimes Act

a. The Shepard-Byrd Hate Crimes Act was enacted by Congress and signed into law by the President in October 2009. Pub. L. No. 111-84, Div. E, 123 Stat. 2190 (Oct. 28, 2009). Sections 4704-4706 of the Act authorize financial and other assistance to state and local authorities for the investigation and prosecution of hate

crimes, while Section 4707 creates federal criminal offenses, codified at 18 U.S.C. 249, for bias-motivated violent conduct.

The criminal provisions of the Act prohibit only willful, violent conduct. At issue in this case is Section 249(a)(2), which provides criminal penalties for:

> (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.

18 U.S.C. 249(a)(2) (emphasis added).[2] The circumstances described in subparagraph (B) of Section 249(a)(2) require proof of one of several interstate commerce elements.[3]

---

[2] The Act includes two other criminal provisions that are not at issue in this case. Section 249(a)(1) provides criminal penalties for "[w]hoever, whether or not acting under color of law, 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 race, color, religion, or national origin of any person." Section 249(a)(3) applies to offenses that occur in "the special maritime or territorial jurisdiction of the United States."

[3] Conviction for violation of Section 249(a)(2) requires proof of one of the following interstate commerce elements: (i) the conduct occurs during the course of, or as the result of, either the defendant's or the victim's travel across a state line or national border or using a channel, facility, or instrumentality of interstate or foreign commerce; (ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with offense; (iii) the defendant

(continued…)

The Hate Crimes Act incorporates the definition of "bodily injury" from 18 U.S.C. 1365(h)(4), which defines the term to include: "(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." See 18 U.S.C. 249(c)(1). However, the Act includes an important exception: the definition "does not include solely emotional or psychological harm to the victim." *Ibid.*

The Hate Crimes Act is narrower in some respects than existing criminal civil rights laws because it does not apply to threats, intimidation, or interference with federally protected activities. See, *e.g.*, 18 U.S.C. 245(b)(2) (providing criminal penalties for "[w]hoever * * * by force or *threat of force* willfully injures, *intimidates, or interferes with*, or attempts to injure, *intimidate or interfere with* – (2) any person because of his race, color, religion or national origin and because he is or has been" engaging in any one of a list of federally protected activities, such as enrolling in a public school or college).

(…continued)
employs a firearm, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce in connection with the offense; or (iv) the defendant's conduct either (I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or (II) otherwise affects interstate or foreign commerce. 18 U.S.C. 249(a)(2)(B).

b. Consistent with its desire to supplement rather than supplant state authority, Congress took measures to ensure that federal prosecutions would be brought only in limited circumstances. Accordingly, the Act provides that no federal prosecution may be undertaken for violations of the Act in the absence of a certification by the Attorney General or a designee that:

> (A) the State does not have jurisdiction;
>
> (B) the State has requested that the Federal Government assume jurisdiction;
>
> (C) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence; or
>
> (D) a prosecution by the United States is in the public interest and necessary to secure substantial justice.

18 U.S.C. 249(b).

Congress also enacted rules of construction to ensure that the Act is enforced only against violent conduct and only in ways that are consistent with the First Amendment and the Federal Rules of Evidence. Pub. L. No. 111-84, Div. E, Sec. 4710 (1)-(6), 123 Stat. 2841 (Oct. 28, 2009) (Section 4710). Thus, Congress made clear that the Act applies only "to violent acts motivated by actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability of a victim." Section 4710(2). Congress also made it clear that nothing in the Act "shall be construed to allow a court, in any criminal trial for an offense

described under * * * [the Act], in the absence of a stipulation by the parties, 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." Section 4710(1).

Congress also enacted the following provision to ensure a narrow construction and application of the statute:

> (3) CONSTRUCTION AND APPLICATION. — Nothing in this division, or an amendment made by this division, shall be construed or applied in a manner that infringes any rights under the first amendment of the Constitution of the United States. Nor shall anything in this division, or an amendment made by this division, be construed or applied in a manner that substantially burdens a person's exercise of religion (regardless of whether compelled by, or central to, a system of religious belief), speech, expression, or association, unless the Government demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest, if such exercise of religion, speech, expression, or association was not intended to –
>
> > (A) plan or prepare for an act of physical violence; or
> >
> > (B) incite an imminent act of physical violence against another.

Section 4710(3). Congress reinforced this directive, stating that nothing in the Act "shall be construed to allow prosecution based solely upon an individual's expression of racial, religious, political, or other beliefs or solely upon an individual's membership in a group advocating or espousing such beliefs," and adding a separate provision that nothing in the Act "shall be construed to diminish

any rights under the first amendment to the Constitution of the United States." Section 4710(4) & (5). Finally, Congress specified that nothing in the Act "shall be construed to prohibit any constitutionally protected speech, expressive conduct or activities (regardless of whether compelled by, or central to, a system of religious belief), including the exercise of religion protected by the first amendment to the Constitution of the United States and peaceful picketing or demonstration. The Constitution of the United States does not protect speech, conduct or activities consisting of planning for, conspiring to commit, or committing an act of violence." Section 4710(6).

c. Congress made several statutory findings that support the constitutionality of the Act. Pub. L. No. 111-84, Div. E, Sec. 4702 (1)-(10), 123 Stat. 2835-2836 (Oct. 28, 2009) (Section 4702). It found, for instance, that "[t]he incidence of violence motivated by the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim poses a serious national problem." Section 4702(1).[4] Congress also found that "[s]uch violence disrupts the tranquility and safety of communities and is

[4] Congress heard evidence about the prevalence of hate crimes and the need for federal involvement to address the problem. As the House Report on the bill stated, such offenses "are disturbingly prevalent and pose a significant threat to the full participation of all Americans in our democratic society." H.R. Rep. No. 86, 111th Cong., 1st Sess. Pt. 1, 5 (2009). In 2007 alone, the FBI had documented more than 7,600 hate crimes, including 1,265 incidents (16.6%) motivated by bias based upon sexual orientation. *Ibid*.

deeply divisive." Section 4702(2). In addition, Congress found, "[a] prominent characteristic of a violent crime motivated by bias is that it devastates not just the actual victim and the family and friends of the victim, but frequently savages the community sharing the traits that caused the victim to be selected." Section 4702(5). Congress also found that "[s]uch violence substantially affects interstate commerce in many ways." Section 4702(6).[5]

Congress recognized that "[s]tate and local authorities are now and will continue to be responsible for prosecuting the overwhelming majority of violent crimes in the United States, including violent crimes motivated by bias," but also found that "[t]hese authorities can carry out their responsibilities more effectively with greater Federal assistance." Section 4702(4). Congress noted that "[f]ederal jurisdiction over certain violent crimes motivated by bias enables Federal, State, and local authorities to work together as partners in the investigation and prosecution of such crimes." Section 4702(9). Finding that "[e]xisting Federal

[5] Specifically, Congress found that "(A) [t]he movement of members of targeted groups is impeded, and members of such groups are forced to move across State lines to escape the incidence or risk of such violence.
(B) Members of targeted groups are prevented from purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity. (C) Perpetrators cross State lines to commit such violence. (D) Channels, facilities, and instrumentalities of interstate commerce are used to facilitate the commission of such violence. [and] (E) Such violence is committed using articles that have traveled in interstate commerce." Section 4702(6).

law is inadequate to address this problem," Congress concluded that "[t]he problem of crimes motivated by bias is sufficiently serious, widespread, and interstate in nature as to warrant Federal assistance to States, local jurisdictions, and Indian tribes." Section 4702(4) & (10).

In testimony before the Senate Judiciary Committee in support of the legislation, Attorney General Holder declared that the Hate Crimes Act would "help protect all Americans from the scourge of the most heinous, bias-motivated violence." *The Mathew Shepard Hate Crimes Act of 2009: Hearing Before the Senate Comm. on the Judiciary*, 111th Cong., 1st Sess. 4 (2009) (*Senate Hearing*). "Perpetrators of hate crimes," the Attorney General stated, "seek to deny the humanity that we all share, regardless of the color of our skin, the god to whom we pray, or the person who we choose to love." *Id.* at 5. In written responses submitted following his testimony, the Attorney General made it clear that "the bill would protect heterosexuals as well as members of the LGBT community, just as the bill would protect people of all races, not merely groups traditionally viewed as minorities." *Id*. at 72; see *id.* at 76 ("the bill would protect everyone from assaults based on their sexual orientation," including "an individual who formerly identified himself as gay [who was] attacked because he now identified himself as heterosexual or because he was incorrectly perceived as still being homosexual").

