IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

GARY GLENN, PASTOR LEVON YUILLE, PASTOR RENE B. OUELLETTER, PASTOR JAMES COMBS, Plaintiffs v. ERIC HOLDER, Jr., in his official capacity as Attorney General of the United States, Defendant	Case No. 1:10-cv-10429-TLL-CEB THOMAS L. LUDINGTON United States District Judge CHARLES E. BINDER Magistrate Judge

REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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This is a pre-enforcement, facial challenge to the constitutionality of 18 U.S.C. 249(a)(2), one of the criminal provisions of the Mathew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (the Shepard-Byrd Hate Crimes Act or the Hate Crimes Act), which makes it a criminal offense to "*willfully 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).[1]

As we explained in the brief in support of defendant's motion to dismiss (U.S. Br.), plaintiffs' complaint should be dismissed for lack of jurisdiction because they do not have standing and because their claims are not ripe for review. U.S. Br. 9-18. In the alternative, the complaint should be dismissed for failure to state a claim upon which relief can be granted. U.S. Br. 18-31.

[1] Plaintiffs characterize this case as "a facial and as-applied challenge." Plaintiffs' Brief (Pltff. Br.) 1. But since Section 249(a)(2) has not been applied against the plaintiffs, their only possible claim is that the statute is facially invalid.

1. Plaintiffs lack standing because they have not alleged (1) "an intention to engage in a course of conduct * * * proscribed by" the Hate Crimes Act, or (2) that "there exists a credible threat of prosecution thereunder." *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); U.S. Br. 10. In particular, plaintiffs have not alleged that they intend to "*willfully cause[] bodily injury* to" anyone. 18 U.S.C. 249(a)(2); see U.S. Br. 10.

In their brief in response to the motion to dismiss (Pltff. Br.), plaintiffs contend that Section 249(a)(2) is not limited to violent conduct. Pltff. Br. 4-5. They imagine a situation in which a person could be prosecuted under the statute if he merely caused emotional or psychological injury to another that was accompanied by a stomachache or headache. Pltff. Br. 4. But this contention depends upon a mistaken reading of the statutory definition of "bodily injury" and is belied by the plain language of the statute.

First, it is plain that the term "bodily injury" requires proof of some kind of physical insult to the victim's *body*. Section 249(c)(1) incorporates by reference a modified version of the definition of the term in 18 U.S.C. 1365(h)(4). As defined in Section 1365(h)(4), "bodily injury" means:

> (A) a cut, abrasion, bruise, burn, or disfigurement;
>
> (B) physical pain;
>
> (C) illness;
>
> (D) impairment of the function of a bodily member, organ, or mental faculty; or
>
> (E) *any other injury to the body*, no matter how temporary.

18 U.S.C. 1365(h)(4) (emphasis added). Section 249(c)(1) modifies this definition by stating that the term "does *not* include solely emotional or psychological harm to the victim." Thus,

while bodily injury may be accompanied by psychological harm, it is the injury to the body that is prosecutable under Section 249(a)(2).

Second, the Act's prohibitions are expressly limited to violent conduct. Section 4710 of the Act states as much: "(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." Pub. L. No. 111-84, Div. E, Sec. 4710(2), 123 Stat. 2841 (Oct. 8, 2009). [2]

Finally, the Hate Crimes Act is violated only when a defendant "*willfully* cause[es] bodily injury." 18 U.S.C. 249(a)(2) (emphasis added). 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 this element, the prosecution must prove, beyond a reasonable doubt, that the defendant *intended* to cause bodily injury and that he "acted with knowledge that his conduct was unlawful." *Id.* at 192 (citation omitted). Similarly, to be convicted of aiding or abetting a violation of Section 249(a)(2), a defendant must "intend[] to facilitate the commission of the crime." *United States* v. *Dolt*, 27 F.3d 235, 238 (6th Cir. 1994). Thus, there is no merit to plaintiffs' suggestion (Pltff. Br. 4) that they might be prosecuted solely because a listener became physically ill as a result of hearing their speech about the "homosexual agenda."

