No. 23-1135

In the Supreme Court of the United States

SALINE PARENTS, AN UNINCORPORATED ASSOCIATION, ET AL.,

Petitioners,

v.

MERRICK B. GARLAND, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONERS

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August 8, 2024

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ARGUMENT IN REPLY

This case presents important questions involving the right of private citizens to be free from federal law enforcement investigations and surveillance because of their political viewpoints. Petitioners, who are targets of these investigations, have standing to advance this ripe challenge to this unlawful governmental overreach.

The Government asserts that "this Court has long rejected [Petitioners'] arguments," asserting that "*Laird* held that such 'speculative apprehension' was insufficient to establish Article III standing." Gov't Resp. at 6. *Laird* does not address the facts of this case.

In fact, the Court should grant this petition to clarify *Laird v. Tatum*, 408 U.S. 1 (1972), in light of the unique facts it embraced. This is particularly important as the *law enforcement* actions at issue here are readily distinguishable from the *intelligence gathering* activities of the Army at issue in *Laird*.

Laird does not (nor should it) grant license to the Department of Justice and its Federal Bureau of Investigation (FBI) to use their vast law enforcement resources to suppress the speech of political opponents without consequences, and the Court should say so.

At issue in *Laird* was a broad, *intelligence gathering* program. As described by the Court:

> The system put into operation as a result of the Army's 1967 experience consisted essentially of the collection of information about public activities that were thought to have at least

> some potential for civil disorder, the reporting of that information to Army Intelligence headquarters at Fort Holabird, Maryland, the dissemination of these reports from headquarters to major Army posts around the country, and the storage of the reported information in a computer data bank located at Fort Holabird. The information itself was collected by a variety of means, but it is significant that the principal sources of information were the news media and publications in general circulation. Some of the information came from Army Intelligence agents who attended meetings that were open to the public and who wrote field reports describing the meetings, giving such data as the name of the sponsoring organization, the identity of speakers, the approximate number of persons in attendance, and an indication of whether any disorder occurred. And still other information was provided to the Army by civilian law enforcement agencies.

Laird, 408 U.S. at 6.

The Court described the challengers' complaint in *Laird* as follows:

> [The challengers] disagree with the judgments made by the Executive Branch with respect to the type and amount of information the Army needs and that the very existence of the Army's data-gathering system produces a constitutionally impermissible chilling effect upon the exercise of their First Amendment rights. That alleged "chilling" effect may

> perhaps be seen as arising from respondents' very perception of the system as inappropriate to the Army's role under our form of government, or as arising from respondents' beliefs that it is inherently dangerous for the military to be concerned with activities in the civilian sector, or as arising from respondents' less generalized yet speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to respondents. Allegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; "the federal courts established pursuant to Article III of the Constitution do not render advisory opinions." *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947).

Laird, 408 U.S. at 13-14.

In the present case, the Attorney General has targeted protesting parents expressing dissident viewpoints at local school board meetings (Loudon County was at the epicenter of this controversy), considering them to be "threats," and directing the Department of Justice "to us[e] its authority and resources to *discourage* these threats[1] . . . and *other forms of intimidation and harassment*." R-8, First Am. Compl. ¶ 71 (emphasis added). To achieve this end, the Attorney General directed the FBI's *Criminal* Investigation Division and *Counterterrorism* Division to create specific "threat tags" for the investigations

[1] The very purpose of this policy directive is to silence political opposition at school board meetings.

authorized by the directive. *Id.* ¶¶ 84-86. Accordingly, this is not simply a *passive* intelligence gathering exercise by the Army. Rather, it is a *publicly* announced (with great fanfare) attack on political opponents by the chief law enforcement officer of the federal government, who promised to use the "authority and resources" at his disposal (principally, the FBI) to "discourage" political dissension.

In its response, the Government fails to address the point that targeted investigations (not simply passive intelligence gathering) by law enforcement trigger First Amendment protection. In *DeGregory v. New Hampshire Attorney General*, 383 U.S. 825, 829 (1966), the Court noted that "[i]nvestigation is a part of lawmaking and the First Amendment, as well as the Fifth, stands as a barrier to state intrusion of privacy." In *Gibson v. Florida Legislative Committee,* 372 U.S. 539, 560-61 (1963), Justice Douglas observed, "We deal here with the authority of a State to investigate people, their ideas, their activities. . . . When the State or Federal Government is prohibited from dealing with a subject, it has no constitutional privilege to investigate it." (Douglas, J., concurring). In *Barenblatt v. United States*, 360 U.S. 109, 126 (1959), the Court stated that "[t]he provisions of the First Amendment . . . of course reach and limit . . . investigations." And in *Socialist Workers Party v. Attorney General*, 419 U.S. 1314, 1319 (1974), the Court noted the dangers inherent in investigative activity that "threatens to dampen the exercise of First Amendment rights."

