

No. 25-115

IN THE
Supreme Court of the United States

MONICA MILLER AND SUZANNE ABDALLA,

Petitioners,

v.

LETITIA JAMES,
THE ATTORNEY GENERAL OF NEW YORK,

Respondent.

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

REPLY BRIEF

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ARGUMENT IN REPLY

I. Petitioners Have Plausibly Alleged Reputational Harm Sufficient for Standing Purposes, and Controlling Law Compels Summary Reversal of the Second Circuit's Contrary Decision.

Respondent Letitia James, the New York Attorney General (“Attorney General”), implausibly maintains that publicly declaring during a press conference she convened that Red Rose Rescue, a pro-life organization, is a “terrorist group” and that its members are “terrorists” causes no reputational harm to Petitioners, who are admittedly members of Red Rose Rescue. *See infra* n.1. As alleged in the Complaint, the Attorney General’s appellation was designed to malign Red Rose Rescue and its associates in the eyes of the public and to reduce the effectiveness of their First Amendment activities. (Compl. ¶¶ 48-52, R.1).

The principal issue presented by this petition is whether Petitioners, who are members of Red Rose Rescue, have standing to advance their constitutional challenge to the actions of the Attorney General when they have alleged a chilling effect on their First Amendment rights and reputational harm.

The Attorney General notes that “this Court and others have recognized that reputational harm is a cognizable injury for purposes of Article III standing. The Second Circuit has consistently adhered to this longstanding rule.” Resp. at 8, n.1. But not in this case. And that is the problem. There are no special

“standing” rules for pro-life organizations nor should there be. Yet, that is precisely what the Second Circuit has done here in contravention to decisions from this Court and other Circuit Courts, including the Second Circuit itself. *See Meese v. Keene*, 481 U.S. 465 (1987); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951); *Foretich v. United States*, 351 F.3d 1198 (D.C. Cir. 2003); *Parsons v. United States DOJ*, 801 F.3d 701 (6th Cir. 2015); *Oneida Indian Nation v. United States DOI*, 789 F. App’x 271 (2d Cir. 2019).

The Attorney General’s efforts to distinguish these cases are unavailing as they are not distinguishable, other than to say that they did not involve a pro-life organization or the New York Attorney General.

It is implausible to argue as Respondent does here that when the Attorney General of New York, the top law enforcement officer for the state, publicly declares that the organization you belong to is a “terrorist group” and that you, as a member of the group, are a “terrorist” that this does not constitute reputational harm. Bear in mind, there are no allegations that anyone associated with Red Rose Rescue, including Petitioners, has ever engaged in any act of terrorism or any other violent criminal act.

As Petitioners alleged in their Complaint, the Attorney General’s actions have “the purpose and effect of deterring pro-lifers from associating with Red Rose Rescue and those involved with Red Rose Rescue, including [Petitioners], and deterring donors and volunteers from supporting the activities of Red Rose Rescue. [The Attorney General’s] actions also

legitimize the illegitimate attacks against pro-lifers in the public eye. Consequently, the challenged actions harm [Petitioners'] constitutionally protected activities and interests.” (Compl. ¶ 51, R.1). The Attorney General’s actions also “have had a chilling effect on the right of association by deterring pro-lifers from associating with Red Rose Rescue.” (*Id.* ¶ 53).

As the Attorney General notes, in *Joint Anti-Fascist Refugee Committee*, a case in which the reputational harm was caused by identifying the challengers as “communists”—which, unlike “terrorist,” is not a criminal designation—“[t]he groups alleged numerous concrete harms caused by damage to their reputations,” including “reduced contributions [and] loss of membership.” Resp. at 9. These harms, which naturally follow from injuring the reputation of an organization, are similar to the additional harms alleged in this case. *See supra*. Such harms are a reasonable and foreseeable result caused by injuring the reputation of an organization. But the cognizable legal injury for standing purposes is the injury to the organization’s reputation. The Attorney General is conflating the harms that are a natural consequence of a reputational injury with the reputational injury itself. And it is the reputational injury, not the harms that flow from it, that is the basis for standing.