Nor is there any significance to plaintiffs' allegations that third parties have accused them of intentionally causing bodily injury or counseling others to cause bodily injury to persons because of their sexual orientation. Pltff. Br. 2, 8. Plaintiffs do not allege that they have

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[2] Plaintiffs seek to minimize the significance of the Rules of Construction in Section 4710 by claiming that they have not been codified as part of 18 U.S.C. 249. Pltff. Br. 6-7. Whether codified or not, the Rules of Construction were duly enacted by Congress and are as much a part of the statute as any other language in the Act.

willfully caused anyone bodily injury, that they intend to do so in the future, or that they either have intentionally counseled or intend to counsel anyone else to cause bodily injury. Thus, they have not alleged either that they have engaged in conduct that violates Section 249(a)(2) or that they intend to do so in the future. As explained in our opening brief, it is the language of the statute, not the isolated statements of third parties with no responsibility for enforcement of the Act, that will govern its enforcement. U.S. Br. 14.

The Hate Crimes Act prohibits violent conduct. It is true that evidence of a defendant's speech might be relevant to prove his motive or intent in a prosecution under Section 249(a)(2). See U.S. Br. 13-14. But since plaintiffs do not allege that they are likely to engage in conduct prohibited by the Act or that there is a "credible threat" that they will be prosecuted under the Act, they lack standing to assert any claims stemming from the possible use of such evidence in a hypothetical case. *Babbitt*, 442 U.S. at 298.

None of the cases cited by plaintiffs (Pltff. Br. 9-13) support their contention that they have standing.[3] 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 delay elections and thereby 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

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[3] 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). *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 348, 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.

consumer boycotts in the past and asserted an intention to do so in the future. *Id.* at 301-303. On the other hand, the Court 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. 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 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 political buttons in the courtroom where he had been required to remove a button and said 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*, 484 U.S. 383, 392-393 (1988) (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 teacher who wished to teach about evolution challenging statute prohibiting such teaching and providing 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 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").

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). Plaintiffs oppose Section 249(a)(2) of the Hate Crimes Act because they believe it to be "an unjust and immoral law." Pltff. Br. 3. But that does not give them standing to challenge its constitutionality.

2. Just as plaintiffs do not have standing to challenge Section 249(a)(2), their pre-enforcement challenge is not ripe for review. See U.S. Br. 16-18. As the Sixth Circuit has recognized, "the ripeness requirement aims to prevent the court from entangling itself in abstract disagreements." *Peoples Rights Org., Inc.* v. *City of Columbus*, 152 F.3d 522, 527 (6th Cir. 1998) (citation & internal quotation marks omitted). "In the context of a pre-enforcement challenge, a case is 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). *Peoples Rights* was a challenge to a municipal ordinance restricting the possession of assault weapons. *Id.* at 527-528. The Sixth Circuit found that the plaintiffs had standing and that their claims were ripe because they were unable to determine whether their weapons were covered by the ordinance, the City had stated its intention to prosecute violations of the ordinance, and plaintiffs thus risked prosecution if they possessed their weapons inside the City limits. *Id*. at 527-530. Here, in contrast, plaintiffs claims are not ripe because they lack the "immediacy and reality" required to warrant adjudication. *Peoples Rights*, 152 F.3d at 527.

3. As explained in our opening brief, the requirement that the prosecution prove an explicit interstate commerce connection in every case "ensure[s], through case-by-case inquiry," *United States* v. *Lopez*, 514 U.S. 549, 561 (1995), that each prosecution under Section 249(a)(2) of the Hate Crimes Act is "in pursuance of Congress' power to regulate interstate commerce." *United States* v. *Morrison*, 529 U.S. 598, 613 (2000); U.S. Br. 27-28. The presence of the

interstate commerce elements in Section 249(a)(2) distinguishes this statute from the civil provision of the Violence Against Women Act (VAWA), 42 U.S.C. 13981, invalidated in *Morrison*. Indeed, as we explained in our opening brief (U.S. Br. 28), the Supreme Court recognized the significance of this distinction when it noted that the courts of appeals had "uniformly upheld" the criminal provisions of the VAWA, which include interstate commerce elements. *Morrison*, 529 U.S. at 613 n.5; see 18 U.S.C. 2261(a)(1).

In an effort to diminish the significance of the interstate commerce elements set forth in Section 249(a)(2)(B), plaintiffs rely on *United States* v. *Corp*, 236 F.3d 325, 330-331 (6th Cir. 2001), abrogation recognized on other grounds in *United States* v. *Bowers*, 594 F.3d 522, 523 (6th Cir. 2010). Pltff. Br. 25. But rather than aiding plaintiffs, *Corp supports* the conclusion that plaintiffs' facial challenge to Section 249(a)(2) should be dismissed for failure to state a claim.

