IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

AMERICAN FREEDOM LAW CENTER, INC., Plaintiff, v. DANA NESSEL, in her official capacity as Attorney General of Michigan; JAMES WHITE, in his official capacity as Director, Michigan Department of Civil Rights, Defendants.	No. 1:19-cv-153 Hon. Paul L. Maloney

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS NESSEL'S AND WHITE'S MOTIONS FOR SUMMARY JUDGMENT

AMERICAN FREEDOM LAW CENTER
Robert J. Muise, Esq. (P62849)
P.O. Box 131098
Ann Arbor, Michigan 48113
(734) 635-3756
rmuise@americanfreedomlawcenter.org

Attorneys for Plaintiff

Kyla L. Barranco (P81082)
Christina M. Grossi (P67482)
Ann M. Sherman (P67762)
Michigan Department of Attorney General
P.O. Box 30754
Lansing, Michigan 48909
(517) 335-7573

Attorneys for Defendant Attorney General Dana Nessel

Ron D. Robinson (P35927)
Tonya C. Jeter (P55352)
Michigan Department of Attorney General
Civil Rights Division
3030 W. Grand Boulevard, Suite 10-200
Detroit, Michigan 48202
(313) 456-0200

Attorneys for Defendant MDCR Director James White

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Constitutions

Other

Rules

INTRODUCTION

> Now when day came, the chief magistrates sent their policemen, saying, "Release those men." And the jailer reported these words to Paul, saying, "The chief magistrates have sent us to release you. Therefore, come out now and go in peace." But Paul said to them, "*They have beaten us in public* without trial, men who are Romans, and have thrown us into prison; and *now are they sending us away secretly*? No indeed! But let them come themselves and bring us out."

Acts 17:35-37.

Defendants have *publicly* attacked and tarnished Plaintiff's reputation. They have officially and publicly endorsed and promoted the false designation of Plaintiff as a "hate group," and thus, by clear implication, promoted the false narrative that Plaintiff is a criminal organization engaging in "hate." Now, Defendants want to send us away secretly. "***No indeed!***"

Defendants' actions are unlawful and exceedingly harmful. In light of "cancel culture" and the promotion of the false narrative that conservatives are "insurrectionists" and "domestic terrorists," labeling a private organization a "hate group" is the equivalent of designating the organization a domestic terrorist. "Progressive" politicians are fond of attaching pejorative labels to political opponents. And they use these labels to silence their opponents on social media, shame financial institutions into denying them services, and, in the words of the American Freedom Law Center's co-founder, make their political opponents "radioactive." (Yerushalmi Dep. at 129:18-25 to 130:1-3 [Ex. 9]).[1]

It is one thing for a radical private organization like the Southern Poverty Law Center ("SPLC") to spew its vitriol about political opponents. However, when the Attorney General ("AG") and the Michigan Department of Civil Rights ("MDCR") join and officially endorse this

[1] Exhibits 1 through 10 were previously filed in support of Plaintiff's motion for summary judgment (*see* Doc. No. 77). Exhibits 11 (AG Dep. Ex. 37) and 12 (Muise Supplemental Declaration authenticating Exhibit 11) are filed with this opposition.

partisan attack by lending government resources and thus becoming the government enforcement agency for SPLC's destructive agenda, constitutional protections are triggered.

This movement to silence free speech, chill political associations, and punish political dissent must stop. And this Court can begin the process by ruling in Plaintiff's favor.

Indeed, Defendants were given an opportunity to demonstrate their objectivity; promote "equity," "tolerance," and "unity"; prove they are above the corrosive and harmful effects of identity politics and propaganda; lend some credibility to the arguments they are advancing here; and prove they are not biased against certain organizations, such as Plaintiff, because of their political views. To that end, Plaintiff served an interrogatory on Defendants as a test to see whether they are neutral officials who have no interest in weaponizing their governmental powers. And they failed. Plaintiff propounded the following:

> Would you publicly acknowledge/make a public announcement, at least equal in scope, manner, and duration to the Press Release, affirming that Plaintiff is not a hate group and affirming that you disagree with the Southern Poverty Law Center's designation of Plaintiff as a hate group?