During his testimony, the Attorney General was asked if a minister could be held criminally liable under the Act if he preached "that homosexuality should be condemned and is in fact unacceptable," and if a member of the minister's congregation, motivated by his sermon, committed an offense. *Senate Hearing* 12-13. The Attorney General answered unequivocally that the minister would *not* be liable under the Act because "[t]his bill seeks to protect people from conduct that is motivated by bias. It has nothing to do with regard to speech." *Ibid.* He also stated that the Act would not prohibit harassment or "mental intimidation." *Ibid.* "[W]e're looking for acts that result in bodily injury and in the absence of bodily injury, that kind of conduct would not be cognizable under the statute." *Ibid.* The Attorney General reiterated in written responses to the Committee that the "bill does not criminalize thought or speech, no matter how offensive. Rather, it criminalizes violent acts motivated by a bias." *Id.* at 63.

2. Plaintiffs' Challenge To The Act

This is a pre-enforcement, facial challenge to the constitutionality of Section 249(a)(2) of the Hate Crimes Act. According to the complaint, plaintiffs "take a strong public stand against homosexual activism, the homosexual lifestyle, and the homosexual agenda." R.E. 1, Complaint ¶¶ 17, 19, 22, 24.[6] Plaintiffs assert that

[6] Citations to "R.E. __" refer to documents in the Electronic Record. Citations to "Pl. Br. __" refer to plaintiffs' opening brief in this appeal.

"[c]lear and emphatic opposition to homosexuality, homosexual activism, and the homosexual agenda is a duty of all Christians," and that they "publicly denounce homosexuality, homosexual activism, and the homosexual agenda as being contrary to God's law and His divinely inspired Word." R.E. 1, Complaint ¶¶ 37-38. Plaintiffs do not allege that they intend to cause bodily injury or to attempt to cause bodily injury to any person. Nor do plaintiffs allege that any federal law enforcement official has asserted that they have or will violate the Act, or that any such official has threatened to prosecute them under the Act.

Plaintiffs brought this action against Attorney General Eric Holder, Jr., in his official capacity. R.E. 1, Complaint ¶ 26. They contend that the Act violates their rights under the First Amendment and the Equal Protection Clause of the Fifth Amendment, that Congress lacked the authority to enact the Act under the Commerce Clause, and that the Act violates the Tenth Amendment. R.E. 1, Complaint ¶¶ 102-125. They seek a declaration that the Act violates these provisions of the Constitution and an injunction barring its application to their speech or activities.

Although plaintiffs do not allege they intend to cause or attempt to cause bodily harm to anyone, they assert that the Act threatens to chill their religious exercise and freedom of speech because they will be targeted for investigation and prosecution. R.E. 1, Complaint ¶¶ 52-53. They do not allege that any federal

official with prosecutorial authority has threatened them with prosecution. Rather, they cite a statement from the Attorney General that the Act would be "a great tool for the Justice Department." R.E. 1, Complaint ¶ 44. Plaintiffs also allege that they have been accused by "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 * * * the Act." R.E. 1, Complaint ¶ 56. Plaintiffs cite statements from private parties, as well as isolated members of Congress, purportedly accusing them of causing violence against gays that would be prohibited by the Act. R.E. 1, Complaint ¶¶ 57-69. Plaintiffs also assert that similar "hate crimes" legislation had been enforced in Pennsylvania and several foreign countries "to deter and punish the speech of priests, pastors, and other religious persons." R.E. 1, Complaint ¶ 71.

Plaintiffs allege that "the Hate Crimes Act, which was promoted by homosexual activists and sponsored by legislators who seek to garner their political support, is more about promoting the homosexual agenda and marginalizing Biblical teachings against sexual immorality than it is about protecting people from acts of violence." R.E. 1, Complaint ¶ 95. According to plaintiffs, the "real purpose" of the Act "is to deter, inhibit, chill, and punish thought, beliefs, and speech." R.E. 1, Complaint ¶ 82.

3. The District Court's Decision

The Attorney General moved to dismiss the complaint for lack of jurisdiction, pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, and, in the alternative, for failure to state a claim, pursuant to Rule 12(b)(6). R.E. 9, Motion to Dismiss. The district court granted the Attorney General's motion to dismiss for lack of jurisdiction on the grounds that (1) plaintiffs lack standing to assert their claims; and (2) plaintiffs' claims are not ripe for review. R.E. 23, Order Granting Attorney General's Motion to Dismiss (Order), pp. 3-4, 26.

The court concluded that plaintiffs lack standing because "they do not allege an 'injury in fact,' that is both 'concrete and particularized,' and 'actual or imminent.'" R.E. 23, Order, p. 21 (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). In particular, the district court explained, "[p]laintiffs do not allege that they intend to 'willfully cause' any 'bodily injury.'" R.E. Order, p. 21. That fact, "in combination with the Attorney General's denial that the Hate Crimes Act applies to Plaintiffs' conduct (a conclusion that is supported by the text of the statute, the Rules of Construction, and the legislative history), supports the conclusion that Plaintiffs have not demonstrated that 'there exists a credible threat of prosecution' under the Act." R.E. 23, Order, pp. 21-22 (quoting *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). Thus, the court concluded, their "fear of prosecution is speculative." R.E. 23, Order, p. 21 (citing

Babbitt, 442 U.S. at 298; *Greater Cincinnati Coal. for the Homeless* v. *City of Cincinnati*, 56 F.3d 710, 716 (6th Cir. 1995)).

The district court also concluded that plaintiffs' claims are not ripe for review. R.E. 23, Order, pp. 22-25. Plaintiffs' "risk of harm," the court ruled, "was speculative." R.E. 23, Order, p. 25. Thus, they had "not demonstrated a sufficient 'likelihood that the harm alleged will ever come to pass.'" R.E. 23, Order, p. 25 (quoting *Norton* v. *Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002), cert. denied, 537 U.S. 1172 (2003)). The "hypothetical situations" plaintiffs allege, the court explained, were not "of 'substantial and of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" R.E. 23, Order, p. 25 (quoting *Norton*, 298 F.3d at 554).

The district court explained that "Plaintiffs allege their own personal beliefs and assertions of third party members of the general public to suggest that they would be subject to prosecution and investigation under the Act, rather than any concrete, 'reasonably founded in fact,' threat of prosecution or investigation." R.E. 23, Order, p. 25 (quoting *Planned Parenthood Ass'n* v. *City of Cincinnati*, 822 F.2d 1390, 1395 (6th Cir. 1987)). The court also concluded that "the fact that the United States Attorney * * * expressed her administration's intent to vigorously enforce the Hate Crimes Act does not amount to a credible threat of

prosecution of the Plaintiffs for their opinions under the factual circumstances alleged." *Ibid*.

Because the court ruled that plaintiffs lack standing and that their claims are not ripe for review, the court did not reach the Attorney General's alternative motion to dismiss their complaint for failure to state a claim, under Rule 12(b)(6), Federal Rules of Civil Procedure. R.E. 23, Order, p. 25.

SUMMARY OF ARGUMENT

Plaintiffs lack standing because they fail to establish the constitutional minimum requirement of injury in fact. To establish standing to maintain a pre-enforcement challenge to a criminal statute, plaintiffs must allege that they intend to engage in conduct that violates the statute and sufficient facts to establish that there is a credible threat that they will be prosecuted. Plaintiffs can establish neither. They have not alleged that they intend to "willfully cause[] bodily injury to any person or * * * attempt[] to cause bodily injury to any person, because of the actual or perceived * * * sexual orientation * * * of any person." 18 U.S.C. 249(a)(2). None of the conduct that plaintiffs allege violates Section 249(a)(2), which prohibits only willful violent conduct – not protected speech, expression, association, or religious exercise. Nor is there any credible threat that plaintiffs will be prosecuted for violating Section 249(a)(2). Their allegations that they are

subject to prosecution are purely hypothetical and based upon misreading of the statute.

Plaintiffs claims are not ripe for review. In determining ripeness, "this court examines (1) the likelihood that the harm alleged will ever come to pass; (2) whether the factual record is sufficiently developed to allow for adjudication; and, (3) hardship to the parties if judicial review is denied." *Norton* v. *Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002), cert. denied, 537 U.S. 1172 (2003) (citation omitted). Plaintiffs cannot establish any of these elements. Because plaintiffs have not alleged that they intend to violate Section 249(a)(2), there is no likelihood that any harm will occur, and there will be no harm if judicial review is denied. Moreover, because plaintiffs have brought a facial challenge to the Act, there is no factual predicate to determine whether any particular application of the Act is constitutional.

The district court therefore correctly dismissed plaintiffs' complaint for lack of subject matter jurisdiction.