Corp was an appeal from a conviction for violation of a federal statute prohibiting the possession of child pornography. 236 F.3d at 326-327; see 18 U.S.C. 2252(a)(4)(B). The interstate commerce element in this statute is unusually broad, providing that the statute applies, *inter alia*, where the pornographic images were produced using materials that had moved in or affecting interstate commerce. See 18 U.S.C. 2252(a)(4)(B). In *Corp*, the element was proven by evidence that the photographic paper the defendant used was produced in Germany. 236 F.3d at 326. The Sixth Circuit concluded that the interstate commerce element in the child pornography statute was too broad to ensure, by itself, that the conduct regulated had sufficient connection to interstate commerce to bring it within Congress's Commerce powers. *Corp*, 236 F.3d at 330-331 (citing *United States* v. *Rodia*, 194 F.3d 465, 473 (3d Cir. 1999), cert. denied, 529 U.S. 1131 (2000)). The Sixth Circuit wrote in *Corp*: "The statute facially has an extremely wide sweep. * * * A painter using a model who was just under 18, even if it was his wife,

would fall afoul of the statute if the paints, brushes, or canvas had traveled in interstate commerce, even long before enactment of the act." *Ibid.*; see *Rodia*, 194 F.3d at 473 (it is "at least doubtful" that the interstate commerce element in Section 2252(a)(4)(B) "adequately performs the function of guaranteeing that the final product regulated substantially affects interstate commerce"); *United States* v. *Morales-De Jesus*, 372 F.3d 6, 13-14 (1st Cir. 2004) (agreeing with *Rodia* as to similar interstate commerce element in Section 2251(a)), cert. denied, 545 U.S. 1130 (2005).

In contrast, as explained in our opening brief, the interstate commerce elements in Section 249(a)(2)(B) are similar to those in other federal criminal statutes that have been routinely upheld as valid exercises of Congress's authority under the Commerce Clause. U.S. Br. 28-30; see *Morales-DeJesus*, 372 F.3d at 13 (noting that interstate commerce elements in other statutes "will more effectively limit the number of cases that fall under the purview of the statute, as envisioned by the Supreme Court"). Thus, proof of the interstate commerce elements in Section 249(a)(2) will fulfill the role envisioned by *Lopez*, and *Morrison*, ensuring, on a case-by-case basis, that there is sufficient connection to interstate commerce to bring the prosecution within the Commerce power.

Even more to the point, despite their reservations about the adequacy of the interstate commerce elements in Sections 2251 and 2252, the courts in *Corp*, *Rodia*, and *Morales-DeJesus* each declined to invalidate the child pornography statute as *facially* unconstitutional. In particular, the Sixth Circuit concluded that it should read the interstate commerce element in Section 2252 "as a meaningful restriction," *Corp*, 236 F.3d at 332, and stated that it would decide "on a case-by-case basis * * * whether the activity involved in a particular case had a

substantial effect on commerce," *id.* at 333.[4] *Corp* went on to reverse the conviction, determining that the interstate commerce nexus *in that case* was insufficient to bring it within Congress's Commerce power. 236 F.3d at 332-333.[5]

Thus, far from supporting plaintiffs' contention that Section 249(a)(2) should be invalidated as facially unconstitutional, *Corp* stands for the proposition that the adequacy of the interstate commerce connection should be judged on a case-by-case basis, as the statute is applied. Section 249(a)(2) is authorized by the Commerce Clause.

4. Plaintiffs' contention that Section 249(a)(2) of the Hate Crimes Act infringes their First Amendment rights depends entirely on their erroneous belief that the statute prohibits something other than willful violent conduct. In particular, plaintiffs seek to distinguish *Wisconsin* v. *Mitchell*, 508 U.S. 476 (1993), by contending that Section 249(a)(2), unlike the statute at issue in *Mitchell*, "punishes expressive conduct – it does not require a physical assault." Pltff. Br. 34-35. As explained on pp. 2-3, *supra*, and in our opening brief, U.S. Br. 3-4, 19, 24-25, the Hate Crimes Act prohibits only violent conduct. For that reason, and the reasons set forth in our opening brief, the Act does not violate the First Amendment. U.S. Br. 19-25.

