No. 12-553

In the Supreme Court of the United States

GARY GLENN, ET AL., PETITIONERS

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioners lack standing to challenge the constitutionality of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 18 U.S.C. 249.

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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2012. The petition for a writ of certiorari was filed on October 31, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (Act), Pub. L. No. 111-84, Div. E, 123 Stat. 2835, imposes criminal penalties on certain violent conduct. In a provision codified at 18 U.S.C. 249(a)(2), the Act makes willful infliction of bodily injury

due to the victim's "sexual orientation" or "gender identity" a federal crime. Section 249(a)(2)(A) states:

> Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) [regarding interstate commerce] or paragraph (3) [regarding special maritime or territorial jurisdiction], willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person * * * shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and * * * shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if[] * * * death results from the offense[] or * * * 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.

18 U.S.C. 249(a)(2)(A).[1]

That provision requires a willfully violent act, and does not apply to conduct that causes "solely emotional or psychological harm." 18 U.S.C. 249(c)(1); see *ibid.* (defining "bodily injury" by cross-reference to 18 U.S.C. 1365(h)(4)); 18 U.S.C. 1365(h)(4) (defining bodily injury to mean "(A) a cut, abrasion, bruise, burn, or disfigure-

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[1] See 18 U.S.C. 249(a)(2)(B) (describing circumstances that relate to interstate commerce, including travel across state lines, use of an instrumentality of interstate commerce, use of a weapon that has traveled in interstate commerce, or interference with the victim's economic activity); 18 U.S.C. 249(a)(3) (covering conduct that is "within the special maritime or territorial jurisdiction of the United States").

ment; (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"); §§ 4710(1)-(6), 123 Stat. 2841-2842 (stating that the Act covers "violent acts motivated by actual or perceived * * * sexual orientation" or "gender identity * * * of a victim"). Thus, Section 249(a)(2) does not proscribe threats, attempts at intimidation, or speech that singles out a particular group for censure. Cf., *e.g.*, 18 U.S.C. 245(b)(2).

Congress ensured that Section 249(a)(2) would be construed narrowly, so as to criminalize only violent conduct, by means of uncodified "Rules of Construction." Those Rules state 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." § 4710(6), 123 Stat. 2842; see also, *e.g.*, § 4710(3), 128 Stat. 2841 (stating that "[n]othing in [Section 249(a)(2)] * * * shall be construed or applied in a manner that infringes any rights under the first amendment to the Constitution of the United States"); *ibid.* (stating that "[n]othing in [Section 249(a)(2)] * * * shall be construed or applied in a manner that * * * substantially burdens a person's exercise of religion * * * , speech, expression, or association," unless the burden is narrowly tailored to a compelling interest, so long as the exercise in question was not to "plan or prepare for an act of physical violence" or "incite an imminent act of physical violence against another"); § 4710(4), 128 Stat. 2842 (stating that "[n]othing in [Section 249(a)(2)] 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"); § 4710(5), 128 Stat. 2842 (stating that "[n]othing in [Section 249(a)(2)] * * * shall be construed to diminish any rights under the first amendment to the Constitution of the United States").

No prosecution under Section 249(a)(2) can proceed without "certification in writing of the Attorney General, or a designee." 18 U.S.C. 249(b)(1); see 18 U.S.C 249(b)(2) (setting forth specific criteria that any certification must meet, and stating that the certification requirement does not "limit the authority of Federal officers, or a Federal grand jury, to investigate possible violations"). Consistent with the terms of the Act, the Attorney General has explained that a minister would not be 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 then "act[ed] on that sermon." *The Matthew Shepard Hate Crimes Prevention Act of 2009: Hearing Before the Senate Comm. on the Judiciary*, 111th Cong., 1st Sess. 12-13 (2009) (*Senate Hearing*); see *id.* at 63 (Attorney General's statement that the bill only "criminalizes violent acts motivated by a bias," and therefore "does not criminalize thought or speech, no matter how offensive"); see also H.R. Rep. No. 86, 111th Cong., 1st Sess. 16 (2009) ("The legislation does not punish, nor prohibit in any way, name-calling, verbal abuse, or expressions of hatred toward any group, even if such statements are hateful. Moreover, nothing in this legislation prohibits the lawful expression of one's deeply held religious or personal beliefs. The bill only covers violent actions.").