ARGUMENT

I

PLAINTIFFS LACK STANDING TO ASSERT THEIR CLAIMS BECAUSE THEY DO NOT ALLEGE THAT THEY INTEND TO VIOLATE SECTION 249(a)(2) OR THAT THERE IS A CREDIBLE THREAT THAT THEY WILL BE PROSECUTED UNDER THE ACT

A. To Establish Standing To Bring A Pre-Enforcement Challenge To A Criminal Statute, A Plaintiff Must Allege That He Intends To Engage In Conduct That Is Prohibited By The Statute And That There Is A Credible Threat That He Will Be Prosecuted Under The Statute

To establish standing, as an "irreducible constitutional minimum," a plaintiff must establish that he or she has "suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations & internal quotation marks omitted). Plaintiffs are required to demonstrate standing for each specific claim that they seek to raise. *Daimler Chrysler Corp*. v. *Cuno*, 547 U.S. 332, 352 (2006). Further, a court should not consider the merits of an action unless and until it is satisfied that plaintiffs have standing and that their claims are ripe. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998).

The "threshold question" in determining standing is "whether the plaintiff has made out a 'case or controversy' between himself and the defendant," that is, "whether the plaintiff has 'alleged such a personal stake in the outcome of the

controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). The requisite "personal stake" exists "only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action.'" *Id*. at 499 (citation omitted). Where standing depends upon allegations of future harm, the "threatened injury must be 'certainly impending' to constitute injury in fact." *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990) (quoting *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

To establish sufficient injury to bring a pre-enforcement challenge to a criminal statute, plaintiffs must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute, and [that] there exists a credible threat of prosecution thereunder." *Babbitt*, 442 U.S. at 298 (citation omitted). In *Virginia* v. *American Booksellers Ass'n, Inc*., 484 U.S. 383 (1988), for example, the Supreme Court held that an organization of booksellers had standing to challenge the constitutionality of a statute that expressly restricted their ability to display certain written and visual materials. *Id.* at 386; see *id.* at 388-389, 392. The statute, the Court explained, was "aimed directly at plaintiffs, who, if their interpretation of the statute is

correct, will have to take significant and costly compliance measures or risk criminal prosecution." *Id.* at 392.

On the other hand, "persons having no fears of * * * prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *Babbitt*, 442 U.S. at 298 (quoting *Younger* v. *Harris*, 401 U.S. 37, 42 (1971)). In *Younger*, plaintiffs lacked standing to challenge the constitutionality of a state syndicalism law because they did not allege any intention to violate the law, but rather alleged only that they were "inhibited" by the law, or were "uncertain" whether they might be prosecuted under it. *Id.* at 41-42. Similarly, in *Greater Cincinnati Coalition for the Homeless* v. *City of Cincinnati*, 56 F.3d 710, 716 (6th Cir. 1995), the plaintiff did not have standing to challenge an anti-panhandling ordinance where he had not violated the ordinance in the past and did not allege that he intended to violate its terms in the future.

Plaintiffs here cannot meet the threshold requirement for standing because they did not allege that they intend "to engage in a course of conduct * * * proscribed by [the] statute," or that "there exists a credible threat of prosecution thereunder." *Babbitt*, 442 U.S. at 298.

B. Plaintiffs Do Not Allege That They Intend To Engage In Conduct Proscribed By Section 249(a)(2)

Plaintiffs do not allege that they intend to engage in any conduct prohibited by Section 249(a)(2). In particular, they do not allege that they intend to "willfully

cause[] bodily injury to any person or * * * attempt[] to cause bodily injury to any person, because of the actual or perceived * * * sexual orientation * * * of any person." 18 U.S.C. 249(a)(2). Rather, plaintiffs allege that they "take a strong public stand against homosexual activism, the homosexual lifestyle, and the homosexual agenda," that "[c]lear and emphatic opposition to homosexuality, homosexual activism, and the homosexual agenda is a duty of all Christians," and that they "publicly denounce homosexuality, homosexual activism, and the homosexual agenda as being contrary to God's law and His divinely inspired Word." R.E. 1, Complaint ¶¶ 17, 19, 22, 24, 37-38. The plain terms of the Act simply do not prohibit any such speech or conduct. Indeed, as explained below, p. 25-28, *infra*, the Rules of Construction expressly bar any application of the Act to the kind of protected expression alleged in plaintiffs' complaint.

Moreover, the Act prohibits only willful conduct. As the Supreme Court has explained, the term "willfully" "differentiates between deliberate and unwitting conduct," and "in the criminal law it also typically refers to a culpable state of mind." *United States* v. *Bryan*, 524 U.S. 184, 191 (1998). Thus, to establish the willfulness element in a Section 249(a)(2) prosecution, the government will be required to prove, beyond a reasonable doubt, that the defendant deliberately caused bodily injury and that he "acted with knowledge that his conduct was unlawful." *Id*. at 192 (citation omitted); see *United States* v. *Carney*, 387 F.3d

436, 442 n.2 (6th Cir. 2004) (to establish a "willful" violation of a criminal statute, the prosecution must prove "that the defendant knew both the pertinent fact(s) and understood the illegality of the pertinent charged conduct") (emphasis omitted) (citing *Bryan*, 524 U.S. at 192-193 (1998)). Plaintiffs have not alleged that they intend deliberately and knowingly to cause bodily injury to anyone.

Plaintiffs' contention that the Act will subject them to liability under 18 U.S.C. 2 is also without foundation. R.E. 1, Complaint ¶¶ 54-69; see Pl. Br. 9 & n.2. Section 2(a) of Title 18 provides that one who "aids, abets, counsels, commands, induces or procures" an offense "is punishable as a principal." To establish this offense, the prosecution must prove "that the substantive offense has been committed" and "that the defendant committed overt acts or affirmative conduct to further the offense, and intended to facilitate the commission of the crime." *United States* v. *Dolt*, 27 F.3d 235, 238 (6th Cir. 1994) (citations omitted); see *Carney*, 387 F.3d at 446 (affirming a conviction under 18 U.S.C. 2 where "[t]he record evidence compellingly demonstrated that the defendant[s] * * * knowingly, willfully, actively, and repeatedly collaborated with a convicted felon's ongoing unlawful conspiratorial scheme"). Thus mere speech – without the intent to facilitate the commission of a violent act and some direct assistance or participation in the offense itself – could never be the basis for a prosecution for aiding and abetting a violation of the Hate Crimes Act. Plaintiffs have not alleged

that they intend to commit any overt acts to further an offense under the Act or to facilitate the commission of any violent conduct that might violate the Act.

On appeal, despite the plain language of the statute, plaintiffs baldly state that "the Act does not limit its reach to *physical* acts of violence, but expressly includes within its reach so-called 'hate' *speech* and '*hateful words.*'" Pl. Br. 6 (emphasis in the original). Despite the quotation marks, plaintiffs give no citation for this statement, and the words "'hate' speech" and "hateful words" are not found in the statute. There is no merit to any of plaintiffs' arguments in support of their interpretation of the statute.

Plaintiffs first point to the statutory definition of "bodily injury," which includes "(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," but "does not include solely emotional or psychological harm to the victim." 18 U.S.C. 1365(h)(4); see 18 U.S.C. 249(c)(1). According to plaintiffs, they could be prosecuted under the Act if they caused someone emotional or psychological harm which resulted in that person suffering a headache or a stomachache, or even committing suicide. Pl. Br. 7-8. This contention, however, fails to take account of the willfulness element of the statute, which requires proof that the defendant deliberately caused bodily injury and that he "acted with knowledge that his

conduct was unlawful." *Bryan*, 524 U.S. at 192 (citation omitted). In other words, because of the requirement to prove willfulness, plaintiffs simply cannot commit an unwitting violation of the statute. As the district court explained, even assuming the statute applies to injuries such as a headache or a stomachache caused by emotional distress, the Act does not criminalize plaintiffs' expression of their views because they do not allege that they intend, through their speech, to cause any kind of bodily injury. R.E. 23, Order, p. 21.

Plaintiffs nonetheless seek to satisfy the willfulness requirement in the statute by arguing that "they intend to engage in conduct that * * * 'willfully causes bodily injury.'" Pl. Br. 25. To establish the willfulness element of the offense, however, the prosecution must prove that the *defendant* acted willfully to cause bodily injury. 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.[7] Thus, they have not alleged that they intend to engage in any conduct that would violate Section 249(a)(2).

[7] Indeed, plaintiffs' complaint does not even allege that they intend to cause emotional distress, let alone that they intend to cause bodily injury as a result of emotional distress.