Defendants' response: an emphatic "***No***." (AG Resp. to Interrogs. ¶ 6 [Ex. 8]; MDCR Am. Resp. to Interrogs. ¶ 8 [Ex. 5]).

The Court should deny Defendants' motions.

AG MOTION

The AG's motion is fraught with factual inaccuracies and contradictions. For example, Defendants' press release of February 22, 2019, expressly cited to the SPLC "hate report." The press release provided a hyperlink to SPLC's "hate map," which listed 31 "hate groups" operating in Michigan, and top on the list is Plaintiff. The body of the press release specifically referenced the 31 "hate groups." Any honest and reasonable person reading this press release would reach only one conclusion: Defendants agree with, support, and endorse SPLC's "hate

group" designations. In fact, Defendants used SPLC's report to promote and justify their own partisan political interests: the AG's creation of the Hate Crimes Unit and MDCR's creation of a "hate and bias incident" database. Yet, and apparently with a straight face, the AG asserts that SPLC was only "tangentially referenced in the February 22, 2019 press release." (AG Br. at 36). This is false. SPLC's "hate group" designation was front and center. The very title of the official release is "MDCR Director Arbulu and Attorney General Dana Nessel respond to new hate group report."

The AG further asserts that "[t]he Attorney General is not SPLC, and, contrary to AFLC's bald assertions, the Unit does not rely on SPLC in its operations." (AG Br. at 23). The statement that the AG is not SPLC is legally irrelevant (*see infra*) and the claim that the Unit does not rely on SPLC is as demonstrably false as the *sworn* statement by the AG's designated witness that the Unit does not investigate groups. In the "formal report" of the Unit's *criminal investigation* of Church Militant (a group), the report states, "Church Militant is listed by the Southern Poverty Law Center as an LGBT-Hate Group." In other words, the AG does "rely on SPLC in its operations." Discovery has proven that fact.

Indeed, the AG has *publicly* relied upon and endorsed SPLC's "hate group" designations. She testified as such to the Michigan legislature. And in this testimony, she made it clear that the "hate group" designation is based on the viewpoints expressed by the group, stating, "[I]f you have a group that *speaks out*, whether it's through their postings on the internet or whether it's in public appearances, and the seeming purpose of the group or a large part of the purpose of the group has to do with disparaging members of minority communities, I think the SPLC frequently connotes that to be a hate group." The AG's chief of staff, in an email disclosed during discovery, confirms the AG's public reliance on SPLC and her public pledge to pursue "hate

groups," stating "*AG has publicly stated that the [hate crimes] unit will be looking at hate groups from the SPLC*."

The AG concludes her brief with the false assertion that Plaintiff is asking this Court to issue "an injunction forbidding law enforcement from investigating and prosecuting those who commit . . . atrocious [hate] crimes." (AG Br. at 39). Plaintiff is asking no such thing. (*See infra* § VI).

The crux of the AG's motion is that Plaintiff lacks standing, its claims are not ripe for review, and its claims are moot. Largely for reasons already found by the Court in *American Freedom Law Center, Inc. v. Nessel*, No. 1:19-cv-153, 2020 U.S. Dist. LEXIS 60622 (W.D. Mich. Jan. 15, 2020), the AG's justiciability arguments lack merit. And the AG's arguments on the substantive claims fare no better.

MDCR MOTION

MDCR's motion is based upon a false premise: that the only way in which MDCR can violate the Constitution is if the harm caused by this government agency and its executive director was the result of a formal policy adopted by the Michigan Civil Rights Commission ("MCRC"). (MDCR Br. at 19-27). That argument is wrong as a matter of law. Indeed, Defendant is attacking a strawman. MDCR is a government agency. It too can violate the Constitution, as in this case, irrespective and independent of anything MCRC may or may not do. (MDCR Br. at 22 [incorrectly asserting that "there was no state action [unless the MCRC] "consider[ed], deliberat[ed], and approv[ed]" the action]).

The harm here was caused by MDCR. MDCR officially and publicly placed its government power, with its authority, presumed neutrality, and assumed access to all the facts, behind SPLC's designation of Plaintiff as a "hate group." This occurred on February 22, 2019.

