No. 23-1135

In the Supreme Court of the United States

SALINE PARENTS, ET AL., PETITIONERS

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MARK B. STERN
BEN LEWIS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

In October 2021, the Attorney General issued a one-page internal memorandum directing various Department of Justice components to convene meetings to address a spike in threats of violence and other criminal conduct against public school officials. Petitioners allege that they engage in advocacy related to public schooling, but do not threaten violence or engage in unlawful activity. They do not allege that the government has taken any action against them on the basis of the memorandum. The questions presented are:

1. Whether petitioners have Article III standing to challenge the internal memorandum.

2. Whether, if petitioners have standing, their challenge is ripe.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 88 F.4th 298. The opinion of the district court (Pet. App. 20-31) is reported at 630 F. Supp. 3d 201.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2023. A petition for rehearing was denied on January 18, 2024 (Pet. App. 33-34). The petition for a writ of certiorari was filed on April 15, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners filed suit in the United States District Court for the District of Columbia seeking to enjoin an alleged policy set forth in an internal memorandum issued by the Attorney General to various Department of

Justice (DOJ) components and an internal email within the Federal Bureau of Investigation (FBI). The district court dismissed the complaint for lack of Article III standing. Pet. App. 20-31. The court of appeals affirmed. *Id.* at 1-19.

1. On October 4, 2021, the Attorney General sent a one-page memorandum to various DOJ components observing a "disturbing spike in harassment, intimidation, and threats of violence against" public school officials. Pet. App. 4 (citation omitted); see D. Ct. Doc. 10-2, at 2 (Feb. 15, 2022). The memorandum acknowledged that "while spirited debate about policy matters is protected under our Constitution, that protection does not extend to threats of violence or efforts to intimidate individuals based on their views." Pet. App. 4 (brackets and citation omitted). The memorandum directed the FBI to "convene meetings" to "facilitate the discussion of strategies for addressing threats" against school officials. *Id.* at 4-5 (citation omitted). On October 20, an FBI official sent an internal email to agents stating that a "'threat tag'" had been created to facilitate "internal tracking" of such threats and to enable "'comprehensive analysis of the threat picture.'" *Id.* at 5 (citations omitted).

Petitioners are parents and an unincorporated association of parents in Saline, Michigan and Loudon County, Virginia. Pet. App. 5. They allege that they engage in advocacy related to public schooling, including by attending school board meetings and organizing protests in their respective communities. See *id.* at 5-6. They "declare that they intend only to engage in constitutionally protected conduct" and do not "mak[e] threats of criminal violence." *Id.* at 6. On October 19, 2021, petitioners filed this lawsuit seeking to enjoin the Attorney General from enforcing a supposed "policy"

encapsulated in the October 4 memorandum, on the theory that the policy violates their rights under the First Amendment, Fifth Amendment, and Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (42 U.S.C. 2000bb *et seq.*). Pet. App. 7-8.

2. The district court dismissed the operative complaint for lack of Article III standing. Pet. App. 20-31. Petitioners had argued that (1) the threat of enforcement of the alleged policy would chill their speech and (2) the policy itself caused them reputational harm by labeling them as domestic terrorists. See *id.* at 25. The court rejected the first argument on the ground that the alleged policy was "'not regulatory, proscriptive, or compulsory in nature'"—and that even if it were, "it would not apply to [petitioners'] conduct" because they "represent that their conduct includes verbal opposition and peaceful protests," whereas the alleged policy "only covers 'criminal conduct' that is not constitutionally protected, such as 'threats of violence.'" *Id.* at 27-28 (citation omitted). The court rejected the second argument on the ground that "the policy does not label anyone a domestic terrorist," and that although a private third party had sent a letter to the White House using the phrase "'domestic terrorism,'" that letter "cannot fairly be interpreted as directed at [petitioners'] activities" and "cannot plausibly be considered part of the alleged policy," given that neither the memorandum nor the email mentions the letter. *Id.* at 30-31 (citation omitted).