Plaintiffs also cite a letter from a Congressional opponent of the legislation stating that the Act "will hinder [plaintiffs'] ability to preach the gospel and openly teach biblical principles." Pl. Br. 10 (quoting R.E. 13, Pl. Resp. to Mot. to Dismiss, Ex. 1). But "[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 483 (1981) (quoting *Schwegmann Bros*. v. *Calvert Distillers Corp*., 341 U.S. 384, 394 (1951)); see also *Fieger* v. *United States Atty. Gen*., 542 F.3d 1111, 1119 (6th Cir. 2008) (holding that "isolated statements made by opponents of a bill are to be accorded little weight because '[i]n their zeal to defeat a bill, [opponents] understandably tend to overstate its reach'") (quoting *NLRB* v. *Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 66 (1994)). This is particularly true where the plain language of the statute negates any such interpretation. Cf. *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 295 (1995) ("[W]hen a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.") (citation omitted).

Plaintiffs next suggest that the statute's purported prohibition of "hate speech" may be found in the Rules of Construction. Pl. Br. 12-13. They point first to Section 4710(1), which forbids 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." Matthew Shepard

and James Byrd, Jr., Hate Crimes Prevention Act , Pub. L. No. 111-84, Div. E, Section 4710(1), 123 Stat. 2841 (Oct. 28, 2009). To be sure, evidence of speech or associations may be relevant and admissible to prove the defendant's intent or motive in any criminal prosecution, including a prosecution under Section 249(a)(2). See *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489-490 (1993); *United States* v. *Skillman*, 922 F.2d 1370, 1372-1374 (9th Cir. 1990). But the mere fact that evidence of speech may be admissible at trial does not mean that such speech is proscribed or targeted by the Act. Moreover, the admission of such evidence is not prohibited by the First Amendment. *Mitchell*, 508 U.S. at 489 ("The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.").

Plaintiffs next contend that another of the Rules of Construction, Section 4710(3), unconstitutionally permits the application of the statute to their speech. Pl. Br. 13-14. To the contrary, Section 4710(3) *prohibits* any application or construction of the statute "in a manner that infringes any rights under the first amendment to the Constitution of the United States" or "substantially burdens a person's exercise of religion, speech, expression, or association." Plaintiffs' speech, as described in their Complaint, is protected by the First Amendment, and, as explained below, it does not fall within either of the exceptions set forth in

Section 4710(3). Therefore, Section 4710(3) would prohibit any prosecution based on that speech.

There are two exceptions to the proscription in Section 4710(3) – if the exercise of religion, speech, expression, or association was intended (1) to "plan or prepare for an act of physical violence," or (2) to "incite an imminent act of physical violence against another." Section 4710(3). But these exceptions are merely black letter recitations of familiar First Amendment principles. See, *e.g.*, *Cox* v. *Louisiana*, 379 U.S. 536, 555 (1965) ("[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.") (citation omitted); *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 * * * except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

Thus, Section 4710(3) simply acknowledges that there are limited circumstances in which speech may be proscribed without violating the First Amendment. Neither of these exceptions is applicable to plaintiffs' expression, as alleged in their Complaint, which alleges only that plaintiffs openly express their opposition to "homosexual activism, the homosexual lifestyle, and the homosexual

agenda." R.E. 1, Complaint ¶¶ 17, 19, 22, 24; see also R.E. 1, Complaint, ¶¶ 37-38. In the context of Section 249(a)(2), Section 4710(3) would permit a prosecution based upon expression only if the expression was used willfully to cause bodily injury by "plan[ning] or prepar[ing] for an act of physical violence," or by "incit[ing] an imminent act of physical violence against another." In either of these instances, to prove a violation of the statute it would still be necessary to establish that the offender *willfully* caused bodily injury. Plaintiffs allegations that they "take [] a strong public stand against homosexual activism, the homosexual lifestyle, and the homosexual agenda" (R.E. 1, Complaint ¶¶ 17, 19, 22, 24) do not constitute allegations that they intend to "incite an imminent act of physical violence against another," to "plan or prepare for an act of physical violence," or otherwise to willfully cause bodily injury, in violation of Section 249(a)(2). Thus, Section 4710(3) does not advance plaintiffs' contention that they intend to violate the Act.[8]

[8] Section 4710(3) also permits the Act to be construed to impose a substantial burden on First Amendment rights if "the Government demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest." Like the exceptions discussed in the text, this passage is simply a restatement of First Amendment law. See, *e.g.*, *Citizens United* v. *Federal Election Comm'n*, 130 S. Ct. 876, 898 (2010) ("Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.") (citations & internal quotation marks

(continued…)

Plaintiffs next contend that the Attorney General "consider[s] Plaintiffs' speech to be 'hate' speech that not only *causes* 'bodily injury,' but also incites violence against homosexuals and is thus not protected under the First Amendment (or, equally as important, not excluded from the proscriptions of the Act)." Pl. Br. 13-14. This unsupported assertion is directly contradicted by the Attorney General's position in this case and his Congressional testimony in support of the Act, in which he repeatedly stated that the Act proscribes violent conduct and is not aimed at protected speech. In particular, the Attorney General specifically stated that the Act would *not* apply to speech by a clergyman who preached against homosexuality. See p. 11, *supra*; see also R.E. 23, Order, p. 21 (noting the "Attorney General's denial that the Hate Crimes Act applies to Plaintiffs' conduct (a conclusion that is supported by the text of the statute, the Rules of Construction, and the legislative history)").

At bottom, plaintiffs' entire case is based upon an interpretation of the Act that is contrary to its plain language. This case therefore is similar to *Western Mining Council* v. *Watt*, 643 F.2d 618, 626 (9th Cir.), cert. denied, 454 U.S. 1031 (1981), where the plaintiffs claims were "the result of fears of prosecution based

---

(…continued)
omitted). The Attorney General does not assert any interest, let alone a compelling interest, in bringing any Section 249(a)(2) prosecution based on the kind of protected expression alleged in plaintiffs' complaint.

on their own patently erroneous interpretation of the Act." As in *Western Mining Council*, "[p]laintiffs cannot, however, create a justiciable case of controversy simply by misreading statutes and claiming as injury fears born of their own error." *Ibid*.

C. Plaintiffs' Allegations Do Not Establish A Credible Threat That They Will Be Prosecuted Under Section 249(a)(2)

Nor do plaintiffs' allegations establish a "credible threat" that they will be prosecuted under Section 249(a)(2). See *Babbitt*, 442 U.S. at 298. As explained above, plaintiffs have not alleged that they intend to engage in any conduct that violates the Act. Nor have they alleged that they have been threatened with arrest or prosecution by any federal law enforcement official. Indeed, the Attorney General has expressly stated that the kind of conduct alleged in their complaint does not violate the Act. See p. 11, *supra*. Thus, as the district court concluded, their "fear of prosecution is speculative." R.E. 23, Order, p. 21 (citing *Babbitt*, 442 U.S. at 298; *Greater Cincinnati Coal. for the Homeless* v. *City of Cincinnati*, 56 F.3d 710, 716 (6th Cir. 1995)).

Plaintiffs nonetheless contend that the Act authorizes "federal investigative and other federal law enforcement actions against" them because of their opposition to "homosexual activism, the homosexual lifestyle, and the homosexual agenda," R.E. 1, Complaint ¶ 48, and that the Act will subject them "to increased government scrutiny, questioning, investigation, [and] surveillance * * * on

account of" their opposition, R.E. 1, Complaint ¶ 52. There is no basis for these allegations in the language of the Act itself, which prohibits only willful, violent conduct – "willfully caus[ing] bodily injury to any person" or attempting to cause such injury "through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device." 18 U.S.C. 249(a)(2); see also Section 4710(2) ("This division applies to *violent acts*.") (emphasis added).

Plaintiffs also allege that the possibility that they will be investigated in connection with a hate crime chills their exercise of their First Amendment rights. See, *e.g.*, R.E. 1, Complaint ¶¶ 52, 69; Pl. Br. 7-12. But this allegation too is insufficient to establish standing. Even in the First Amendment context, plaintiffs "must present more than '[a]llegations of a subjective chill.' There must be a 'claim of specific present objective harm or a threat of specific future harm.'" *Bigelow* v. *Virginia*, 421 U.S. 809, 816-817 (1975) (quoting *Laird* v. *Tatum*, 408 U.S. 1, 13-14 (1972)) (internal quotation marks omitted); see *White* v. *United States*, 601 F.3d 545, 554 (6th Cir. 2010). In *Laird*, "most if not all of the [plaintiffs]" established that they had "been the subject of Army surveillance reports." *Tatum* v. *Laird*, 444 F.2d 947, 954 n.17 (D.C. Cir. 1971), rev'd, 408 U.S. 1 (1972). They contended that this surveillance of their activities had "chilled" their exercise of First Amendment rights. *Laird*, 408 U.S. at 13. The Supreme Court nevertheless held that plaintiffs failed to demonstrate "a direct injury as the

result of [the Government's] action" because their decision to curtail their expressive activity reflected a "subjective 'chill'" that did not qualify as a "specific present objective harm or a threat of specific future harm" caused by the Government's surveillance. *Id*. at 13-14 (citation omitted); see also *ACLU* v. *National Sec. Agency*, 493 F.3d 644, 661 (6th Cir. 2007) ("[T]o allege a sufficient injury under the First Amendment, a plaintiff must establish that he or she is regulated, constrained, or compelled directly by the government's actions, instead of by his or her own subjective chill"), cert. denied, 552 U.S. 1179 (2008); see *id.* at 689 (Gibbons, J., concurring in the judgment).