In *Meese v. Keene*, 481 U.S. 465 (1987), this Court confirmed that reputational harm was a cognizable injury sufficient for advancing a claim arising under the First Amendment. As the Attorney General notes, “this Court held that the plaintiff had standing to challenge the Department of Justice’s designation of

certain foreign films as political propaganda.” Resp. at 9. Further, “[a]s this Court explained, the plaintiff’s affidavits ‘support[ed] the conclusion that his exhibition of films that have been classified as ‘political propaganda’ by the Department of Justice would substantially harm his chances for reelection and would adversely affect his reputation in the community.” Resp. at 9 (quoting *Keene*, 481 U.S. at 474). In other words, the plaintiff’s affidavits allowed him to demonstrate that the adverse designation of certain films he intended to show would harm *his* reputation. Unlike this case, the reputational harm in *Keene* was indirect, thus the need for showing how the “political propaganda” label attached to the films would harm the plaintiff’s reputation. Here, the reputational harm is direct. Moreover, the harms that followed from the reputational injury in *Keene* were the reducing of his “chances for reelection” and harming “his reputation in the community.” The reputational injury from the “terrorist group” and “terrorist” labels in this case is direct, and the additional harms to Petitioners that follow from this injury are at least as concrete as those alleged in *Keene*.

In *Parsons*, members of a group called the Juggalos had standing to challenge a Department of Justice report identifying them as a “hybrid gang.” *Parsons*, 801 F.3d at 711-12. Notably, no individual was identified in the report. Rather, the plaintiffs self-identified as members of the Juggalos. *Compare id.* at 706 (“Plaintiffs self-identify as Juggalos”), *with* Resp. at 3 [defending her actions, in part, by asserting that “[t]he Attorney General did not name either of the

petitioners during the press conference”).¹ And while *some* members of the “hybrid gang” had been subject to “allegedly improper stops, detentions, interrogations, searches, denial of employment, and interference with contractual relations,” *see* Resp. at 10 (citing *Parsons*, 801 F.3d at 712), these are harms that followed from the reputational injury. But the reputational injury was sufficient. As the Sixth Circuit stated, “Stigmatization also constitutes an injury in fact for standing purposes.” *Id.* In other words, the reputational injury was the stigmatizing “hybrid gang” label irrespective of the additional harms suffered by members of the Juggalos.

Petitioners here are stigmatized by the “terrorist” and “terrorist group” labels irrespective of the harms that naturally flow from this reputational injury. Indeed, the plaintiff in *Keene* didn’t suffer the types of harms that some members of the Juggalos suffered, but that didn’t stop this Court from acknowledging that an injury to reputation is sufficient for standing purposes. *NCAA v. Governor of N.J.*, 730 F.3d 208, 220 (3d Cir. 2013) (“As a matter of law, reputational harm is a cognizable injury in fact.”) (citing *Keene*).

In *Foretich v. United States*, 351 F.3d 1198 (D.C. Cir. 2003), the D.C. Circuit held that “[c]ase law is clear that where reputational injury derives directly

¹ There is no dispute that Petitioners are members of Red Rose Rescue. *See* Resp. at 4 (“Petitioners are Red Rose Rescue members residing in Michigan.”); *id.* at 2 (stating that the Attorney General’s civil “complaint mentions petitioner Miller and 31 others as individuals affiliated with Red Rose Rescue”).

from an unexpired and unretracted government action, that injury satisfies the requirements of Article III standing to challenge that action.” *Id.* at 1213. Citing *Keene*, the court concluded that the challenged Act “directly damages [Dr. Foretich’s] reputation and standing in the community by effectively *branding* him a child abuser and an unfit parent.” *Id.* at 1214 (emphasis added). In other words, it was the negative “branding” that constituted the injury in fact for standing purposes. Here, the Attorney General has effectively branded Petitioners as “terrorists” and belonging to a “terrorist group.” As a result, Petitioners have suffered an injury to their reputations sufficient to confer standing.

The Second Circuit understands this point even if it wasn’t willing to apply it in this case. For example, in *Oneida Indian Nation v. United States DOI*, 789 F. App’x 271, 277 (2d Cir. 2019), the court discussed the appellant’s reputational injury claim and found it wanting. As stated by the Second Circuit, “[t]o support its reputational injury argument, Appellant cites cases in which a plaintiff successfully asserted reputational injury based on a derogative or negatively perceived label applied to the plaintiff by the government.” *Id.* 277. In reaching its conclusion, the Second Circuit cited *Keene*, *Joint Anti-Fascist Refugee Committee*, and *Parsons*, noting the reputational injury caused by the *derogatory label*; the court did not rely on the other harms that flowed from this injury. The court concluded its rejection of the appellant’s reputational injury claim by observing that “here the government has said nothing about the New York Oneidas, let alone anything derogatory.” Thus, as the Second

Circuit acknowledged in *Oneida Indian Nation*, but failed to do so here, a derogatory label applied by the government is a sufficient reputational injury to satisfy standing.

