No. 14-133

In the Supreme Court of the United States

SARAHJANE BLUM, ET AL., PETITIONERS
v.
ERIC H. HOLDER, ATTORNEY GENERAL

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

REPLY BRIEF FOR PETITIONERS

SHAYANA KADIDAL
Counsel of Record
RACHEL MEEROPOL
BAHER AZMY
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
kadidal@ccrjustice.org
(212) 614-6438

ALEXANDER A. REINERT
55 Fifth Avenue, Room 938
New York, NY 10003

DAVID MILTON
HOWARD FRIEDMAN
Law Offices of Howard Friedman, P.C.
90 Canal Street, 5th Floor
Boston, MA 02114

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The government takes no issue with Petitioners' argument that the *Clapper v. Amnesty International* standard does not govern whether a litigant properly has standing in a case such as this one, involving a pre-enforcement challenge to a criminal statute. Nor does the government even attempt to defend the First Circuit panel's lengthy analysis of *Clapper*'s impact on standing in pre-enforcement cases. Indeed, the government only cites directly to *Clapper* on three occasions in its opposition.[1] Thus, all parties seem to be in agreement that the First Circuit's application of *Clapper's* "certainly impending" standard to a pre-enforcement criminal law challenge was erroneous. The First Circuit's holding created a circuit split, and has subsequently been plainly repudiated by this Court's decision in *Susan B. Anthony List v. Driehaus*. For this reason, this Court should grant the petition, vacate the First Circuit's opinion, and remand for further proceedings.

Ignoring this clear path, the government instead argues that Petitioners' reading of the AETA does not meet the "objectively reasonable" threshold required by this Court to establish pre-enforcement standing. Opp. at 7-12. The government next claims that the First Circuit panel held that Petitioners had failed to meet even that low threshold, rendering the panel's extensive discussion of *Clapper* academic for present purposes. Opp. at 12-14. For the reasons set forth in the petition and elaborated below, neither contention is correct.

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[1] *See* Opp. at 5-6, 8, 12.

1. The First Circuit's cursory and flawed rejection of Petitioners' reading of the statute is not an "alternative" holding

The First Circuit held that "plaintiffs' alleged injuries are 'too speculative for Article III purposes'" under *Clapper* because their future prosecution is not certainly impending. Pet. App. 18a. After explaining this holding, the First Circuit noted in passing that "plaintiffs have not established the needed degree of injury to establish standing based on their proffered interpretations of the statute…. even under the potentially more lenient 'substantial risk' standard [referred to in footnote 5 of *Clapper*] or even the 'objectively reasonable' standard." *Id.* However, as the petition makes clear, the panel did not actually conduct an analysis of whether Petitioners' reading of the text of the AETA was "objectively reasonable." The panel briefly considered whether the three challenged subsections of the AETA in fact reached Petitioners' intended speech and conduct, [Pet.] App. 19a-25a, but, unlike the district court, it failed to decide whether the actual *text* of the prohibitions covered those actions. Instead, in each instance it held that the presence of a "savings clause" exempting First Amendment-protected activity from prosecution, combined with the Justice Department's disavowals that Petitioners could be prosecuted under the statute, "was sufficient to find that the statute does not cover constitutionally protected conduct." Pet. at 11; *see also* Pet. at 27 n.17.

As laid out at length in the petition, that was improper: a generic savings clause cannot save a statute whose text reaches speech or conduct protected by the First Amendment, and current prosecutors may not bind their successors or even themselves to limit a statutes' reach. *See* Pet. at 20-23. Neither the presence of a savings clause nor prosecutorial disavowal can substitute for

examining the actual text of a statute to determine if a plaintiff's interpretation is "objectively reasonable."