The Supreme Court addressed a similar claim of a subjective "chill" in *Wisconsin* v. *Mitchell*, 508 U.S. 476 (1993), a First Amendment challenge to a state statute that enhanced an offender's sentence if his crime was motivated by bias. The Court rejected the defendant's claim that the statute was "unconstitutionally overbroad because of its 'chilling effect' on free speech," finding the claim too speculative to support an overbreadth challenge:

> The sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional "overbreadth" cases. We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim's protected status, thus qualifying him for penalty enhancement. * * * This is simply too speculative a hypothesis to support Mitchell's overbreadth claim.

Id. at 488-490.

In this case, plaintiffs' claim is even more attenuated than in *Mitchell* or *Laird*. The Act prohibits violent conduct, not protected speech. As explained above, evidence of speech, expression, or associations generally would be relevant and thus admissible in a prosecution against one who has engaged in the prohibited violent actions to prove that individual's motive. See pp. 25-26, *supra*. But plaintiffs do not allege that they intend to engage in any such violent conduct. Thus, their claim that they will be subjected to any kind of investigation is pure speculation. To be sure, like all citizens, if plaintiffs have information relevant to the investigation of a violent offense, they may be asked to provide that information to law enforcement officials. But the mere possibility that they might be called upon to do so in relation to an offense that might occur in the future is simply too "'conjectural' or 'hypothetical'" to constitute a claim of actual injury necessary to establish standing. *Lujan*, 504 U.S. at 560 (citation omitted).

Nor is there any merit to plaintiffs' suggestion that the statute will be misapplied to their expression of their views. Pl. Br. 15-18. "[T]he actual purpose" of the Act, plaintiffs contend, "is all about elevating certain persons (homosexuals) to a protected class under federal law based on nothing more than their choice to have sex with persons of the same gender, while marginalizing strong religious opposition to this immoral choice." Pl. Br. 16. They contend that the Attorney General and the United States Attorney's Office in Michigan "have

publicly abandoned their neutrality and become themselves activists with an agenda." Pl. Br. 17-18. Plaintiffs' extraordinary assertions are factually incorrect and in any event, are legally irrelevant.

For instance, plaintiffs cite a news article reporting a statement by the Attorney General at a single event, carefully editing the report to make it appear that he was concerned only about the Act's benefits for gay men and lesbians. Pl. Br. 16. In fact, according to the news article, the Attorney General said that he believed the Act would "significantly improve the quality of life for *people with disabilities, for women*, and for gay and lesbian Americans." R.E. 21, Pl. Sur-reply Ex. 2 (emphasis on the words omitted from the passage quoted in plaintiffs' brief at p. 16). Plaintiffs ignore the Attorney General's testimony that the Act would benefit "all Americans," *The Mathew Shepard Hate Crimes Act of 2009: Hearing Before the Senate Comm. on the Judiciary*, 111th Cong., 1st Sess. 4 (2009); his testimony that those who commit hate crimes "seek to deny the humanity that we all share, regardless of the color of our skin, the god to whom we pray, or the person who we choose to love," *id.* at 5; and his testimony that the Act protects heterosexuals as well as gay men or lesbians, *id.* at 72, 76; see p. 10, *supra*.

In any event, general statements concerning who would benefit from the Act, as well as the reported statements by the Attorney General or of the representatives of the United States Attorney's Office that they are eager to enforce

the statute (Pl. Br. 15-18), are insufficient as a matter of law to establish a credible fear of prosecution. "[A] general threat of prosecution is not enough to confer standing." *San Diego Cnty. Gun Rights Comm*. v. *Reno*, 98 F.3d 1121, 1127 (9th Cir. 1996); *Poe* v. *Ullman*, 367 U.S. 497, 501 (1961) (plurality opinion) (holding that mere allegation that state attorney planned to prosecute any offense committed under state law, including state contraception statutes, is insufficient to confer standing). Plaintiffs have cited nothing to indicate that any federal prosecutor intends to apply the statute to protected speech or to prosecute plaintiffs or anyone else for their views. As the district court noted, statements by Department of Justice personnel that they intend to vigorously enforce the Act do "not amount to a credible threat of prosecution of the Plaintiffs for their opinions." R.E. 23, Order, p. 25. Any claim that plaintiffs may be subject to false prosecution based on their publicly stated views is without foundation and too speculative to support standing. See *White*, 601 F.3d at 553-554.

Plaintiffs also claim that "supporters" of the Act view their speech as unprotected hate speech that may be prosecuted under the Act. Pl. Br. 13-14. Their complaint recites alleged statements by third parties (R.E. 1, Complaint ¶¶ 57-67), claims about the enforcement of allegedly similar legislation in other jurisdictions (R.E.1, Complaint ¶¶ 70-72), and isolated statements by Congressional supporters of the Act (R.E. 1, Complaint ¶¶ 59, 74-75), in support of

their contention that they could be investigated or prosecuted for violating the Act based solely on their speech. But these allegations about the views of third parties are simply irrelevant. Plaintiffs have cited no cases – and we are aware of none – holding that isolated statements of private individuals or legislators are sufficient to constitute a credible threat of prosecution. None of the individuals or organizations quoted in plaintiffs' complaint have any responsibility for the enforcement of the Act. And it is the language of the Act – not the enforcement of allegedly "similar" statutes in other jurisdictions, or isolated statements of supporters – that will govern its enforcement. The Hate Crimes Act prohibits only willful, violent conduct. It does not criminalize protected speech.

Plaintiffs' complaint does not allege that they intend to engage in any conduct that might violate the Act and does not allege facts sufficient to support their claim that they will be prosecuted under the Act. Thus, their allegations do not establish a credible threat of prosecution.

D. The Cases Cited By Plaintiffs Do Not Support Their Argument That They Have Standing

None of the cases cited by plaintiffs (Pl. Br. 20-25) support their contention that they have standing. In *Babbitt*, 442 U.S. at 299-301, the Court held that the plaintiffs, individual farm workers and their union, had standing to challenge provisions of a statute regulating union election procedures where the regulations would diminish farm workers' ability to participate in the elections. The Court

also held that plaintiffs had standing to challenge, as unconstitutionally vague, provisions of the law that regulated consumer publicity and imposed criminal sanctions for violations of the regulations, where plaintiffs had promoted consumer boycotts in the past and asserted an intention to do so in the future. *Id.* at 301-303. On the other hand, *Babbitt* held that plaintiffs did not have standing to challenge a provision stating that employers were not required to give the union access to employer facilities. *Id.* at 303-304. While it was "inevitabl[e]" that the union would seek such access, the Court explained, it was "conjectural to anticipate that access [would] be denied." *Id.* at 304. Moreover, the merits of plaintiffs' challenge would depend upon the nature of the facilities to which the union might seek access, and thus should be postponed until an actual controversy was presented. *Ibid.* The Court similarly concluded that plaintiffs' challenge to mandatory arbitration was not justiciable because it did not present a sufficiently "real and concrete dispute." *Id.* at 304-305. The arbitration provision would not come into play unless there was an arguably illegal strike. *Ibid.* And even then, the employers might choose from a variety of remedies before choosing arbitration. *Ibid.* Thus, in *Babbitt*, the Court limited plaintiffs' standing to those provisions of the statute that directly regulated plaintiffs' activities that were certain to occur in the future (union elections), or in which the plaintiffs had engaged in the past and alleged an intent to engage in in the future (consumer

boycotts). Here, in contrast, plaintiffs assert standing to challenge a statute that they do not allege they have ever or will ever violate and where there is no credible threat of prosecution.

In *Presbyterian Church* v. *United States*, 870 F.2d 518, 520-523 (9th Cir. 1989), the Ninth Circuit held that the plaintiff churches had suffered injury to their religious mission and thus had standing to bring an action asserting their First Amendment rights, where government surveillance of the churches had *actually occurred* – that is, *after* government agents entered the churches and surreptitiously recorded religious services. On the other hand, because it was unclear whether the churches would be subject to such surveillance in the future, the court of appeals remanded to the district court to determine whether the churches had standing to seek prospective relief. *Ibid.* In this case, in contrast, plaintiffs seek to premise standing on speculation that they might some day in the future be investigated by law enforcement officers for an offense that they do not plan to commit.