2. Petitioners brought suit against the Attorney General in his official capacity, contending that the Act violates their rights under the First Amendment and is unconstitutional on a number of additional grounds. Pet. App. 23-24. The complaint alleges that petitioners—three of whom are pastors, and one of whom is the President of the American Family Association of Michigan—"publicly denounce homosexuality, homosexual activism, and the homosexual agenda as being contrary to God's law and His divinely inspired Word." *Id.* at 22, 66. It also alleges that the "real purpose" of the Act "is to deter, inhibit, chill, and punish thought, beliefs, and speech," and claims that petitioners' speech will make them targets for investigation and prosecution, although they have not yet been subject to any such government action. *Id.* at 5, 69-70, 77.

The district court dismissed the complaint on the grounds that petitioners lack standing and their claims are not ripe. Pet. App. 5. The district court concluded that petitioners "do not allege that they intend to 'willfully cause' any 'bodily injury'"; "have not demonstrated that 'there exists a credible threat of prosecution' under the Act"; and established nothing more than a "speculative" risk of any harm. *Id.* at 48-49, 53 (citation omitted).

3. The court of appeals affirmed, concluding that petitioners "do not have standing to challenge the Act" (and declining to address the issue of ripeness). Pet. App. 13.

First, the court concluded that petitioners have not alleged that they have violated the Act or that they intend to violate it in the future. The court explained that Section 249(a)(2) "prohibits violent acts; it does not prohibit constitutionally protected speech or conduct."

Pet. App. 4. The court determined that petitioners "have not alleged any actual intent to cause bodily harm themselves" or to "facilitate the causation of bodily harm by others." *Id.* at 10-11 (citing 18 U.S.C. 2, which imposes aiding and abetting liability on a person who provides "knowing aid" to the perpetrator of a crime "with the intent to facilitate" it). Rather, the court said, petitioners have alleged only that they wish to engage in a particular "course of speech," and cannot "pinpoint what it is they want to say that could subject them to prosecution." *Id.* at 8-9.

Second, the court concluded that petitioners have not alleged any credible threat of prosecution for lawful acts. Pet. App. 12. Although petitioners pointed to various "undated quotes by various people and organizations" accusing opponents of homosexuality of promoting violence "through their religious messages," in the court's view, those comments "say nothing about [petitioners'] actual intent, what the Act says, or how the Act might be applied to [petitioners] by those with actual authority to implement it." *Id.* at 12-13. Moreover, petitioners did not allege any facts suggesting that the government "has taken or intends to take any investigatory actions" or initiate any prosecution under the Act "against those merely engaging in protected speech." *Id.* at 13. Thus, the court explained, there was no basis to believe that anyone is "faced with a 'chilling effect' on their protected activity." *Id.* at 12.

Judge Stranch concurred. She wrote separately to explain that petitioners' "attempts to support their claim" of standing through use of legislative history and statements by federal prosecutors were "plainly without merit." Pet. App. 14; see, *e.g.*, *id.* at 15-17 (concluding that legislative history of the Act shows that Congress

"intended to protect [the] constitutional expression of religious beliefs" by people such as petitioners); *id.* at 17-20 (finding "wholly groundless [petitioners'] claim that statements made by federal prosecutors and the Attorney General constitute threats of enforcement of the [Act] against religious leaders for their religious speech").

ARGUMENT

The court of appeals correctly held that petitioners, who do not plan to violate Section 249(a)(2) and who are not credibly threatened with investigation or prosecution under that provision based on the allegations in their complaint, lack standing to challenge the Act. That holding does not conflict with any decision of this Court or another court of appeals. Accordingly, this Court's review is not warranted.

1. To establish Article III standing, a plaintiff must demonstrate that he has "suffered an injury in fact * * * which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal quotation marks and citations omitted); see also, *e.g.*, *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 493 (2009). An asserted injury cannot be "imminent" where it is based on "speculati[on] that [government] officials will" take harmful actions. *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 344-345 (2006); see also *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Such conjecture gives "no assurance that the asserted injury is * * * 'certainly impending.'" *DaimlerChrysler Corp.*, 547 U.S. at 345 (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990)). Moreover, "allegations of a subjective 'chill'" are not sufficient to establish standing; "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)) (brackets omitted).[2]

Applying these principles, the court of appeals correctly decided that petitioners lack standing to pursue a suit that "is really a political statement against the [Act]." Pet. App. 3. Petitioners have not identified any threat to prosecute or investigate them under Section 249(a)(2), or any actual or threatened prosecution or investigation of any similarly situated person. That is unsurprising in light of the Act's language and history. The Act penalizes willfully violent conduct, and expressly preserves the First Amendment rights of petitioners and others to express their political and religious views. See 18 U.S.C. 249(a)(2); §§ 4710(1)-(6), 128 Stat. 2841-2842. In addition, the Attorney General—who is ultimately responsible for any decision to pursue a Section 249(a)(2) case—has stated that the Act does not penalize religious leaders who exhort their followers to reject homosexuality. See *Senate Hearing* 12-13, 63.