That bell has rung (and it continued to ring until approximately March 6, 2020, and it remains ringing within the official records of this government agency). MDCR had full authority to take this very public position, which it posted on its official government website for more than a year. No one from MCRC complained or did anything to stop this. And to compound the harm, MDCR, through its executive director, announced an initiative to create a "hate and bias incident" database. The executive director had the authority to publicly announce this initiative. In fact, MDCR previously "experimented" with such a database, and no one from MCRC complained or did *anything* to stop it. There is *no* formal policy in place to prevent any of this in the future. No one was reprimanded or censored in any way for this official, public announcement, which the MDCR director had authority to make.

In short, MDCR's arguments miss the gravamen of Plaintiff's challenge: Defendants have given the government's imprimatur to and endorsement of the designation of Plaintiff as a "hate group" by identifying Plaintiff as one of the 31 "hate groups" operating in Michigan and posting SPLC's "hate map" to prove it.[2] Moreover, the proposal to create yet another "hate and bias incident" database did not "die" when Arbulu was terminated. (MDCR Br. at 5). It went into hiding because of this lawsuit. There is *nothing* preventing MDCR from *once again* "experimenting" with this Orwellian program. The only one who can truly kill this "experimentation" is this Court by granting Plaintiff prospective relief.

Finally, MDCR's "government speech" argument (MDCR Br. at 29-31) is wrong as a matter of law, as demonstrated by *Meese v. Keene*, 481 U.S. 465 (1987), and *Parsons v. United*

[2] MDCR falsely asserts that "the only way a reader would know that the AFLC was identified by the SPLC as a hate group would be to click on a hyperlink, then navigate to the SPLC map, and then search for the AFLC's name." (MDCR Br. at 11). In fact, all the reader had to do was click the hate map hyperlink provided by Defendants in their press release, and this link took you *directly* to the Michigan map *with Plaintiff listed on the very top*. There was no "navigating" to the hate map nor "searching" for Plaintiff required.

States DOJ, 801 F.3d 701 (6th Cir. 2015). The cases cited by MDCR are inapposite. This case does not involve a government display. *Compare Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (holding that the placement by the government of a permanent monument in a public park did not raise First Amendment issues); *Newton v. Lepage*, 700 F.3d 595 (1st Cir. 2012) (holding that the removal of a mural from a government building did not violate the First Amendment). Nor does it involve the government subsidizing speech, thereby triggering a compelled speech claim. *Compare Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (holding that the use of mandatory bar dues to fund political and ideological activities not directly related to regulating the legal profession violated the bar members' free speech rights); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005) (holding that a federal program financing advertising to promote beef products was not susceptible to a compelled speech challenge because the advertising was government speech). MDCR's argument has no merit.[3]

STATEMENT OF FACTS

On ***February 22, 2019***, the "MDCR Director . . . and Attorney General Dana Nessel" issued a press release that was posted on the official *government* website of MDCR (www.michigan.gov/mdcr). (AG Dep. at 22:18-25 to 23:1-7; AG Dep. Ex. 2 [Ex. 1]; AG Admissions ¶¶ 13-16 [Ex. 2]; MDCR Admissions ¶¶ 14-16 [Ex. 3]). This official announcement was publicly displayed and posted on the government website until at least ***March 6, 2020***. (AG Admissions ¶¶ 14-16 [Ex. 2]; MDCR Admissions ¶¶ 14-16 [Ex. 3]). Thus, it remained posted for more than a year *after* the filing of this lawsuit, which occurred on February 28, 2019. (Compl. [Doc. No. 1]). This public announcement remains part of the government's official

[3] MDCR also makes a free exercise argument. (MDCR Br. at 20). However, Plaintiff did not raise a free exercise claim.

records and is available to the public via FOIA. (AG Dep. at 34:4-6 [Ex. 1]; *see also* MDCR Admissions ¶ 14 [Ex. 3]).

In this official, public statement, Defendants posted a hyperlink to the "Hate Map" of Michigan that was produced by SPLC. The "Hate Map" lists Plaintiff as the first "hate group" operating in Michigan. (Yerushalmi Suppl. Decl. ¶¶ 3-4 [Ex. 4]; AG Dep. Ex. 3 [Ex. 1]; AG Dep. at 28:3-15 [Ex. 1]).