In each of the other cited cases holding that the plaintiffs had standing, plaintiffs had alleged that they would engage in conduct prohibited by the challenged statute or regulation and/or that there was a credible threat that the provision would be enforced against them. See *Red Bluff Drive-In* v. *Vance*, 648 F.2d 1020, 1024-1025, 1034 n.18 (5th Cir. 1981) (owners of adult entertainment

businesses had standing to challenge an obscenity statute directly regulating the material and performances presented in their establishments), cert. denied, 455 U.S. 913 (1982); *Berner* v. *Delahanty*, 129 F.3d 20, 23-25 (1st Cir. 1997) (attorney had standing to challenge judicial ban on wearing political buttons in the courtroom where he had been required to remove a button and alleged that he would seek to wear a button in the courtroom again), cert. denied, 523 U.S. 1023 (1998); *Dombrowski* v. *Pfister*, 380 U.S. 479, 481-489 (1965) (plaintiffs alleged sufficient injury to seek injunctive relief barring enforcement of state laws against subversive activities where plaintiffs had been charged with violating the statutes once and were threatened with future prosecutions); *New Hampshire Right To Life Comm.* v. *Gardner*, 99 F.3d 8 (1st Cir. 1996) (organization had standing to challenge campaign finance statute where it intended to make campaign expenditures banned by the statute and there was no evidence contradicting credible threat of prosecution); *Hoffman* v. *Hunt*, 126 F.3d 575, 579, 582 (4th Cir. 1997) (plaintiffs who had been threatened with arrest for picketing reproductive health clinics had standing to challenge statute that prohibited blocking access to clinics), cert. denied, 523 U.S. 1136 (1998); *Minnesota Citizens Concerned for Life* v. *Federal Election Comm'n*, 113 F.3d 129 (8th Cir. 1997) (organization seeking to make campaign expenditures had standing to challenge regulation denying it a partial exemption from restrictions on such expenditures); *G & V Lounge, Inc.* v.

Michigan Liquor Control Comm'n, 23 F.3d 1071 (6th Cir. 1994) (plaintiff had standing where policy of deference to local officials in licensing decisions constituted prior restraint of expressive activity and where defendants threatened to revoke plaintiff's liquor license if it presented topless dancing); *Steffel* v. *Thompson*, 415 U.S. 452, 458-459 (1974) (plaintiff threatened with arrest for distributing handbills had standing to challenge statute under which he would be prosecuted); *Virginia* v. *American Booksellers Ass'n, Inc.*, 484 U.S. at 392-393 (booksellers had standing to challenge obscenity statute where "the law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution" and where plaintiffs had "an actual and well-founded fear that the law will be enforced against them"); *Epperson* v. *Arkansas*, 393 U.S. 97, 101-103 (1968) (Court would decide case brought by a teacher seeking to challenge a statute that prohibited teaching of evolution and that provided for dismissal and criminal prosecution; although there was no record of any such prosecutions in the past, counsel for the State said at oral argument that plaintiff would be liable for prosecution if she presented the theory of evolution in class); *Doe* v. *Bolton*, 410 U.S. 179, 187-189 (1973) (doctors who provided abortions had standing to challenge statute prohibiting them from doing so where predecessor statute had been enforced); *Planned Parenthood Ass'n* v. *City of Cincinnati*, 822 F.2d 1390,

1395-1396 (6th Cir. 1987) (organization had standing to challenge ordinance regulating disposal of fetuses where its "fear of prosecution [was] reasonably founded in fact"). [9]

Plaintiffs here, in contrast, have not alleged an intention to engage in the violent conduct prohibited by the Hate Crimes Act. And their "fears of * * * prosecution" are purely "imaginary or speculative." *Babbitt*, 442 U.S. at 298 (citation omitted). They therefore have not alleged the constitutional minimum to establish Article III standing.

E. Plaintiffs' Claims Are Precluded By Prudential Standing Limits

In addition to the minimum constitutional requirements, the courts impose prudential limits on litigants' standing. Of particular relevance here, "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, * * * the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499. This prudential limit is relaxed for plaintiffs

---

[9] Standing was not at issue in *Reno* v. *ACLU*, 521 U.S. 844 (1997), *Elrod* v. *Burns*, 427 U.S. 347 (1976), or *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002). See Pl. Br. 22, 24-25, 27, 33, 35. *Reno* involved a direct regulation of protected expression. See 521 U.S. at 849. *Elrod* held that employees who had been discharged or threatened with discharge because of their political affiliations had suffered injury and stated a cognizable claim for violation of First and Fourteenth Amendment rights. 427 U.S. at 349, 373. And *Free Speech Coalition* invalidated the Child Pornography Prevention Act on the ground that it prohibited a substantial amount of protected expression. 535 U.S. at 244-258.

who allege that a statute is overbroad in violation of the First Amendment. Such plaintiffs "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." *American Booksellers Ass'n, Inc.*, 484 U.S. at 392-393 (internal citations & quotation marks omitted). But this principle does not overcome the "irreducible minimum" requirement that a plaintiff allege a personal stake in the litigation. Even plaintiffs seeking to assert an overbreadth challenge must first allege sufficient facts to establish a claim that they have suffered or are likely to suffer some injury as a result of the challenged statute. See *Prime Media, Inc.* v. *City of Brentwood*, 485 F.3d 343, 353-354 (6th Cir. 2007). As explained above, plaintiffs here have failed to allege any such harm because they have not alleged that they intend to engage in conduct that is likely to subject them to prosecution under the statute. Therefore, they lack standing to assert an overbreadth claim.

Plaintiffs seek to assert a classic "generalized grievance" against a federal statute with which they disagree. They complain that the statute is "inherently divisive" and creates "a special, protected class of persons under federal law." R.E. 1, Complaint ¶¶ 1, 3. They allege that the Act "seeks to normalize" behavior that they believe to be "contrary to the moral law and harmful to the common good

of society." R.E. 1, Complaint ¶ 4. These and other grievances contained in plaintiffs' complaint amply illustrate why the courts impose prudential standing requirements. If mere disagreement with a federal policy were enough to create a federal case, then the judicial system would be flooded with claims. The generalized-grievance standing barrier prevents this from happening by blocking claims that are rooted in ideological disagreements and not designed to redress a specific, concrete injury. "Prudential standing requirements preclude litigation in federal court 'when the asserted harm is a generalized grievance shared in substantially equal measure by all or a large class of citizens,' or where instead of litigating 'his own legal rights and interests,' the plaintiff instead purports to 'rest his claim to relief on the legal rights or interests of third parties.'" *Prime Media, Inc.*, 485 F.3d at 349 (citation & internal quotation marks omitted).

Plaintiffs lack standing to bring a pre-enforcement challenge to the Hate Crimes Act.

II

PLAINTIFFS' CLAIMS ARE NOT RIPE FOR REVIEW

The district court correctly dismissed plaintiffs' complaint for lack of jurisdiction because plaintiffs' claims are not ripe for review. *Bigelow* v. *Michigan Dep't of Nat. Res.*, 970 F.2d 154, 157 (6th Cir. 1992); *Norton* v. *Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002), cert. denied, 537 U.S. 1172 (2003). As this Court

explained in *Norton*, the "[r]ipeness doctrine exists 'to ensure that courts decide only existing, substantial controversies, not hypothetical questions or possibilities.'" *Ibid*. (citation omitted); see also *Peoples Rights Org., Inc.* v. *City of Columbus*, 152 F.3d 522, 527 (6th Cir. 1998) ("[T]he ripeness requirement aims to prevent the court from entangling itself in abstract disagreements.") (citation & internal quotation marks omitted).

In determining ripeness, "this court examines (1) the likelihood that the harm alleged will ever come to pass; (2) whether the factual record is sufficiently developed to allow for adjudication; and, (3) hardship to the parties if judicial review is denied." *Norton*, 298 F.3d at 554 (citation omitted). In a pre-enforcement challenge such as this one, "a case is ordinarily ripe for review only if the probability of the future event occurring is substantial and of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Ibid*. (citation & internal quotation marks omitted).

