No. 10-28

In the Supreme Court of the United States

KIND_YADA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR ANYTIME REVIEW
TO THE UNITED STATES GOVERNMENT

MERITS BRIEF FOR THE UNITED STATES

LEWIS F. POWELL, JR.
Solicitor General
Counsel of Record
LYDXIA
Agency Assistant
Department of Justice
Washington, D.C. 20530-0001
osg@justice.email
(202) 514-2217

QUESTION PRESENTED

In *United States* v. *Incels Union*, 09-63 (Aug. 26, 2020), this Court heard a case pertaining to the constitutionality of the Pride Act of 2020, Pub. L. 80-12 (2020). Because this Court found that respondents did not have standing, however, it declined to reach the constitutional issue that respondents had pressed. *Incels Union*, slip op. at 10, 13-15.

The question presented by petitioners is:

Whether the term "sexual orientation" as used by Pub. L. 80-12 renders it constitutionally vague under the First Amendment of the Constitution.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

JURISDICTION

The petition for a writ of review was filed on November 28, 2020. The petition was granted on December 4, 2020. The jurisdiction of this Court is invoked under Article III, § 4 of the United States Constitution.

STATEMENT

In July of 2020, a bill was introduced in Congress that would ensure that discrimination based on sexual orientation would not occur in both public and private at-will employment. This bill eventually became the Pride Act of 2020, Pub. L. 80-12. While the bill was well received by most individuals, some groups disapproved of it, and started planning challenges to the bill through the courts.

The first attempt at such did not go so well. See *United States* v. *Incels Union,* 09-63 (Aug. 26, 2020). In *Incels*

prohibit*Union*, this Court heard an appeal from a challenge from the Union of Communist Incels against Women, Homosexuals, Minorities and Capitalists, or Incels Union for short. In the District Court, respondents had attempted to challenge the Act based on the void for vagueness doctrine emphasized by this Court in *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972). Instead of ultimately determining whether the Pride Act was unconstitutional, however, the Court was tasked with resolving numerous procedural issues, including whether the District Court had abused its discretion by striking the United States' counsel and issuing a preliminary injunction without considering the traditional four-factor test, and whether it had clearly erred in granting default judgment to respondents. Specifically, this Court found that respondents had *no standing* to sue, and reinforced the general idea that general grievances *cannot* form the basis of an Article III case or controversy. *Id.*, slip op. at 9. As a result, it never dealt with whether Pub. L. 80-12 was unconstitutional on its face.

The aforementioned groups realized that they could still attempt to challenge the bill. They subsequently filed this suit on November 28th, 2020. The Court granted review on December 4th, 2020.

ARGUMENT

While the Court may be loathe to hear this argument for the fourth time, petitioners lack standing to bring this case because they have not suffered a direct injury that is concrete and particularized solely due to Pub. L. 80-12's

prohibitions. General grievances do not suffice as an Article III injury.[1]

Nevertheless, the United States will go over the merits of petitioner's case.

Pub. L. 80-12's prohibitions are not vague. Petitioners argue that the term "sexual orientation" is vague because they are required to supposedly guess at its meaning. However, the term "sexual orientation" is readily available in both legal dictionaries, and this Court has accepted a definition of the term "sexual orientation" from a dictionary in the past. While dictionary entries may not be seen as controlling authority in this Court, they are valuable because they are evidence of what people "at the time of a statute's enactment" would have understood its words "to mean." *Bostock* v. *Clayton County*, 140 S.Ct. 1731, 1766 (2020) (Alito, J., dissenting). To a common person, then, the term sexual orientation is not as cloudy as petitioners seem to think.

I. PETITIONER LACKS STANDING TO BRING THIS CASE

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[1] In this case, petitioner's argument is also partially moot. Assuming that he is challenging the entire bill, he cannot claim that § 3(a) of Pub. L. 80-12 is unconstitutional. For one, the Workers Protection Act of 2020, Pub. L. 81-7 (2020) has already superseded the Pride Act of 2020. Specifically, § 2(d) of Pub. L. 81-7 states that no employee may be terminated if the termination was based in part or in whole by "[t]he employee's sex, sexual orientation, color of skin, gender, religion, or for any other reason not related to the performance of the employee." The nullifying clause, § 1(d), automatically means that § 3(a), which had prohibited terminations by the Executive Branch based on sexual orientation, is no longer operable, i.e. repealed. The United States does not plan to enforce the Pride Act of 2020 when it comes to Executive Branch terminations. Instead, we look towards whether Pub. L. 81-7 § 2(d) has been.

A. Article III, § 2 of the Constitution restricts this Court's jurisdiction to "cases" and "controversies." *Campbell-Ewell Co.* v. *Gomez*, 577 U. S. 153, 160 (2016), see also *Ultiman* v. *United States*, 6 U. S. 19 (2018) (*per curiam*); *Kirkman* v. *Nevada Highway Patrol*, 5 U. S. 62 (2018) (*per curiam*). This Court has applied that cases and controversies requirement to cases under anytime review. See *George* v. *United States*, 5 U. S. 66, 67 (2018) (plurality opinion) (applying mootness doctrine to Anytime Review cases), *Heave* v. *United States*, 5 U. S. 85 (2018) (same), *Ultiman*, 6 U. S. at 19 (acknowledging and accepting the tenets of *George* and *Heave*). In order to fulfill this requirement, petitioner must demonstrate that he has constitutional standing. *Bank of America, Corp.* v. *Miami*, 137 S.Ct. 1296, 1302 (2017).