In this official, public statement, Defendants stated, "The [SPLC] report documents an increase in active extremist and hate organizations in Michigan." The MDCR Director stated, "This is a troubling trend . . . These groups range in the ideological extremes from anti-Muslim, to anti-LGBT to black nationalists and white nationalists. Particularly of concern, over one half of the identified groups are located east of US-23 between Flint and Ann Arbor." (AG Dep. Ex. 2 [Ex. 1]).

The public release stated, "Attorney General Dana Nessel said she would *stand up to hate* in Michigan." Defendant Nessel was quoted as stating, "Hate *cannot continue to flourish in our state*. . . . I have seen the appalling, often fatal results of hate when it is acted upon. That is why I am establishing *a hate-crimes unit* in my office -- ***to fight against*** hate crimes ***and the many hate groups*** which have been allowed to proliferate ***in our state***." (emphasis added). (*Id.*). The AG ***personally*** approved her comments for this press release. (AG Dep. 44:6-25 to 45:1-21 [Ex. 1]; AG Dep. Ex. 9 [Ex. 1]).

"In *addition to* . . . the hate crime unit initiative, MDCR" publicly announced that this government agency was going to track and record in a database what it considers "hate and bias incidents," even if they are "protected under the First Amendment." (AG Dep, Ex. 2 [Ex. 1]).

MDCR has previously "experimented" with a hate and bias incidents database. (MDCR Am. Resp. to Interrogs. at ¶ 6 [Ex. 5]). There is ***no*** current policy that prohibits the creation of a hate and bias incidents database. (MDCR Dep. at 31:22-25 to 32:1 [Ex. 6]). No one was reprimanded or censored in any way by MDCR for this official, public announcement of the intent to create a hate and bias incident database. (*Id*. at 27:15-25 to 29:1; 31:22-25 to 32:1). The MDCR director has authority to post press releases such as this on the official government website of MDCR. (*Id*. at 27:15-17 [Ex. 6]).

The day that this official course of action was publicly announced by Defendants, Plaintiff received a media inquiry from The Detroit News, asking for a response to the announcement that "Attorney General Nessel is going to be investigating" SPLC designated hate groups, which includes Plaintiff. (AFLC's Resp. to AG Interrogs. ¶ 3 [Ex. 7]).

Plaintiff formally responded on February 28, 2019, by filing this federal civil rights lawsuit. The same day Plaintiff filed its initial Complaint, Defendant Nessel commented on her official Facebook page about a news story published by the Detroit News regarding Plaintiff's lawsuit. The title of the story was "Law center files federal lawsuit against Nessel, state civil rights director." The "law center" referenced in the story is Plaintiff, and the story was about *this* legal action. (AG Dep. at 41:18-25 to 42:1-5 [Ex. 1]; AG Dep. Exs. 6 & 7 [Ex. 1]). Rather than publicly disavow any efforts to "fight against . . . the many hate groups" in Michigan, including Plaintiff, Defendant Nessel doubled-down, posting a link to the Detroit News story on her official Facebook page[4] with the following comment:

> Only in Trump's America do you get sued for pledging to prosecute hate crimes and *pursue organizations that engage in illegal conduct against minority*

[4] Defendant Nessel uses this Facebook page to post information about official matters related to her duties as the AG. (AG Dep. at 41:10-12 [Ex. 1]; AG Admissions ¶¶ 20-21 [Ex. 2]).

> *communities*. I will never back down on my commitment to protect the safety of all Michiganders. Bring it.

(AG Dep. at 41:1-25 to 42:1-22 [Ex. 1]; AG Dep. Exs. 6 [Facebook post] & 7 [Detroit News story] [Ex. 1]). Despite her public endorsement of Plaintiff as a "hate group" and her vow to "fight against" such "hate groups," the AG's designated witness testified on September 23, 2020, as follows:

> Q. Do you have any information as you sit here today that AFLC has ever engaged in any activity that is not legal or protected by the constitution?
> A. No.