Without question, there is inherent danger in investigative activity by the Department of Justice

and its FBI that is *intended* to dampen or "discourage" First Amendment activity. Indeed, this challenge must be considered

> against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

To be clear, Petitioners are not passive observers. They are active participants in the very "threat" conduct that is targeted by the Attorney General, and Petitioners' protests (in particular, the protests of the Loudon County Petitioners) serve as the very basis for the policy directive at issue. That is, Petitioners have standing to challenge this adverse action that is directed toward them, and the injury they suffer (the suppression of their right to free speech) is redressable. *See, e.g., Presbyterian Church v. United States*, 870 F.2d 518, 522-23 (9th Cir. 1989) ("A judicial determination that the INS surveillance of the churches' religious services violated the First Amendment would reassure members that they could freely participate in the services without having their religious expression being recorded by the government and becoming part of official records."); *see also* R-8, ¶ 107.

In addition to the suppression of their right to free speech, Petitioners are suffering reputational harm by the fact that the federal government considers them

"criminals" and "domestic terrorists" for engaging in their political protests. The Government takes issue with the claim that Petitioners are considered "domestic terrorists" by this policy directive. Gov't Resp. at 7-8. Yet, the Government cannot explain why the FBI's *Criminal* Investigation Division and *Counterterrorism* Division have jurisdiction to meddle in local school board matters if the Government does not believe that the protestors are "criminals" committing federal crimes, including domestic terrorism. Moreover, as the alleged (and thus undisputed) facts in this case demonstrate, the challenged policy directive was the direct result of *collusion* between the Biden administration and the "progressive" members of the National School Boards Association ("NSBA"), which submitted a letter to the White House on which the Attorney General relied in creating the policy directive. This letter was the pretext for the policy directive, and it proved to be the sole basis for the issuance of the infamous October 4 memorandum. In this letter, the protestors are referred to as "domestic terrorists." *See* R-8, ¶¶ 73-81.

Reputational harm is itself an injury, regardless of whether other harms accompany it. "As a matter of law, reputational harm is a cognizable injury in fact." *NCAA v. Governor of N.J.*, 730 F.3d 208, 220 (3d Cir. 2013) (citing *Meese v. Keene*, 481 U.S. 465 (1987)); *Foretich v. United States*, 351 F.3d 1198, 1213 (D.C. Cir. 2003) ("Case law is clear that where reputational injury derives directly from an unexpired and unretracted government action, that injury satisfies the requirements of Article III standing to challenge that action."). And it is an injury that triggers First Amendment protection. *See, e.g., Meese*, 481 U.S. 465.

Thus, it is wrong to conclude that only harms resulting from governmental action that is "regulatory, proscriptive, or compulsory in nature" are sufficient to invoke standing under the First Amendment. *See* Gov't Resp. at 3, 5. Reputational injury is harm to one's public reputation and perception. In this case, the reputational harm was evident (and alleged). In short, the public has eyes to see even if the courts choose to be willfully blind, and the public eyes clearly see the reputational harm caused by the challenged policy directive.[2]

One final point. Procedurally, this case comes to the Court on the granting of a motion to dismiss. Accordingly, "where the defendant contests only the legal sufficiency of plaintiff's jurisdictional claims [as in this case], the standard is similar to that of Rule

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[2] *See* https://nypost.com/2021/10/25/ag-merrick-garland-white-house-owe-americas-domestic-terrorist-parents-an-apology-and-an-explanation/ (writing that the Attorney General "owe[s] America's 'domestic terrorist' parents an apology"); https://thefederalist.com/2021/10/21/ag-merrick-garland-admits-federal-war-on-parentssprang-from-school-boards-letter-not-evidence ("AG Merrick Garland admitted that the basis for targeting parents concerned about what their children are learning in schools was a letter from the NSBA."); https://www.washingtonexaminer.com/news/house-gop-calls-on-garland-to-withdraw-doj-schools-memo-after-nsba-apologized-for-domestic-terrorism-letter (stating that "House GOP calls on Garland to withdraw DOJ schools memo after NSBA apologized for 'domestic terrorism' letter" and that "[b]ecause the NSBA letter was the basis for your memorandum and given that your memorandum has been and will continue to be read as threatening parents and chilling their protected First Amendment rights, the only responsible course of action is for you to fully and unequivocally withdraw your memorandum immediately").

12(b)(6), under which dismissal is warranted if no plausible inferences can be drawn from the facts alleged that, if proven, would provide grounds for relief." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002). Thus, in evaluating standing at this juncture, the Court must assume that Petitioners (the parties asserting federal jurisdiction) are correct on the legal merits of their claims, "that a decision on the merits would be favorable and that the requested relief would be granted[.]" *In re Thornburgh*, 869 F.2d 1503, 1511 (D.C. Cir. 1989); *Cutler v. United States HHS*, 797 F.3d 1173, 1179-80 (D.C. Cir. 2015) ("Because the district court dismissed this case at the complaint stage, [the plaintiff] need only make a plausible allegation of facts establishing each element of standing."); *see also Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007) ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.").

The Government's response is in large measure an argument about which alleged facts this Court should ignore or dismiss and which reasonable inferences, among competing inferences, this Court should draw. In other words, the Government invites the Court to ignore the relevant procedural standards governing this matter. This invitation is patently improper. The facts, taken together, present a "plausible" narrative of a rogue policy designed to intimidate and silence parent protestors at school board meetings, specifically including Petitioners. And while the Government may be operating on facts in a parallel universe, the Court must decide the issues based on the universe of facts provided by Petitioners.

Consequently, because this case comes to the Court at the pleading stage, there are no genuine fact disputes, making this case a good vehicle to resolve the questions presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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