Accordingly, there is no serious risk that petitioners will be prosecuted under Section 249(a)(2). See Pet. App. 7-12. Petitioners attempt to evade that conclusion by claiming (Pet. 3, 5-6, 10) that they might fall within the scope of Section 249(a)(2) if they engage in speech that "causes bodily injury," 18 U.S.C. 249(a)(2)(A), by giving someone a headache or inducing someone to commit suicide. But that claim ignores the statutory re-

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[2] These Article III requirements are "irreducible" (although prudential standing requirements are relaxed in First Amendment overbreadth cases). See *Virginia* v. *American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-393 (1988); *Secretary of State* v. *Joseph H. Munson Co., Inc.*, 467 U.S. 947, 955-956, 958 (1984).

quirement that a violation of Section 249(a)(2) be *willful*, see *Bryan* v. *United States*, 524 U.S. 184, 192 (1998), as well as various of the Rules of Construction making clear that mere speech will not be penalized. Petitioners have disclaimed any intent to cause bodily injury; indeed, as the court of appeals pointed out, they have specifically alleged that anyone who commits a violent criminal act should be subject to "severe criminal penalties" under state law. Pet. App. 7-8. The court of appeals was therefore correct to conclude that petitioners' "proposed course of speech" does not fall within the scope of the statutory proscription. *Id.* at 8-9; see *id.* at 10-11 (discussing willfulness requirement for aiding and abetting liability).

In addition, any "chill" that petitioners may experience is purely "subjective." *Bigelow*, 421 U.S. at 816-817; see Pet. App. 12-13. Petitioners repeatedly insist (Pet. 8-10, 12-17) that their speech will be chilled due to fears of government investigation—fears that appear to be based at least in part on accusations by third parties that petitioners incite violence. But petitioners' arguments are both general and speculative, and their fears do not amount to "a 'claim of specific present objective harm or a threat of specific future harm.'" *Bigelow*, 421 U.S. at 816-817 (quoting *Laird*, 408 U.S. at 13-14). Petitioners thus offer nothing that undermines the Sixth Circuit's conclusion that no "actual facts * * * support an assertion that * * * those merely engaging in protected speech" face any government action stemming from Section 249(a)(2). Pet. App. 12-13; see *Bigelow*, 421 U.S. at 816-817; *Laird*, 408 U.S. at 13-14; see also *Wisconsin* v. *Mitchell*, 508 U.S. 476, 488-490 (1993).

2. Petitioners also contend (Pet. 11-12) that they necessarily have standing because the Act is facially uncon-

stitutional under *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992), which struck down an ordinance criminalizing "fighting words" involving race, religion, or gender. See *id.* at 379-381 (concluding that ordinance was "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses"). But a plaintiff cannot bootstrap itself into standing simply by contending that, if it were permitted to proceed, it would prevail on the merits. See generally *Public Citizen* v. *FTC*, 869 F.2d 1541, 1549 (D.C. Cir. 1989) (noting "the familiar trap of confusing the merits of a case with the threshold requirement of standing to present a challenge"). Regardless of how *R.A.V.* might apply to Section 249(a)(2), petitioners do not have standing to challenge the Act's constitutionality.

In any event, *R.A.V.* is irrelevant here—as evidenced by the Sixth Circuit's omission of any discussion of that opinion. *Wisconsin* v. *Mitchell*, 508 U.S. 476 (1993), which involved a statute analogous to Section 249(a)(2) and which discusses and distinguishes *R.A.V.*, explains why. See *id.* at 487. The statute at issue in *Mitchell* enhanced criminal penalties for the perpetrator of a battery because the victim was selected on the basis of race. See *id.* at 480, 484-485. This Court held that the statute did not violate the First Amendment, stating that punishment of a "discriminatory motive, or reason, for acting" is constitutionally permissible. *Id.* at 487. The Court also observed that "[n]othing in * * * *R.A.V.* compels a different result," because "the statute in this case is aimed at conduct unprotected by the First Amendment"—conduct "thought to inflict greater individual and societal harm" than an ordinary battery. *Id.* at 487-488; see also *id.* at 489 (noting that "[t]he First Amendment * * * does not prohibit the evidentiary

use of speech to establish the elements of a crime or to prove motive or intent"). For the same reasons, *R.A.V.* is distinguishable from the case at hand, which challenges a statute that criminalizes violent conduct motivated by particular kinds of bias.