Thus, while the government claims that the panel made a "fact-specific determination that petitioners failed to demonstrate standing" under the traditional pre-*Clapper* standard, Opp. at 12, in fact the panel did no such thing. Rather than parsing the text of the statute to determine whether it could reasonably be read to reach activities protected by the First Amendment, the panel decided the generic savings clause, together with the government's litigation assurances that it did not read the statute so broadly,[2] "preclude an interpretation according to which protected speech activity ... gives rise to liability." Pet. App. at 21a (for subsection (a)(2)(A)); *see also id.* at 22a ("disavowal" plus savings clause renders "fear of prosecution" under (a)(2)(B) "unreasonable"). This same reliance on the savings clause and prosecutorial disavowal is exactly what led the panel to conclude that actual prosecution was not "certainly impending" under the *Clapper* standard in the first part of its opin-

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[2] The Panel's characterization of the government's litigation position as "disavowal of any intention to prosecute" (Pet. at 15a) is somewhat misleading. At argument, counsel for the government was asked "Are you able to give the Plaintiffs any assurance that tomorrow there won't be a new policy, or indeed a new Attorney General who takes exactly the contrary interpretation of the statute that you're advocating we take? Can you offer any binding commitment along those lines?" Government counsel responded, "I'm not sure I have the pay grade to offer binding commitments, your honor. But our position at this point is the only reasonable interpretation of this statute is that it does not criminalize lawful, peaceful picketing or dissemination of information merely because that causes a loss of profits to an animal enterprise." (An audio file of the argument is available at http://media.ca1.uscourts.gov/files/audio/13-1490.mp3, with this discussion at minute 21:51.)

ion.[3] In other words, the First Circuit's "alternative" holding simply parrots the flawed analysis of the initial, more extensive, discussion in the panel opinion applying the *Clapper* standard to deny standing because prosecution is not "certainly impending."

The government concludes from the panel's supposed alternative holding that "Petitioners therefore err in contending … that the decision below conflicts with decisions in other circuits." Opp. at 13. Of course that ignores the fact that the primary holding below—that *Clapper* alters the standards for pre-enforcement standing—remains good law in the First Circuit (as well as the fact that the panel did not apply the "objectively reasonable" standard to the facts of the case, instead repackaging its *Clapper* analysis to avoid further review). But the government's implication is that the outcome of this case could not possibly change on remand, since there is an alternative ground for decision set forth in the opinion that would necessarily survive Petitioner's requested remand for reconsideration in light of *Susan B. Anthony List*. This Court should not indulge that assumption.

As the petition notes, where the lower court gave, "at most, perfunctory consideration" to an alternative ground supporting the judgment, this presents no bar to summary disposition of a case via a GVR order. Pet. at 27-28 n.17. This Court will find a "GVR order ... potentially appropriate" as a resolution of a petition "[w]here intervening developments ... reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163,

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[3] *See* Pet. App. 16a (fact that the "Government disavow[ed the statute's application to Petitioners] is even more potent when the challenged statute contains, as here, explicit rules of construction … which in themselves would prohibit prosecution of First Amendment activities.").

167 (1996) (per curiam); *see also Henry v. Rock Hill*, 376 U.S. 776, 776 (1964) (per curiam) (historically "our practice ... where[] not certain that the case was free from all obstacles to reversal on an intervening precedent" has been to GVR lower court opinion); 28 U.S.C. § 2106; Sup. Ct. R. 16.1.

Indeed, in situations where a purportedly "alternative" ruling appears closely-bound to the part of the ruling that the lower court would clearly "reject if given the opportunity for further consideration," this Court has not hesitated to give the lower court another opportunity to consider the outcome of the case (and, incidentally, to reconcile its precedent with intervening holdings from this Court). In *Wellons v. Hall*, 558 U.S. 220 (2010), for example, this Court confronted a situation where the Eleventh Circuit had rejected a petition in a capital case seeking *inter alia* discovery into potential judicial and jury misconduct. The Court of Appeals based its rejection on the 28 U.S.C. § 2254(e)(2) procedural bar, a rejection that intervening Supreme Court precedent rendered clearly incorrect. Although the panel stated that it would have rejected the capital defendant's discovery request on the merits in any event, this Court nonetheless granted certiorari, vacated, and remanded the case: "Having found a procedural bar [preventing it from reaching the merits] … the Eleventh Circuit had no need to address whether petitioner was otherwise entitled to an evidentiary hearing and gave this question, at most, perfunctory consideration that may well have turned on the District Court's finding of a procedural bar." 558 U.S. at 222.

The same situation exists here. The panel's erroneous *Clapper* reasoning precisely parallels its cursory and legally-flawed rejection of Petitioners' reading of the AETA's text, and thus there is no way to be sure that the conclusion below would not have been altered by consid-

eration of the intervening authority of this Court's decision in *Susan B. Anthony List*. Pet. at 28 n.17. *Cf. Wellons*, 558 U.S. at 224 ("even assuming that the Eleventh Circuit intended to address [the merits as an alternative ground for its judgment], we cannot be sure that its reasoning [on the merits] really was independent of [its] error" on the procedural bar).