All three of these factors indicate that plaintiffs' claims are not ripe for review. First, as explained in Part I, *supra*, plaintiffs do not allege that they intend to engage in any conduct that might violate the Act. Thus, there is no "likelihood that the harm alleged will ever come to pass." *Norton*, 298 F.3d at 554. This case is quite unlike the facial challenges to the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. 248, which prohibits not only violent conduct but also

"threat[s] of force" and "physical obstruction."[10] The plaintiffs in *Norton*, for example, alleged that they had engaged in "protesting, praying and counseling on the sidewalks around" a Planned Parenthood clinic; that federal law enforcement officials had told the plaintiffs they might be arrested if they did not move their protests across the street from the clinic; and that they had limited their protest activities at the clinic because of these threats. *Norton* v. *Reno*, No. 4:00-CV-141, 2000 WL 1769580, at *1-2 (W.D. Mich. Nov. 24, 2000) (unpublished); see also *American Life League, Inc*. v. *Reno*, 855 F. Supp. 137, 139 & n.2 (E.D. Va. 1994) (finding plaintiffs' claims ripe only after they amended their complaint to allege that "their action at times has constituted, and in the future will constitute * * * 'a physical obstruction' * * * and that by so doing, they interfere with, and/or intimidate and/or injure abortion seekers and providers"), aff'd, 47 F.3d 642 (4th Cir.), cert. denied, 516 U.S. 809 (1995).

Second, because they have brought a facial challenge to the Act, plaintiffs' claims exist in a factual vacuum. No offense has occurred. No offenders have been charged. There is no factual predicate to determine whether any particular

[10] FACE provides criminal penalties for anyone, who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services." 18 U.S.C. 248(a)(1).

application of the Act is constitutional. "Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for the court's review." *National Rifle Ass'n of Am.* v. *Magaw*, 132 F.3d 272, 280 (6th Cir. 1997). "Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." *Id*. at 284.

This lack of a factual predicate is particularly telling here, where plaintiffs contend that the Act violates the First Amendment and the Commerce Clause. See Pl. Br. 33-53. There may be individual prosecutions under the Act that raise legal and factual questions that might implicate the First Amendment: whether evidence of a defendant's speech or associations should be admitted at trial to prove the defendant was motivated by bias; whether a particular statement by a defendant evidences his intent to cause bodily injury or is merely an expression of his views. As the Court explained in *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489 (1993), such evidence must "be scrutinized with care." But such scrutiny will be based upon the facts and circumstances of the particular case. It goes without saying that such scrutiny cannot take place in a facial challenge such as this one, where there are no facts, and no statements to evaluate for relevance or any other factor.

Similarly, any claim that Congress lacked authority under the Commerce Clause to enact Section 249(a)(2) must be adjudicated on a case-by-case basis. Section 249(a)(2) requires proof of one of several interstate commerce elements.

See 18 U.S.C. 249(a)(2)(B). This requirement "ensure[s], through case-by-case inquiry," *United States* v. *Lopez*, 514 U.S. 549, 561 (1995), that the prosecution "is in pursuance of Congress' power to regulate interstate commerce," *United States* v. *Morrison*, 529 U.S. 598, 613 (2000). This Court has made it clear that, even in instances where the Court has doubts about the sufficiency of a particular interstate commerce element, the proper course of action is not to invalidate the statute on its face, but rather to examine, "on a case-by-case basis * * * whether the activity involved in a certain case had" a sufficient nexus to interstate commerce. *United States* v. *Corp*, 236 F.3d 325, 333 (6th Cir. 2001) (abrogation on other grounds recognized by *United States* v. *Bowers*, 594 F.3d 522 (6th Cir. 2010)).

Finally, because plaintiffs have not established any likelihood of harm resulting from enforcement of the Act, they will suffer no hardship if their claims are not reviewed. The district court properly dismissed plaintiffs' complaint because their claims are not ripe for review.

* * * * *

Plaintiffs have not asked the court to rule on the merits of their claims. But they do argue that their complaint "raises important issues of substantive constitutional law." Pl. Br. 33. If this court were to conclude that plaintiffs have standing and that their claims are ripe, the proper course would be to remand to the

district court to address, in the first instance, the Attorney General's motion to dismiss for failure to state a claim.

In any event, plaintiff's substantive claims are without merit. Because they contend that Section 249(a)(2) is unconstitutional on its face, they must demonstrate that it is unconstitutional in all its applications, or at a minimum, that it lacks "a plainly legitimate sweep." *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 (2008) (citation & internal quotation marks omitted). Further, the court "must be careful not to go beyond the statute's facial requirements and speculate about hypothetical or imaginary cases." *Id.* at 449-450 (citation & internal quotation marks omitted). As explained in Part I, *supra*, plaintiff's complaint is based entirely upon speculation and hypothetical applications of the statute.

Section 249(a)(2) does not violate the First Amendment. See Pl. Br. 33-41. The plain language of the statute prohibits only willful, violent conduct, and does not prohibit protected speech, expression, association, or religious exercise. Nor does the Act violate the First Amendment because evidence of speech may be used to prove that an offender acted with a discriminatory motive. See *Mitchell*, 508 U.S. at 489-490.

Congress's enactment of Section 249(a)(2) was plainly authorized by the Commerce Clause. See Pl. Br. 41-55. As explained above, the interstate

commerce elements in the statute ensure that the prosecution "is in pursuance of Congress' power to regulate interstate commerce." *Morrison*, 529 U.S. at 613. As this court has recognized, any concerns a court might have about the sufficiency of an interstate commerce element or the connection to interstate commerce in a given case should be resolved, not through a facial challenge, but rather "on a case-by-case basis." *Corp*, 236 F.3d at 333.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,
THOMAS E. PEREZ
Assistant Attorney General

BARBARA McQUADE
United States Attorney

TONY WEST
Assistant Attorney General
BETH S. BRINKMANN
Deputy Assistant Attorney General

JUDITH E. LEVY
Assistant United States Attorney
Eastern District of Michigan
211 W. Fort Street, Ste. 2001
Detroit, MI 48226
Telephone: (313) 226-9727

MARK B. STERN
MATTHEW M. COLLETTE
Attorneys, Appellate Staff
Civil Division, Room 7212
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 514-4214

/s/ *Linda F. Thome*
JESSICA DUNSAY SILVER
LINDA F. THOME
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
P.O. Box 14403
Ben Franklin Station
Washington, D.C. 20044-4403
Telephone: (202) 514-4706

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains no more than 11,737 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

/s/ *Linda F. Thome*
LINDA F. THOME
Attorney

Date: January 21, 2011

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2011, the foregoing BRIEF FOR THE DEFENDANT AS APPELLEE was filed electronically with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF user:

Robert Joseph Muise
Thomas More Law Center
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, Michigan 48106

/s/ *Linda F. Thome*
LINDA F. THOME
Attorney

ADDENDUM

ATTACHMENT A

DESIGNATION OF RELEVANT RECORD DOCUMENTS

DOCKET NUMBER	DOCUMENT DESCRIPTION
1	Plaintiff's Complaint
9	Attorney General's Motion to Dismiss
21	Plaintiff's Sur-Reply, Exhibit 2
23	Order Granting Attorney General's Motion to Dismiss

ATTACHMENT B

demonstration) protected from legal prohibition by the First Amendment to the Constitution;

(2) to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference;

(3) to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

(4) to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.

(e) DEFINITIONS.—As used in this section:

(1) FACILITY.—The term ''facility'' includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

(2) INTERFERE WITH.—The term ''interfere with'' means to restrict a person's freedom of movement.

(3) INTIMIDATE.—The term ''intimidate'' means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.

(4) PHYSICAL OBSTRUCTION.—The term ''physical obstruction'' means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

(5) REPRODUCTIVE HEALTH SERVICES.—The term ''reproductive health services'' means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counselling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

(6) STATE.—The term ''State'' includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(Added Pub. L. 103–259, § 3, May 26, 1994, 108 Stat. 694; amended Pub. L. 103–322, title XXXIII, § 330023(a)(2), (3), Sept. 13, 1994, 108 Stat. 2150.)

AMENDMENTS

1994—Pub. L. 103–322, § 330023(a)(2), amended section catchline generally. Prior to amendment, catchline read as follows: ''§ 248 Freedom of Access to Clinic Entrances.''

Subsec. (b). Pub. L. 103–322, § 330023(a)(3), in concluding provisions, inserted '', notwithstanding section 3571,'' before ''be not more than $25,000''.

EFFECTIVE DATE OF 1994 AMENDMENT

Section 330023(b) of Pub. L. 103–322 provided that: ''The amendments made by this subsection (a) [amending this section] shall take effect on the date of enactment of the Freedom of Access to Clinic Entrances Act of 1994 [May 26, 1994].''

EFFECTIVE DATE

Section 6 of Pub. L. 103–259 provided that: ''This Act [see Short Title note below] takes effect on the date of the enactment of this Act [May 26, 1994], and shall apply only with respect to conduct occurring on or after such date.''

SHORT TITLE

Section 1 of Pub. L. 103–259 provided that: ''This Act [enacting this section and provisions set out as notes under this section] may be cited as the 'Freedom of Access to Clinic Entrances Act of 1994'.''

SEVERABILITY OF PROVISIONS

Section 5 of Pub. L. 103–259 provided that: ''If any provision of this Act [see Short Title note above], an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any other person or circumstance shall not be affected thereby.''