3. The court of appeals affirmed. Pet. App. 1-19.

The court of appeals agreed with the district court that neither of petitioners' asserted injuries supported Article III standing. Pet. App. 9-14. The court explained that the memorandum "announces initial plans

by the DOJ to investigate and strategize internally" and thus "does not threaten imminent legal action against anyone, and certainly not against [petitioners]." *Id.* at 12. The court further explained "even on a generous reading" of the complaint, petitioners "have not offered anything to show that the Government labeled them in any way, let alone impugned their reputations." *Id.* at 13-14.

The court of appeals also held that even if petitioners had Article III standing, their claims would not be ripe. Pet. App. 14-19. The court found it "much 'too speculative'" that the government would "decide to take enforcement action at some point * * * against [petitioners] in particular," especially given that "[n]either the Memorandum nor the FBI Email threatens imminent enforcement action generally, much less against [petitioners] specifically." *Id.* at 16-17 (citation omitted). The court also observed that withholding judicial review of petitioners' claims would "not subject [them] to any legally cognizable 'hardship,'" given that petitioners are "'not required to engage in, or to refrain from, any conduct' as a result of the challenged DOJ documents." *Id.* at 18 (citations omitted).

ARGUMENT

Petitioners renew their contentions (Pet. 8-19) that they have Article III standing to pursue their claims and that their challenge is ripe. The court of appeals correctly rejected those contentions, and its factbound decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. The court of appeals correctly held that petitioners lack Article III standing. To demonstrate standing, a plaintiff must allege an injury that is "concrete, par-

ticularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper* v. *Amnesty International USA*, 568 U.S. 398, 409 (2013) (citation omitted). Neither of petitioners' asserted injuries satisfies that standard.

a. Petitioners first assert (Pet. 8-15) that the Attorney General's internal memorandum, and the alleged policy it sets forth, will have a chilling effect on their speech. But to bring such a pre-enforcement claim, petitioners must show, at a minimum, that their "intended future conduct" is "'arguably proscribed'" by the alleged policy. *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 162 (2014). By the same token, plaintiffs cannot establish Article III standing "simply by claiming that they experienced a 'chilling effect' that resulted from a governmental policy that does not regulate, constrain, or compel any action on their part." *Amnesty International*, 568 U.S. at 419; see *Laird* v. *Tatum*, 408 U.S. 1, 11 (1972) (plaintiff alleging a chilling effect lacks standing where government policy is "not regulatory, proscriptive, or compulsory in nature").

The alleged policy here does not regulate, constrain, or compel any action on petitioners' part, and their intended conduct is thus not even arguably proscribed by it. Both the memorandum and the FBI email are internal agency documents that "do not establish any regulatory actions or even purport to offer viable policy statements," and that impose "no obligations outside of the DOJ." Pet. App. 16-18. The memorandum announces concerns about threats of violence and similar unlawful conduct against school officials, and directs DOJ personnel to convene meetings to address such conduct. The email merely announces internal steps to enable better collection of information concerning

threats. Neither even purports to regulate petitioners or anyone else outside DOJ; at most, they represent "plans by the DOJ to investigate and strategize internally." *Id.* at 12.

Petitioners argue (Pet. 14) that "[b]eing the target of government law enforcement actions such as investigations and surveillance * * * is in fact compulsory by its very nature." But this Court has long rejected such arguments. In *Laird*, for example, the plaintiffs alleged a "chilling effect" based on their allegations that the government "was engaged in certain [investigative and data-gathering] activities" and that "armed with the fruits of those activities, the agency might in the future take some * * * action detrimental to" them. 408 U.S. at 11. *Laird* held that such "speculative apprehensiveness" was insufficient to establish Article III standing. *Id.* at 13. Similarly, *Amnesty International* held that plaintiffs claiming to be chilled by governmental investigative efforts pursuant to a surveillance statute lacked Article III standing, in part because it was "speculative whether the Government w[ould] imminently target" them—much less do so in reliance on the challenged statute, given that "[t]he Government has numerous other methods of conducting surveillance." 568 U.S. at 411-413; see *id.* at 417-418. As the court of appeals in this case correctly recognized, petitioners likewise offer only speculation that the government might take any action against them pursuant to the memorandum and email.