(AG Dep. at 37:9-12 [Ex. 1]; *see also id.* at 16:17-25 to 18:1-5; AG Admissions ¶ 7 [admitting that the AG has "no credible information that Plaintiff has ever engaged in any criminal activity"] [Ex. 2]; *see also* Yerushalmi Suppl. Decl. ¶ 2 [Ex. 4]; Yerushalmi Decl. ¶ 4 [Doc. No. 24-1]). And there is no reasonable dispute that the "hate group" label is a pejorative label. (AG Dep. at 16:8-13; 37:5-7 [Ex. 1]; *see also* Yerushalmi Suppl. Decl. ¶ 2 [Ex. 4]; Yerushalmi Decl. ¶¶ 2-13 [Doc. No. 24-1]).

The AG, via "Assistant Attorney General Sunita Doddamani, Lead Prosecutor/Director, Michigan Department of Attorney General's Hate Crimes Unit"—the person chosen to respond on behalf of the AG—stated in a *sworn* response to an interrogatory submitted by Plaintiff that "[t]he Hate Crimes Unit does not investigate groups." (AG Resp. to Interrogs. ¶ 2 [Ex. 8]). Yet, this same witness (Ms. Doddamani), in a sworn affidavit disclosed via discovery (the affidavit was executed on October 30, 2019, in response to a FOIA request submitted on behalf of, *inter alia*, Church Militant/St. Michael's Media), "attest[ed] to the fact that the Hate Crimes Unit [was] in the midst of an open and ongoing *criminal investigation* involving . . . St. Michael's Media, Inc., and/or Church Militant, and *their* possible violation of state criminal statutes." (AG Dep. at 42:24-25 to 44:1-4 [Ex. 1]; AG Dep. Ex. 8 [emphasis added] [Ex. 1]; *see also* AG Dep.

at 100:16-25 to 101:1-20 [Ex. 1]). Moreover, the AG, through her designated witness, testified at deposition as follows:

> Q. Did you conduct an investigation of that complaint [of Church Militant]?
> A. Could you define investigation?
> Q. Well, you used the term investigation previously. You said *you investigate and you prosecute hate crimes*. *Using your understanding of the term investigation* then did you investigate that organization?
> A. Yeah. I mean in my term of what an investigation means it means any follow up to a complaint that's received to verify its accuracy or inaccuracy, so any follow up, *yes*.

(AG Dep. at 28:25 to 29:1-9 [emphasis added] [Ex. 1]; *see also* AG Dep. at 117:18-23 [testifying that there is no formal written definition of investigation] [Ex. 1]).

"Church Militant/St. Michael's Media" is designated by SPLC as a "hate group" operating in Michigan. (AG Dep. at 78:7-25 to 79:1-9 [Ex. 1]; Dep. Ex. 3 [Ex. 1]). In the "formal report" of this criminal investigation by the Hate Crimes Unit, the report states, "Church Militant is listed by the Southern Poverty Law Center as an LGBT-Hate Group." (AG Dep. at 78:7-25 to 79:1-9 [Ex. 1]; AG Dep. Ex. 24 [Ex. 1]).

In an email dated February 22, 2019, the AG's *Chief of Staff* wrote, "***AG has publicly stated that the [hate crimes] unit will be looking at hate groups from the SPLC***." (AG Dep. at 46:19-25 to 47:1-14 [Ex. 1]; AG Dep. Ex. 10 [Ex. 1]). In an email exchange dated February 28, 2019, the AG directed Ms. Rossman-McKinney, the AG's "head of the communications department" (AG Dep. at 46:2-4 [Ex. 1]), to change "hate crimes" to "hate groups" in an official, public response to this lawsuit. (AG Dep. at 51:1-25 to 52:1-10 [Ex. 1]; AG Dep. Ex. 12 ["We will rely on our own research and investigation in making a determination as to what *organizations* are operating as *hate groups* in this state, and what action is required in order to ensure the public is safe from any illegal activity which stems from *such organizations*."] [emphasis added] [Ex. 1]).