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[4] The Sixth Circuit later recognized that *Corp's* requirement of a substantial effect on interstate commerce in each case had been abrogated by the Supreme Court's decision in *Gonzales* v. *Raich*, 545 U.S. 1 (2005). *Bowers*, 594 F.3d at 529. Such proof in every case was unnecessary, *Bowers* explained, "given Congress's broad regulatory power in the child-pornography arena, as well as its rational belief that wholly intrastate, noncommercial activity affects the larger interstate commercial market. *Ibid.* "We cannot envision, after *Raitch*, a circumstance under which an as-applied Commerce Clause challenge to a charge of child-pornography possession or production would be successful." *Id.* at 530.

[5] The courts in *Rodia* and *Morales-DeJesus* affirmed the convictions in those cases. *Rodia* concluded that the statute was facially constitutional because the possession of child pornography substantially affects commerce. 194 F.3d at 473-482. *Morales-De Jesus* concluded that the connection to interstate commerce in that case was sufficient to bring the application of the statute within Congress's Commerce power. 372 F.3d at 17-18, 21.

5. Plaintiffs' contention that Section 249(a)(2) is unconstitutionally vague focuses on the term "actual or perceived . . . sexual orientation [or] gender identity." Pltff. Br. 37-38. But there is nothing confusing or vague about these terms. Each of the words has an easily understandable meaning.[6] Investigations and prosecutions under Section 249(a)(2) will involve questions relating to these terms: What is the victim's sexual orientation? Did the defendant perceive the victim to be gay or straight? Did the defendant act because of the victim's gender-related characteristics? Each of these questions is capable of an objective determination, and is not dependent upon "a subjective judgment such as whether conduct is 'annoying' or 'indecent.'" *United States* v. *Williams*, 128 S. Ct. 1830, 1846 (2008). As explained in our opening brief, Section 249(a)(2) is not unconstitutionally vague. U.S. Br. 22-24.

6. Plaintiffs' contention that Section 249(a)(2) violates Equal Protection also depends upon a misinterpretation of the plain language of the Act. As explained in our opening brief, the Act does not prohibit violent acts only against gay men or lesbians. U.S. Br. 26. It prohibits willful, violent conduct based on "actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of *any person*." 18 U.S.C. 249(a)(2). Thus, it protects individuals who are straight, as well those who are gay, lesbian, or bisexual. It also protects individuals who are physically assaulted because of their religion, as well as gender or disability.

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[6] "Actual" means "existing in fact." New Oxford American Dictionary 16 (2d ed. 2005). To "perceive" means "interpret or look on (someone or something) in a particular way; regard as." *Id.* at 1261. "Sexual orientation" means "a person's sexual attraction toward members of the same, opposite, or both genders." *Id.* at 1554. Thus, a person's "actual * * * sexual orientation" refers to whether, as a matter of fact, he or she is sexually attracted to members of the same, opposite or both genders. "Perceived * * * sexual orientation" refers to whether he or she is regarded by the defendant as being sexually attracted to members of the same, opposite, or both genders. The statute defines "gender identity" to mean "actual or perceived gender-related characteristics." 18 U.S.C. 249(c). "Gender" means "the state of being male or female (typically used with reference to social and cultural differences rather than biological ones)." New Oxford American Dictionary 700. Thus, "gender identity" refers to someone's identity as a male or female and the characteristics associated with being male or female.

The statute does not exempt those "who encourage, support, or promote" gay rights from investigations or prosecutions. Pltff. Br. 38. Nor does it "target[] certain expressive conduct based on disfavor toward the view of the person engaging in it," or "provide special rights, protections, and recognition for some persons while denying the same to others based on their 'actual or perceived' 'sexual orientation,' or 'gender identity.'" Pltff. Br. 38-39. Section 249(a)(2) protects everyone. It does not violate Equal Protection.

7. With no citation to the legislative record, plaintiffs distort statements made by Attorney General Holder in support of the legislation that was enacted as the Hate Crimes Act. To set the record straight, we set forth below plaintiffs' misstatements and the Attorney General's actual statements as recorded in the legislative history.

First, plaintiffs allege that Attorney General Holder "candidly acknowledged during his Senate testimony that there was no need for the Act." Pltff. Br. 3 n.1; see also Pltff. Br. 30. The only citation for this claim is paragraph 81 of plaintiffs' complaint, which refers to an exchange between Attorney General Holder and Senator Hatch during the Attorney General's testimony before the Senate Judiciary Committee. In fact, the Attorney General emphasized the need for the legislation during this exchange and in his testimony generally:

> SEN. ORRIN HATCH (R-UT): * * *
>
> Mr. Attorney General, in the many years I've been involved in this debate I've asked proponents of federal hate crimes legislation for evidence that crimes motivated by prejudice and bias are not being punished at the state level. And you've been very hedging here too, because you know most all of them are.
>
> Certainly, there are individual stories wherein a perpetrator received a sentence that may have been denied -- or, excuse me, that may have been deemed too lenient.
>
> And there are I'm sure many accounts of crimes being punished as something other than a, quote, "hate crime," unquote.