2. Petitioners' reading of the AETA easily meets the "objectively reasonable" test

Petitioners' reading of the AETA is at least "objectively reasonable." Indeed, the length and detail of the discussion of this point in the government's opposition brief itself demonstrates as much. Opp. at 8-12.

The government begins its argument by claiming that "[u]nlike [in] some cases in which this Court has found a pre-enforcement First Amendment claim to be justiciable, petitioners do not contend that their planned future conduct would in fact violate the challenged statute."[4] This is simply not the case. *See* Pet. at 7 ("Peti-

[4] The government elaborates this statement as follows: "That is, they do not concede that a prosecution against them for engaging in that conduct would be valid under the statute, but instead simply suggest that the statute might be interpreted that way." Opp. at 8. It is entirely unclear what distinction the government is attempting to draw with this statement—and there is no clarification offered elsewhere in their brief, other than an unexplained citation to pages 6-9 of the petition. Notwithstanding the confusion engendered by the use of passive voice ("might be interpreted that way"—by whom?), if the implication is that Plaintiffs do not believe the statute could be interpreted this way *by future prosecutors*, it is absolutely incorrect, as the multiple references to the petition quoted above make clear.

It is similarly unclear what the government refers to when it later states that "petitioners' standing argument rest[s] on an im-

tioners fear that any of their intended [activities] might result in their prosecution"); *id.* at 9 ("the statute … punishes expressive conduct and speech"); *id.* at 13 (the "threat in a pre-enforcement challenge is the risk that one's intended conduct would violate it"); *id.* (Petitioners "reasonably fear that their conduct is prohibited"); *id.* at 14 (petitioners "have an "objectively reasonable' fear of prosecution'").

Petitioners have made their concerns with the specific language of the AETA clear. Pet. at 6-9. 18 U.S.C. § 43(a)(2)(A) prohibits damaging or causing the loss of any real or personal property of an animal enterprise. Black's Law Dictionary defines "personal property" as "[a]ny moveable or *intangible* thing that is subject to ownership and not classified as real property." BLACK'S LAW DICTIONARY 1412 (10th ed. 2014) (emphasis added). Money is intangible property. This means that the AETA prohibits causing an animal enterprise to lose profit or expend money on increased security. The government claims that because the first clause of the "damage or … loss of any real or personal property" subsection of AETA (18 U.S.C. § 43(a)(2)(A)) specifies that the lost property must be "used" by an animal enterprise, it cannot include future hypothetical profits. Opp. at 9. This ignores Petitioners' reasonable interpretation of the statute to cover increased security costs, which involves current expenditures rather than future profits. Moreover, the reasoning itself is illogical, as "personal property" would thus mean something different in the second clause, which criminalizes damage or loss of property of a person or entity with any "connection to, relationship with, or transactions with" an animal enterprise, without any mention of "use." *See* Pet. App. at 50a. Petitioners'

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plausible interpretation of the AETA, which even they do not fully embrace." Opp. at 10.

textual concerns regarding the other two challenged provisions of the AETA are equally straightforward, and objectively reasonable. *See* Pet. at 8-9 (characterizing flaws in subsections (a)(2)(B) and (a)(2)(C)).[5]

In the end, the government is forced to rely on the savings clause to support its argument that Petitioners readings of the AETA's text are not "objectively reasonable," Opp. at 10, just as the Court of Appeals did to reach its "alternative" holding. *See* Pet. App. at 21a ("this court need not decide in the abstract whether 'personal property…used by an animal enterprise' could ever be reasonably interpreted to include intangibles such as profits" because savings clause provides adequate safeguards); *id.* at 22a & 24a (similar reliance on savings clause to find challenges to (a)(2)(B) and (a)(2)(C) unreasonable).