Defendants have made these public pronouncements about "hate groups"—pronouncements which specifically include Plaintiff—even though Defendants have *zero* evidence that Plaintiff or anyone associated with Plaintiff has ever engaged in any criminal conduct. (*See* AG Admissions ¶ 7 [Ex. 2]). Rather, Plaintiff engages in conduct that is protected by the First Amendment (as does Church Militant, for that matter, *see* https://www.churchmilitant.com/). (AG Dep. at 37:9-12 [Ex. 1]; *see also* Yerushalmi Decl. ¶¶ 2, 4 [Doc. No. 24-1]; Yerushalmi Suppl. Decl. ¶ 2 [Ex. 4]).

The Hate Crimes Unit's criminal investigation of Church Militant was ideologically driven (the complaining witness is identified as "an openly gay married man" and Church Militant is described as an "LGBT-Hate Group"). (AG Dep. at 78:7-25 to 79:1-9 [Ex. 1]; Dep. Ex. 24 [Ex. 1]). The allegations *directly related* and *attributed to* Church Militant, as set forth in the official criminal report (the "formal report"), include the complainant receiving "hate mail, and hate comments *due to* the constant *comments* about his role within the Catholic Church by Church Militant. . . ." (AG Dep. at 78:7-25 to 79:1-9 [Ex. 1]; Dep. Ex. 24 [Ex. 1]). Thus, there was an official *investigation* initiated by the Hate Crimes Unit of an *organization* identified by SPLC as a "hate group" operating in Michigan based on allegations of activity that is protected by the First Amendment as a matter of law. *See Bible Believers v. Wayne Cty.*, 805 F.3d 228, 243 (6th Cir. 2015) (en banc) (stating that the "First Amendment offers sweeping protection that allows all manner of speech to enter the marketplace of ideas").

Despite the public fanfare of the creation of the Hate Crimes Unit and Defendants' public claims that there has been "an increase in active extremists and hate organizations in Michigan" and a "proliferat[ion]" of "hate groups [within the] state," as of September 23, 2020, there have been no (*i.e.,* zero) prosecutions by the Unit. (AG Dep. at 20:3-15 [Ex. 1]).

Prior to filing this lawsuit, on February 19, 2019, Defendant Nessel "testified" before the Michigan House Judiciary Committee as follows:

> We also have now a Hate Crimes Unit to ***combat*** the exponential rise in hate crimes against members of our minority communities, as well as ***tackling*** *the 28* ***identifiable hate groups that are currently operating in Michigan***.[5]

(AG Dep. Ex. 5 [Ex. 1]; AG Dep. at 37:17-25 to 39:1-23 [emphasis added] [Ex. 1]).

During the "Question and Answer" session following her presentation, the AG also answered the following question from Representative Ryan Berman regarding her comment about the "identifiable hate groups":

> Q. I was surprised to hear you say there's 28 hate groups in Michigan. Can you give us more about that or the criteria of . . . who is saying that? . . .
> A. *That information was received from the Southern Poverty Law Center* and they do a detailed analysis on that. . . . And I think a lot of it has to do with when you have some sort of an organized group—and part of the reason for that groups' existence has to do with some sort of animosity against minority community members. *So if you have a group that speaks out, whether it's through their postings on the internet or whether it's in public appearances, and the seeming purpose of the group or a large part of the purpose of the group has to do with disparaging members of minority communities, I think the SPLC frequently connotes that to be a hate group*[6]. . . .

(AG Dep. Ex. 5 [Ex. 1]; AG Dep. at 38:14-25 to 40:1-3 [Ex. 1]). The video of this hearing is available to the public, and it is subject to FOIA. (AG Dep. at 40:2-3 [Ex. 1]).

Per Plaintiff's sworn responses to the AG's interrogatories:

---

[5] Plaintiff was also listed among the 28 "hate groups" previously identified by SPLC. (*See* Yerushalmi Decl. ¶ 5 [Doc. No. 24-1]).

[6] Consequently, the AG knows full well why SPLC lists Plaintiff as a "hate group"—it's because Plaintiff "speaks out" and SPLC disagrees with the content and viewpoint of that speech. In SPLC's "Intelligence Report," which was also included via a hyperlink in the press release, SPLC lists as a "key moment" of hate the fact that Plaintiff "authored an amicus brief in support of [President Trump's travel] ban, claiming the country is at war with the kinetic militancy of jihadists and the cultural challenge of anti-Western, anti-constitutional Islamic law and mores." (*See* Yerushalmi Suppl. Decl. ¶ 3 [Ex. 4]; AG Dep. Ex. 4 ["Intelligence Report" excerpt] [Ex. 1]).