3. Finally, in asserting that they have standing to challenge the Act due to a chilling effect on their First Amendment liberties, petitioners suggest (Pet. 10, 12-17) that various standing-related decisions of this Court and the courts of appeals are inconsistent with the decision below. There is no such conflict, however; those decisions simply apply, on varying facts, the same well-established requirement of injury that the Sixth Circuit correctly articulated and applied in this case.

Petitioners' effort to establish a conflict in the law of standing appears to rely principally (Pet. 14-15) on *The Presbyterian Church (U.S.A.)* v. *United States*, 870 F.2d 518, 520-523 (9th Cir. 1989), in which the Ninth Circuit concluded that the plaintiff churches had standing to bring an action asserting that their First Amendment rights were violated when federal immigration officials "surreptitiously recorded church services." *Id.* at 520. But the court in *Presbyterian Church* reached that conclusion only because government surveillance of the churches had actually occurred and had resulted in "actual injuries," such as a decrease in church membership and attendance at services. *Id.* at 521-522; see also *id.* at 523 (stating that "as we are unable to assess the likelihood that the churches will be subject to * * * surveillance in the future, we are unable to determine whether they have standing to seek prospective relief against such surveillance"). Such a rule does not aid petitioners, who merely speculate that they might

someday be investigated or prosecuted for an offense that they do not plan to commit.

The other decisions cited by petitioners (Pet. 13-14, 16-17) are similarly inapposite. In each, plaintiffs were found to have shown an injury sufficient to meet the Article III standing requirement because they alleged that they would engage in conduct prohibited by the challenged statute or that a credible threat existed of enforcement of the statute against them. See, *e.g.*, *Dombrowski* v. *Pfister*, 380 U.S. 479, 486-489 (1965) (holding that plaintiffs alleged sufficient injury to challenge state laws against subversive activities where plaintiffs had been charged with violating the statutes and were threatened with future prosecutions); *Steffel* v. *Thompson*, 415 U.S. 452, 458-459 (1974) (holding that plaintiff threatened with arrest for distributing handbills, whose "handbilling companion" was actually prosecuted, had standing to challenge relevant statute); *Virginia* v. *American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-393 (1988) (holding that booksellers had standing to challenge obscenity statute where they had "an actual and well-founded fear that the law will be enforced against them" and would "have to take significant and costly compliance measures or risk criminal prosecution"); *Doe* v. *Bolton*, 410 U.S. 179, 187-189 (1973) (holding that doctors who provided abortions had standing to challenge statute prohibiting them from doing so where statute "directly operate[d]" on them and predecessor statute had been enforced); *Epperson* v. *Arkansas*, 393 U.S. 97, 101-103 (1968) (permitting teacher to challenge a statute that prohibited teaching of evolution where counsel for the State said at oral argument that plaintiff

would be "liable for prosecution" if she presented "Darwin's theory" in class).[3]

As the Sixth Circuit properly concluded, petitioners have made no such allegations in this case, and have therefore failed to establish standing. See Pet. App. 7-13. This Court's review of that issue is not warranted.

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[3] See also, *e.g.*, *Berner* v. *Delahanty*, 129 F.3d 20, 23-25 (1st Cir. 1997) (holding that attorney had standing to challenge judicial ban on wearing political buttons in the courtroom because he had previously been required to remove a button and alleged that he would seek to wear a button again), cert. denied, 523 U.S. 1023 (1998); *Hoffman* v. *Hunt*, 126 F.3d 575, 579, 582 (4th Cir. 1997) (holding that 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. *FEC*, 113 F.3d 129, 131 (8th Cir. 1997) (holding that organization seeking to make campaign expenditures had standing to challenge regulation denying it a partial exemption from restrictions on such expenditures); *New Hampshire Right To Life Political Action Comm.* v. *Gardner*, 99 F.3d 8, 16-17 (1st Cir. 1996) (holding that organization had standing to challenge campaign finance statute that took "direct aim at its customary conduct" because it intended to make expenditures likely covered by the statute); *G & V Lounge, Inc.* v. *Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1073, 1075 (6th Cir. 1994) (holding that plaintiff had standing to challenge city's threat to revoke its liquor license if it presented topless dancing as planned); *Planned Parenthood Ass'n of Cincinnati, Inc.* v. *City of Cincinnati*, 822 F.2d 1390, 1395-1396 (6th Cir. 1987) (holding that organization had standing to challenge ordinance where there was a "credible threat of prosecution" and "fear of prosecution [was] reasonably founded in fact"); *Red Bluff Drive-In, Inc.* v. *Vance*, 648 F.2d 1020, 1024-1025, 1033 n.18 (5th Cir. 1981) (holding that owners of adult entertainment businesses had standing to challenge obscenity statute directly regulating the performances presented in their establishments), cert. denied, 455 U.S. 913 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2013