Moreover, the memorandum here makes clear that "spirited debate about policy matters is protected under our Constitution," and that the memorandum was addressed only to "the rise in *criminal conduct* directed toward school personnel." D. Ct. Doc. 10-2, at 2 (em-

phasis added). Petitioners, however, "represent that their conduct includes verbal opposition and peaceful protests," Pet. App. 28, not illegal conduct or any threats. Accordingly, by petitioners' own account, the memorandum does not address, much less proscribe, their intended activities.

Petitioners emphasize that the memorandum and email "never use the term '*true* threats,'" "which are not constitutionally protected," and instead are "focused on speech that some might consider 'intimidating' or 'harassing,'" which "is protected by the First Amendment." Pet. 11 (citation omitted). But the memorandum and email repeatedly refer to "threats of violence" and "criminal conduct," making clear that they are not addressing other types of threats. D. Ct. Doc. 10-2, at 2; D. Ct. Doc. 10-3, at 2-3 (Feb. 15, 2022). And those documents do not suggest a concern with constitutionally protected intimidating or harassing *speech*; instead, they mention "intimidation" and "harassment" in the same breath as threats of violence, making clear that in context, the intimidation and harassment are those associated with violence. See, *e.g.*, D. Ct. Doc. 10-2, at 2 ("The Department is steadfast in its commitment to protect all people in the United States from violence, threats of violence, and other forms of intimidation and harassment.").

b. Petitioners briefly contend that "the Attorney General is 'effectively' branding Petitioners 'domestic terrorists' and 'criminal threats.'" Pet. 16; see Pet. 15-17. That contention lacks merit. Neither the Attorney General's memorandum nor the FBI email refers to petitioners at all, much less brands them with any labels. To the contrary, the government has consistently maintained "that all [of petitioners'] alleged activities are

constitutionally protected." Pet. App. 13. That the FBI email involves its Counterterrorism and Criminal Investigative Divisions, cf. Pet. 4, 17, simply reflects the Attorney General's focus on criminal threats (which petitioners say they do not engage in)—not constitutionally protected speech.

Petitioners' reliance (Pet. 4-5) on a letter sent to the White House by a third party organization is misplaced. Even if the letter referred to certain protesters as "domestic terrorists," the Attorney General's memorandum does not refer to that letter or itself use the phrase "domestic terrorists." Nor does the FBI email. Indeed, the operative complaint contains no plausible factual allegations whatsoever to support petitioners' assertion (Pet. 4) that the memorandum "is the direct result of *collusion*" between the private group and the Attorney General. See Pet. App. 13-14; cf. *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 564-567 (2007).

2. The court of appeals correctly held that even if petitioners had Article III standing, their claims are not ripe. A claim is unripe if it is "dependent on 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Trump* v. *New York*, 592 U.S. 125, 131 (2020) (per curiam) (citation omitted). Here, the court observed that other than "announcing plans to gather information for discussions, the Government has not yet directed its agents to take any concrete action" against anyone, let alone petitioners in particular. Pet. App. 16. It is thus "too speculative whether the problem [petitioners] present[] will ever need solving." *Texas* v. *United States*, 523 U.S. 296, 302 (1998).

Even if petitioners could overcome that hurdle, ripeness additionally "requires [courts] to evaluate both the

fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Texas*, 523 U.S. at 300-301 (brackets and citation omitted). Although the case is on a motion to dismiss (cf. Pet. 18), petitioners' claims are not fit for judicial review because the "operation of the [memorandum and alleged policy] is better grasped when viewed in light of a particular application." *Texas*, 523 U.S. at 301. Petitioners have not alleged any application of that alleged policy against them. And deferring judicial review will not impose any cognizable hardship on petitioners because they are "not required to engage in, or to refrain from, any conduct" as a result of the memorandum. *Ibid.*; see *Trump*, 592 U.S. at 132-133. Petitioners assert (Pet. 18) that the loss of First Amendment freedoms for even a short time is a harm, but as explained above, their alleged "chilling effect" injury is far too speculative to constitute a cognizable hardship.