The false "hate group" designation is part of SPLC's political attack against conservative organizations based on the organization's political views on various issues. If the organization successfully promotes the values and ideals of conservative Christians and Jews, as does Plaintiff, it is likely that the organization will be on SPLC's "hate group" list. *It is because of Plaintiff's political views that it is on this list.*

Because of this harmful political propaganda effort, Plaintiff must spend money, time, effort, and other resources combating this false "hate group" designation. Plaintiff does this principally through its website, social media, and direct mailing. Plaintiff's efforts are undermined by the fact that Defendants (the Michigan Attorney General and the Director of the Michigan Department of Civil Rights), two powerful government officials, have given the government's endorsement of and imprimatur to this pejorative designation. *By doing so, Defendants have now placed the power of the state's government, with its authority, presumed neutrality, and assumed access to all the facts, behind SPLC's designation of Plaintiff as a "hate group." This government endorsement has exacerbated the harm that the "hate group" label has already caused, and continues to cause, Plaintiff.*

The reputational harm that this "hate group" label carries with it can be readily seen through the number of times news agencies have used this demeaning and derogatory label when reporting on Plaintiff. A fully representative sample of such news articles was attached as Exhibit A to the Yerushalmi declaration (Doc. No. 24-1). . . .

This demeaning and derogatory label is also dangerous. The Family Research Council (FRC), a conservative organization labeled a "hate group" by SPLC, was attacked by an armed domestic terrorist who wounded an FRC employee during his violent rampage. The terrorist, Floyd Lee Corkins, admitted during the course of his prosecution that he specifically relied on SPLC's "hate group" designation and its hate map as the basis for his attack. This terrorist attack was widely reported. . . .

A number of major donors fear that if it was made known publicly that they contributed to Plaintiff, they would be publicly admonished and vilified because of the "hate group" label.

Political opponents use the "hate group" designation to publicly attack and vilify large charitable organizations who donate to Plaintiff. . . .

Because there are ways in which major, private donors can donate anonymously through funds such as Schwab and Fidelity, groups relying upon SPLC's "hate group" designation are publicly attempting to cower these financial institutions into blocking such anonymous donations. . . . Anonymous donors have donated to Plaintiff through this method.

> Political opponents also use the "hate group" designation to try and convince banks and other financial institutions to deny Plaintiff financial services. . . .
>
> The AmazonSmile charitable program has expressly denied Plaintiff access to this program based on SPLC's designation of Plaintiff as a "hate group."
>
> In sum, the false "hate group" designation causes financial and reputational harm to Plaintiff. And this harm is exacerbated by the fact that the [AG] and the Director of [MDCR] have endorsed this designation, giving it greater credibility and weight in the mind of the public and in the "mind" of those organizations, such as Amazon, who discriminate against Plaintiff because of this false designation.

(AFLC Resp. to AG Interrogs. ¶ 4 [Ex. 7]; *see also* Yerushalmi Decl ¶¶ 2-13 [Doc. No. 24-1]).

Per the testimony of AFLC Co-Founder David Yerushalmi:

> I can tell you this for certain, the press release itself . . . caused immeasurable harm to the reputation of the American Freedom Law Center.
> Q. How so?
> A. Have you read the press release? The press release itself states very clearly that these hate groups listed by the Southern Poverty Law Center -- and then let's just pause there, hate groups. A government agency defined to and created to protect the civil rights of Michigan's -- Michiganders I think you guys are called, and the attorney general whose job it is to prosecute crimes embrace the very idea that there are hate groups, number one. Number two, that the SPLC is an authoritative source for who those hate groups are and what they're doing apparently, and they then link to that list which identifies the American Freedom Law Center. . . . Now, I don't know about you but when I'm confronted by the chief law enforcement officer who throws these kinds of accusations around about my organization, and therefore also about me personally, I become extremely concerned. And when I get phone calls and people reaching out to me trying to understand what this is all about and donors who are fearful about being exposed as a result of this you can bet your bottom dollar that AFLC has been damaged and that damage continues because at no time has the attorney general or the MDCR or the commission, as you put it, apologized and retracted any statement by anyone on their behalf.
>
> * * *
>
> [AG and MDCR] linked to that hate list because they wanted you and me and the rest of the reading public to go look and see AFLC's name so they would think twice about donating, they would think twice about associating, they would think twice about going for representation to this group because they're now radioactive. We are now radioactive. And you can look and see how we had to respond to that. We had to put a brave face on in our blogs and press releases . . . and say, well, we're proud of it, because that's the only way you can respond to that kind of attack. Because if you say we're cowered by it, we're frightened by