> Now you cited a few of these cases in your written testimony, but I've seen little evidence that there's a trend among state law enforcement officials to ignore violent crimes motivated by prejudice or that state court judges are more likely to give too lenient sentences in those cases than they are in others involving crimes.
>
> Now do you have any evidence that this is the case, that there is a trend that specifically with regard to biased motivated crimes, justice is not being served in this country?
>
> ATTY GEN. HOLDER: I'm not sure that I would say that I see a trend. I think that state and local prosecutors, our partners, do a good job. But I also know as I noted in my prepared remarks that there are instances where there is the need for the federal government to come in where a state or local -- locality for whatever reason has decided not to pursue a case where I think it is clearly appropriate or does not have the ability do to that.

LexisNexis Congressional Documents, Federal News Service, Panel I of a Hearing of the Senate Judiciary Committee; Subject: The Matthew Shepard Hate Crimes Prevention Act of 2009; Witness: Attorney General Eric Holder; June 25, 2009, available at http://web.lexisnexis.com/congcomp/document?_m=4c18e8af17408dca63254a2f6e32e813&_docnum=5&wchp=dGLbVzz-zSkSA&_md5=34ca39ecb8c3e74ca6a2d9e7dd63518e. In his prepared statement, the Attorney General emphasized the need for the legislation, citing FBI statistics indicating the prevalence of bias-motivated crimes based on race, religion, sexual orientation, and national origin; problems with the enforcement of existing federal hate crimes statutes; and specific instances in which state prosecutions did not fully vindicate the federal interest. Statement of Eric H. Holder, Jr., Attorney General, Before The Committee On The Judiciary, United States Senate, June 25, 2009, at 2-7 (Statement). The Attorney General also emphasized that while state and local officials would prosecute most hate crimes, there was a need for federal enforcement as well:

> Although State, local, and tribal governments will continue to take the lead in anti-hate crime enforcement efforts, there are occasions when the Federal

> government may be in a better position to investigate and prosecute a particular hate crime. For example, Federal resources may be better suited to investigate interstate hate crimes, in which the same defendant or group of defendants commit related hate crimes in multiple jurisdictions. There may also be times when a State, local, or tribal jurisdiction expressly requests that the Federal government assume jurisdiction. Finally, there may be rare circumstances in which State, local, or tribal officials are unable or unwilling to bring appropriate criminal charges, or when their prosecutions fail to adequately serve the interests of justice.

Statement at 3.

Plaintiffs also claim that Attorney General Holder "tacitly acknowledged" that the Act could be used "to subject a person to a federal investigation under the Act, thereby making the Act 'a great tool for the Justice Department' to promote its 'pro-gay' agenda." Pltff. Br. 6 n.5; see also Pltff. Br. 1 (Act would be "an agenda-driven 'tool for the Justice Department'"). The only citation for this contention is paragraphs 27 and 44 of plaintiff's complaint, which contain no citation. In fact, in his Senate testimony in support of the bill, Attorney General Holder emphasized that the legislation would "help protect all Americans from the scourge of the most heinous bias-motivated violence." Statement at 1. The Attorney General also testified that the legislation would provide an important tool for law enforcement officers at all levels of government. He urged the enactment of the legislation "to provide our federal, state, local and tribal law enforcement officers with the tools that they need to effectively prosecute and deter these heinous crimes" and stated that the Act would give federal law enforcement officials the "tools to backstop the efforts that would be done by our state and local partners." Hearing.

CONCLUSION

Plaintiffs' complaint should be dismissed for lack of jurisdiction. In the alternative, plaintiffs' complaint should be dismissed for failure to state a claim upon which relief can be granted because the Shepard-Byrd Hate Crimes Act does not violate the First Amendment, the Equal Protection Clause of the Fifth Amendment, the Commerce Clause, or the Tenth Amendment.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on May 20, 2010, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

THOMAS MORE LAW CENTER
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I further certify that I have mailed by U.S. mail the paper to the following non-ECF participants:

None

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