If the text of the AETA were truly not susceptible to the interpretation Petitioners place on it, the Court of Appeals could have dispensed with its lengthy discussion of *Clapper* as well as its blanket reliance on the generic savings clause and this Justice Department's assurances about the statute's limited reach.[6] In this inquiry, however, the text is the only thing that matters, not whether

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[5] The government incorrectly states that Lauren Gazzola, the one plaintiff who challenges section (a)(2)(B) of the statute, was "previously convicted for threats, *a bombing*, and other illegal activities under" the AETA's predecessor statute. Opp. at 3 (emphasis added). As the Third Circuit made clear, Ms. Gazzola expressed approval of the detonation of smoke bombs at a Seattle office, after the fact, during a call-in radio show. *United States v. Fullmer*, 584 F.3d 132, 148-49 (3d Cir. 2009). This was the extent of her involvement in any "bombing."

[6] When the government states that "Petitioners identify no other court of appeals that has allowed a pre-enforcement claim against the AETA to proceed," Opp. at 12, its implication is misleading. The AETA is relatively new; this case is the only pre-enforcement challenge to the statute brought to date.

"the government has consistently maintained" that the statute cannot be read as Petitioners read it, Opp. at 11, or that federal courts have sometimes fairly read savings clauses as a sign of Congressional intent to avoid trenching upon protected expression, Opp. at 12 n.1 (citing *CISPES v. FBI*, 770 F.2d 468 (5th Cir. 1985) as an example of the use of a saving clause to "validate a construction" of a statute that permits constitutional avoidance).

3. Summary disposition is appropriate here

As noted in the petition, at 27-28, and above, summary disposition via a GVR order is appropriate in these circumstances. The government ignores this clear path, claiming that "because the articulation of the standard was not outcome-determinative here, this case would be an unsuitable vehicle for this Court's review of which formulation would have been most appropriate." Opp. at 14. But Petitioners have requested (Pet. at 27-29) that this Court simply grant certiorari, vacate the panel opinion and its lengthy discussion of *Clapper*'s relevance to the pre-enforcement context, and remand the matter. At that point the First Circuit can determine whether, in the wake of this Court's intervening decision in *Susan B. Anthony List*, its initial resolution of this case on standing grounds was correct.

If on remand the First Circuit concludes that it is not "objectively reasonable" to read the AETA as reaching Petitioners' intended speech and conduct—based on an analysis of the text rather than reliance on a generic savings clause and the government's word—that will serve much the same practical purpose as a decision on the merits that the statute does not reach as broadly as Petitioners claim. In the wake of such a decision, Petitioners will know they are free to undertake their chilled speech and conduct.

The decision below, in contrast, does not provide this measure of relief, because it does not bother to interpret the actual text of the statute. And the erroneous standard it articulates for pre-enforcement challenges will continue to engender confusion[7] in the lower courts until such time as it is corrected.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request this Court grant the petition for certiorari, vacate the panel opinion, and remand to the First Circuit for further proceedings in light of this Court's decision in *Susan B. Anthony List v. Driehaus*.

Respectfully submitted,

SHAYANA KADIDAL
Counsel of Record
RACHEL MEEROPOL
BAHER AZMY
Center for Constitutional Rights

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[7] Such confusion is already apparent. *See, e.g.*, *Pollack v. Reg'l Sch. Unit 75*, No. 2:13-cv-00109-NT, 2014 U.S. Dist. LEXIS 43308 at *65-*66 (D. Me. Mar. 31, 2014) (in determining standing to bring First Amendment challenge to school board public comment policy, "the precise standard that does apply is somewhat unclear in the wake of the Supreme Court's recent decision in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013). Before *Clapper*, the First Circuit allowed pre-enforcement First Amendment challenges to go forward if the plaintiff could show she had an 'objectively reasonable' fear of prosecution [citing several cases]. But *Clapper* 'may have adopted a more stringent injury standard,' given its holding that a First Amendment suit premised on a fear of future injury survives only if the injury is 'certainly impending.' *Blum*, 2014 U.S. App. LEXIS 4340, 2014 WL 888918, at *4; *see Clapper*, 133 S. Ct. at 1147.").

666 Broadway, 7th floor
New York, NY 10012
(212) 614-6438
kadidal@ccrjustice.org

ALEXANDER A. REINERT
55 Fifth Avenue, Room 938
New York, NY 10003

DAVID MILTON
HOWARD FRIEDMAN
Law Offices of Howard Friedman, P.C.
90 Canal Street, 5th Floor
Boston, MA 02114

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