To demonstrate the of standing, petitioner would have to demonstrate (1) that he has suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) that the injury is fairly traceable to the defendant's conduct; and (3) redressable by a favorable judicial ruling. *United States* v. *Incels Union*, 09-63 (Aug. 26, 2020), slip op. 8, see also *Spokeo Inc.* v. *Robins*, 136 S.Ct. 1540, 1547 (2016), *Monsanto Co.* v. *Geertson Seed Farms*, 561 U. S. 139, 149 (2010). All three prongs must be demonstrated; failure to demonstrate one means that the case "begins with and ends with standing." *Carney* v. *Adams*, 19-309 (Dec. 10, 2020), 2020 WL 7250101, at *3. The United States thus looks to whether petitioner has satisfied these three prongs in his brief.

First, petitioner must present a concrete *and* particularized injury-in-fact. *Spokeo Inc.*, 136 S.Ct. at 1548. This requirement stems from this Court's general rule that it will not pass upon the constitutionality of any policy upon the complaint of "one who fails to show that he

is injured by its operation." *Coffman* v. *Breeze Corp.*, 323 U. S. 316, 324-325 (1945). In the constitutional context, only "those who have been injured as the result of the denial of constitutional rights" can invoke the Court's jurisdiction on "constitutional questions." *Voeller* v. *Neilston Warehouse Co.*, 311 U. S. 531, 537 (1941); see also *Tyler* v. *The Judges*, 179 U. S. 405 (1900), *Incels Union*, slip op. 9.

For an injury to be "particularized," it must affect petitioner in a "personal and individual way." *Spokeo, Inc.*, 136 S.Ct. at 1548 (quoting *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992)). In essence, a "direct stake in the outcome" is required. *Hollingsworth* v. *Perry*, 570 U. S. 693, 705-706 (2013) (quoting *Arizonans for Official English* v. *Ariz.*, 520 U. S. 43, 64 (1997)). The injury must not be some sort of generalized injury that could affect the general population. In this case, however, being affected by a law doesn't present an injury by itself. An injury only appears if an action taken against an individual has a "tangible impact." *Tools*, 9 U. S. at 128.

Here, however, petitioner does not demonstrate that he has suffered a direct injury from the function of either the Pride Act of 2020 or even the Workers Protection Act of 2020. Instead, his argument takes on the idea of a general grievance, claims that have been rejected over and over by this Court. See, *e.g.*, *United States* v. *Incels Union*, slip op. at 9, *Hollingsworth*, 570 U. S. at 706. With only a mere grievance, petitioner's case already appears grim and highly unsuccessful. It also seems unusual that a District Judge would have any direct stake in the outcome of this litigation.

II. THE TERM "SEXUAL ORIENTATION" DOES NOT RENDER EITHER PUB. L. 80-12 OR PUB. L. 81-7 UNCONSTITTUTIONALLY VAGUE

The United States opts to go over the merits in order to demonstrate that even without the standing argument, petitioner's claims would fall flat.

The void for vagueness doctrine is based on the idea that citizens should not be criminally charged for conduct that he "could not reasonably understand to be proscribed." *Palmer* v. *City of Euclid*, 402 U. S. 544, 546 (1971) (quoting *United States* v. *Harriss*, 347 U. S. 612, 617 (1954)). In other words, an enactment is void for vagueness if "its prohibitions are not clearly defined," *Grayned* v. *City of Rockford*, 408 U. S. 104, 108 (1972), or if "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Const. Co.*, 269 U. S. 385, 391 (1926). Petitioners press that the term "sexual orientation" used in the Pride Act of 2020 is constitutionally vague, and that as a result, the act must be struck down as unconstitutional.

Petitioner's argument, however, is mitigated by the fact that there have been numerous definitions of the term "sexual orientation" readily available for access and usage. Attorneys have already concluded that the term is defined as a person's "predisposition or inclination toward sexual activity or behavior with other males or females; heterosexuality, homosexuality, or bisexuality." Sexual Orientation, Black's Law Dictionary (11th ed. 2019). And in *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020), Justice Alito acknowledged multiple definitions of the term "sexual orientation." See *id.*, at 1758, n.8 (Alito, J., dissenting) (quoting 1 B. Sadock, V. Sadock, & P. Ruiz, Comprehensive Textbook of Psychiatry 2061 (9th ed. 2009), American Heritage Dictionary 1607 (5th ed. 2011),

Webster's New College Dictionary 1036 (3d ed. 2008)). All of the definitions involved an individual's inclination towards a certain sex in regards to sexual activity.

While dictionary entries may not seem much in this Court, they are valuable because they are evidence of what people "at the time of a statute's enactment" would have understood its words "to mean." *Bostock*, 140 S.Ct. at 1766 (Alito, J., dissenting). To a common person, then, the term sexual orientation is not as cloudy as petitioners seem to think. All agree that the term "sexual orientation" would describe a person's inclination to sexual activity with a certain sex of individuals. In sum, the Pride Act of 2020 forbids an employer from terminating an employee solely due to their sexual inclinations. Because we have demonstrated that the term "sexual orientation" is not unconstitutionally vague, the Pride Act (and the Workers Protection Act of 2020) should be sustained.

CONCLUSION

The Court should hold that the Pride Act of 2020, Pub. L. 80-12, and Workers Protection Act of 2020, § 2(d), is not unconstitutionally vague in its application.

Respectfully submitted.

LEWIS F. POWELL, JR.
Solicitor General
Counsel of Record
LYDXIA
Agency Assistant

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