Finally, petitioners rely (Pet. 18) on lower-court cases for the proposition that "justiciability requirements" are "relaxed in the First Amendment context." Although this Court has stated that facial challenges are subject to a different standard on the merits for First Amendment overbreadth claims, see, *e.g.*, *Moody* v. *NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024), it has not relaxed justiciability requirements in the First Amendment context, see, *e.g.*, *Murthy* v. *Missouri*, 144 S. Ct. 1972, 1985-1997 (2024) (applying traditional standing principles); *Meese* v. *Keene*, 481 U.S. 465, 471-472 (1987) (same).

3. The decision below does not conflict with any decision of this Court or another court of appeals. Petitioners mistakenly assert (Pet. 8, 12-14) that the decision below conflicts with this Court's decision in *Keene*,

supra. There, the Court applied traditional Article III standing principles to hold that a state senator who wished to exhibit certain films had standing to challenge a governmental requirement that the films be labeled "'political propaganda'" because uncontradicted affidavits established that such a label "would substantially harm his chances for reelection and would adversely affect his reputation in the community." *Keene*, 481 U.S. at 474. At the same time, the Court emphasized that if the senator "had merely alleged that the ['political propaganda'] appellation deterred him by exercising a chilling effect on the exercise of his First Amendment rights, he would not have standing to seek its invalidation." *Id.* at 473. Petitioners here have not plausibly pleaded any concrete injuries akin to the ones in *Keene*. And in any event, the court of appeals appropriately cited *Keene*, see Pet. App. 30, but found that petitioners did not satisfy the standards set forth in that case. That factbound application of traditional Article III principles does not warrant this Court's review.

Petitioners likewise err in suggesting (Pet. 8-11) that the court of appeals' decision conflicts with the Ninth Circuit's decision in *The Presbyterian Church (U.S.A.)* v. *United States*, 870 F.2d 518 (1989), and the Sixth Circuit's decision in *Parsons* v. *United States Department of Justice*, 801 F.3d 701 (2015). *Presbyterian Church* held that churches suffered cognizable Article III injuries after government agents allegedly "entered the churches wearing 'body bugs' and surreptitiously recorded church services," thereby causing church members to withdraw from active participation, reduce their financial support, and stop seeking pastoral services, among other concrete harms. 870 F.2d at 520; see *id.* at 521-522. *Parsons* held that fans of a musical group suf-

fered cognizable Article III injuries when the government issued a report classifying them as a "'loosely-organized hybrid gang,'" which then "result[ed] in allegedly improper stops, detentions, interrogations, searches, denial of employment, and interference with contractual relations." 801 F.3d at 707, 712 (citation omitted). Petitioners here have not plausibly alleged any past enforcement efforts against them or concrete harms of the sort alleged in those cases.

Indeed, despite finding that the plaintiffs had suffered an injury in the past, *Presbyterian Church* remanded the case to the district court "for a determination of whether the churches have standing to seek prospective relief" because it was "unable to assess the likelihood that the [government] will repeat its surveillance of the churches in the future." 870 F.2d at 521; see *O'Shea* v. *Littleton*, 414 U.S. 488, 495 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief."). In addition to not plausibly pleading any past injuries, petitioners here have not demonstrated any likelihood of future enforcement efforts against them traceable to the October 2021 memorandum. Petitioners thus provide no sound reason to conclude that the Sixth or Ninth Circuits would have decided this case any differently.

Finally, petitioners suggest (Pet. 16) that the D.C. Circuit itself, "in an opinion written by * * * the author of the panel opinion in this case," has issued conflicting decisions on the questions presented. That suggestion lacks merit. In *Foretich* v. *United States*, 351 F.3d 1198 (2003), the D.C. Circuit held that the plaintiff had standing to challenge, as an unconstitutional bill of attainder, a statute that concededly was "aimed solely at" him because he had shown, including through uncontradicted

affidavits, that the statute "embodie[d] a congressional determination that he engaged in criminal acts of child abuse" and "led to harassment by the media, estrangement from his neighbors, and loss of business and professional opportunities." *Id.* at 1204, 1211. Petitioners allege no such harms here. And even if the factbound decision below conflicted with *Foretich*, that sort of intracircuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MARK B. STERN
BEN LEWIS
Attorneys

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