Finally, the injury to Petitioners' reputation is redressable. Respondent's injurious statements are published and remain published on the Attorney General's official website and have been republished by multiple media sources, including, *inter alia*, the *Washington Examiner* and the *Washington Times*. (Compl. ¶ 33, R.1). As stated by the Sixth Circuit in *Parsons*,

An order declaring the 2011 NGIC Report unconstitutional and setting it aside would abate the reflection of Juggalo criminal activity as gang or gang-like by the Agencies. . . . The declaration the Juggalos seek would likely combat at least some future risk that they would be subjected to reputational harm and chill due to the force of the DOJ's criminal gang or gang-like designation.

Parsons, 801 F.3d at 716-17; *see also Keene*, 481 U.S. at 476 (“[E]njoining the application of the words ‘political propaganda’ to the films would at least partially redress the reputational injury of which appellee complains.”). The same is true here. The declaratory and injunctive relief Petitioners seek would at least partially redress the reputational injury of which they complain and would likely combat at least some future risk that they would be subjected to reputational harm

and chill due to the force of the Attorney General's "terrorist" and "terrorist group" labels.

In the final analysis, the Attorney General convened a press conference in which she publicly branded Red Rose Rescue as a "terrorist group" and those who belong to this organization, which admittedly includes Petitioners, as "terrorists." This Court's precedent and the precedent of other Circuit Courts confirm that Petitioners have suffered a reputational injury sufficient to confer standing in this case. The Court should summarily reverse the Second Circuit's ruling on standing and remand the case for further proceedings.

II. The New York Attorney General's Public Declarations that Petitioners Are "Terrorists" Belonging to a "Terrorist Group" Are Defamatory *Per Se* and Not Opinion Protected by the First Amendment.

Petitioners' defamation claim is brought under New York Law. However, federal courts can decide state law claims that relate to the federal claim and that form the same "case or controversy." Because this case unquestionably raises federal constitutional claims, and the defamation claim is directly related to the federal claims, the Court would have supplemental jurisdiction over the defamation claim pursuant to 28 U.S.C. § 1367 (stating that federal courts "shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or

controversy under Article III of the United States Constitution”).

As stated by this Court, “A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 139 (quoting Restatement, Torts, § 559). That is precisely what happened in this case. The Attorney General has weaponized her office to publicly attack political opponents, falsely declaring that private citizens who oppose abortion and associate with Red Rose Rescue are “terrorists” and belong to a “terrorist group.” Such false labeling, particularly by the chief law enforcement officer of the state, is injurious to those who associate with Red Rose Rescue, which includes Petitioners, and this was the very purpose of the Attorney General’s actions.

Terrorism is a crime punishable under New York law, *see* N.Y. Penal Law §§ 490.00, *et seq.*, and federal law, *see* 18 U.S.C. § 2331, and it is widely considered to be one of the most heinous criminal acts. (*See* Compl. ¶ 37, R.1). Falsely accusing someone of a serious crime, such as “terrorism,” is defamation *per se*. *Brandenburg v. Greek Orthodox Archdiocese of N. Am.*, No. 20-CV-3809 (JMF), 2021 U.S. Dist. LEXIS 102800, at *27 (S.D.N.Y. June 1, 2021) (“Accusing someone of a serious crime is defamatory *per se*. . . .”); *see also Van Der Linden v. Khan*, 535 S.W.3d 179, 198 (Tex. App. 2017) (“Khan alleges that falsely accusing someone of having admitted that he provided financial support to terrorists constitutes defamation *per se*. We agree.”);

Grogan v. KOKH, Ltd. Liab. Co., 256 P.3d 1021, 1030 (Okla. Civ. App. 2011) (“It is undisputed that Grogan is not a terrorist, and that portrayal of him as a terrorist would be highly offensive to a reasonable person.”).

The context of the defamatory statements—a press conference called by the Attorney General of New York—makes it exceedingly likely that listeners would consider these injurious statements to be statements of fact as the Attorney General placed the power of the New York government, with its authority, presumed neutrality, and assumed access to all the facts, behind an appellation designed to reduce the effectiveness of Red Rose Rescue and its associates in the eyes of the public. These defamatory statements not only violate New York law, they also implicate the First and Fourteenth Amendments as the Attorney General’s false statements were designed to chill the exercise of constitutional rights by pro-lifers such as Petitioners and to chill those who would associate with Red Rose Rescue from exercising their constitutional rights. (Compl. ¶¶ 43-44, R.1).

The Court should grant review of Petitioners’ defamation claim as it is related to the federal constitutional claims in the action such that they form part of the same case or controversy.

CONCLUSION

The petition for a writ of certiorari should be granted.

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