CONGRESSIONAL STATEMENT OF PURPOSE

Section 2 of Pub. L. 103–259 provided that: ''Pursuant to the affirmative power of Congress to enact this legislation under section 8 of article I of the Constitution, as well as under section 5 of the fourteenth amendment to the Constitution, it is the purpose of this Act [see Short Title note above] to protect and promote the public safety and health and activities affecting interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services.''

§ 249. Hate crime acts

(a) IN GENERAL.—

(1) OFFENSES INVOLVING ACTUAL OR PERCEIVED RACE, COLOR, RELIGION, OR NATIONAL ORIGIN.—Whoever, whether or not acting under color of law, 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 race, color, religion, or national origin of any person—

(A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

(i) death results from the offense; or

(ii) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(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 ac-

tual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person—

(i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(ii) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

(I) death results from the offense; or

(II) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(B) CIRCUMSTANCES DESCRIBED.—For purposes of subparagraph (A), the circumstances described in this subparagraph are that—

(i) the conduct described in subparagraph (A) occurs during the course of, or as the result of, the travel of the defendant or the victim—

(I) across a State line or national border; or

(II) using a channel, facility, or instrumentality of interstate or foreign commerce;

(ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A);

(iii) in connection with the conduct described in subparagraph (A), the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or

(iv) the conduct described in subparagraph (A)—

(I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or

(II) otherwise affects interstate or foreign commerce.

(3) OFFENSES OCCURRING IN THE SPECIAL MARITIME OR TERRITORIAL JURISDICTION OF THE UNITED STATES.—Whoever, within the special maritime or territorial jurisdiction of the United States, engages in conduct described in paragraph (1) or in paragraph (2)(A) (without regard to whether that conduct occurred in a circumstance described in paragraph (2)(B)) shall be subject to the same penalties as prescribed in those paragraphs.

(4) GUIDELINES.—All prosecutions conducted by the United States under this section shall be undertaken pursuant to guidelines issued by the Attorney General, or the designee of the Attorney General, to be included in the United States Attorneys' Manual that shall establish neutral and objective criteria for determining whether a crime was committed because of the actual or perceived status of any person.

(b) CERTIFICATION REQUIREMENT.—

(1) IN GENERAL.—No prosecution of any offense described in this subsection may be undertaken by the United States, except under the certification in writing of the Attorney General, or a designee, that—

(A) the State does not have jurisdiction;

(B) the State has requested that the Federal Government assume jurisdiction;

(C) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence; or

(D) a prosecution by the United States is in the public interest and necessary to secure substantial justice.

(2) RULE OF CONSTRUCTION.—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.

(c) DEFINITIONS.—In this section—

(1) 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;

(2) the term ''explosive or incendiary device'' has the meaning given such term in section 232 of this title;

(3) the term ''firearm'' has the meaning given such term in section 921(a) of this title;

(4) the term ''gender identity'' means actual or perceived gender-related characteristics; and

(5) the term ''State'' includes the District of Columbia, Puerto Rico, and any other territory or possession of the United States.

(d) STATUTE OF LIMITATIONS.—

(1) OFFENSES NOT RESULTING IN DEATH.—Except as provided in paragraph (2), no person shall be prosecuted, tried, or punished for any offense under this section unless the indictment for such offense is found, or the information for such offense is instituted, not later than 7 years after the date on which the offense was committed.

(2) DEATH RESULTING OFFENSES.—An indictment or information alleging that an offense under this section resulted in death may be found or instituted at any time without limitation.

(Added and amended Pub. L. 111–84, div. E, §§ 4707(a), 4711, Oct. 28, 2009, 123 Stat. 2838, 2842.)

AMENDMENTS

2009—Subsec. (a)(4). Pub. L. 111–84, § 4711, added par. (4).

SEVERABILITY

Pub. L. 111–84, div. E, § 4709, Oct. 28, 2009, 123 Stat. 2841, provided that: ''If any provision of this division [enacting this section and section 1389 of this title and sections 3716 and 3716a of Title 42, The Public Health and Welfare, amending this section, enacting provisions set out as notes under this section and section 3716 of Title 42, and amending provisions set out as a note under section 534 and provisions listed in a table relating to sentencing guidelines set out under section 994 of Title 28, Judiciary and Judicial Procedure], an amendment made by this division, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this division, the amendments made by this division, and the application of the provisions of such to any person or circumstance shall not be affected thereby.''

RULE OF CONSTRUCTION

Pub. L. 111–84, div. E, § 4710, Oct. 28, 2009, 123 Stat. 2841, provided that: ''For purposes of construing this division [see Severability note above] and the amendments made by this division the following shall apply:

''(1) IN GENERAL.—Nothing in this division shall be construed to allow a court, in any criminal trial for an offense described under this division or an amendment made by this division, in the absence of a stipulation by the parties, 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. Nothing in this division is intended to affect the existing rules of evidence.

''(2) VIOLENT ACTS.—This division applies to violent acts motivated by actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of a victim.

''(3) CONSTRUCTION AND APPLICATION.—Nothing in this division, or an amendment made by this division, shall be construed or applied in a manner that infringes any rights under the first amendment to the Constitution of the United States. Nor shall anything in this division, or an amendment made by this division, be construed or applied in a manner that substantially burdens a person's exercise of religion (regardless of whether compelled by, or central to, a system of religious belief), speech, expression, or association, unless the Government demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest, if such exercise of religion, speech, expression, or association was not intended to—

''(A) plan or prepare for an act of physical violence; or

''(B) incite an imminent act of physical violence against another.

''(4) FREE EXPRESSION.—Nothing in this division shall be construed to allow prosecution based solely upon an individual's expression of racial, religious, political, or other beliefs or solely upon an individual's membership in a group advocating or espousing such beliefs.

''(5) FIRST AMENDMENT.—Nothing in this division, or an amendment made by this division, shall be construed to diminish any rights under the first amendment to the Constitution of the United States.

''(6) CONSTITUTIONAL PROTECTIONS.—Nothing in this division shall be construed to prohibit any constitutionally protected speech, expressive conduct or activities (regardless of whether compelled by, or central to, a system of religious belief), including the exercise of religion protected by the first amendment to the Constitution of the United States and peaceful picketing or demonstration. The Constitution of the United States does not protect speech, conduct or activities consisting of planning for, conspiring to commit, or committing an act of violence.''

FINDINGS

Pub. L. 111–84, div. E, § 4702, Oct. 28, 2009, 123 Stat. 2835, provided that: ''Congress makes the following findings:

''(1) The incidence of violence motivated by the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim poses a serious national problem.

''(2) Such violence disrupts the tranquility and safety of communities and is deeply divisive.

''(3) State and local authorities are now and will continue to be responsible for prosecuting the overwhelming majority of violent crimes in the United States, including violent crimes motivated by bias. These authorities can carry out their responsibilities more effectively with greater Federal assistance.

''(4) Existing Federal law is inadequate to address this problem.

''(5) A prominent characteristic of a violent crime motivated by bias is that it devastates not just the actual victim and the family and friends of the victim, but frequently savages the community sharing the traits that caused the victim to be selected.

''(6) Such violence substantially affects interstate commerce in many ways, including the following:

''(A) The movement of members of targeted groups is impeded, and members of such groups are forced to move across State lines to escape the incidence or risk of such violence.

''(B) Members of targeted groups are prevented from purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity.

''(C) Perpetrators cross State lines to commit such violence.

''(D) Channels, facilities, and instrumentalities of interstate commerce are used to facilitate the commission of such violence.

''(E) Such violence is committed using articles that have traveled in interstate commerce.

''(7) For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.

''(8) Both at the time when the 13th, 14th, and 15th amendments to the Constitution of the United States were adopted, and continuing to date, members of certain religious and national origin groups were and are perceived to be distinct 'races'. Thus, in order to eliminate, to the extent possible, the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national origins, at least to the extent such religions or national origins were regarded as races at the time of the adoption of the 13th, 14th, and 15th amendments to the Constitution of the United States.

''(9) Federal jurisdiction over certain violent crimes motivated by bias enables Federal, State, and local authorities to work together as partners in the investigation and prosecution of such crimes.

''(10) The problem of crimes motivated by bias is sufficiently serious, widespread, and interstate in nature as to warrant Federal assistance to States, local jurisdictions, and Indian tribes.''

[For definitions of ''State'' and ''local'' used in section 4702 of Pub. L. 111–84, set out above, see section 4703(b) of Pub. L. 111–84, set out as a note under section 3716 of Title 42, The Public Health and Welfare.]

CHAPTER 15—CLAIMS AND SERVICES IN MATTERS AFFECTING GOVERNMENT