> it, no one is going to believe that we can litigate on their behalf. So we had to put a brave face on in the public domain. But I will tell you [that] when the chief law enforcement officer of even, you know, a little village in Michigan [makes these kinds of public statements, it] is going to bother me, [but] when the State of Michigan and someone as ideologically driven as Ms. Nessel [does], who clearly opposes everything we stand for, that's frightening.

(Yerushalmi Dep. at 127:7-25 to 130:1-20, Errata [Ex. 9]).

Plaintiff is identified as a "hate group," with SPLC as the source, in a spreadsheet that is retained by the AG as a government record subject to FOIA. (AG Dep. 94:10-25 to 96:1-6 [Ex. 1]; AG Dep. Ex. 31 [Ex. 1]).

STANDARD OF REVIEW

To succeed on their motions for summary judgment, Defendants must "show[] that there is no genuine dispute as to any material fact and [that they are] entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In evaluating a motion for summary judgment, the court views the facts in the light most favorable to the non-moving party and draws all reasonable inferences in favor of the non-moving party. *Bible Believers*, 805 F.3d at 242.

ARGUMENT

I. Plaintiff Has Standing.

The Constitution confines the federal courts to adjudicating actual "cases" or "controversies." U.S. Const. art. III, § 2. To give meaning to Article III's "case" or "controversy" requirement, the courts have developed several justiciability doctrines, including standing. "The doctrine of standing gives meaning to these constitutional limits by identifying those disputes which are appropriately resolved through the judicial process." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (internal quotations and citation omitted).

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498

(1975). To invoke the jurisdiction of a federal court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Plaintiff has standing for several reasons. First, Plaintiff's injury is not simply a "subjective" chill on speech, which distinguishes this case from *Laird v. Tatum*, 408 U.S. 1, 10-11 (1972). In addition to the chilling effect present here, Plaintiff has established that Defendants have harmed its public reputation. "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*); *Gully v. NCUA Bd.*, 341 F.3d 155, 161-62 (2d Cir. 2003) (stating that "[t]he Supreme Court has long recognized that an injury to reputation will satisfy the injury element of standing"); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 542-43 (3d Cir. 2007) (finding standing to challenge a sanction that "affect[s] [the plaintiff's] reputation"); *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 un-retracted government action, that injury satisfies the requirements of Article III standing to challenge that action.").

As noted by the Sixth Circuit, "where claims of a chilling effect are accompanied by concrete allegations of reputational harm, the plaintiff has shown injury in fact." *Parsons*, 801 F.3d at 711-12 (citing *Meese* and distinguishing *Laird v. Tatum*); *see also Parsons*, 801 F.3d at 712 ("Stigmatization also constitutes an injury in fact for standing purposes.").

Thus, the "*concrete* [evidence] of reputation harm" in addition to the chilling effect caused by Defendants' actions are sufficient to show injury in fact and for this Court to exercise its jurisdiction to hear and decide this case. *See also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139 (1951) (holding that charitable organizations designated as

"Communist" by the Attorney General had standing to challenge their designations because of, *inter alia*, "damage [to] the reputation of the organizations in their respective communities"); *see also United States v. Accra Pac, Inc.*, 173 F.3d 630, 633 (7th Cir. 1999) (stating that "being put on a blacklist . . . is treated as immediately redressible harm because it diminishes (or eliminates) the opportunity to practice one's profession even if the list . . . does not impose legal obligations"); *Doe v. Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999) (holding that a student had standing to challenge a rule requiring that he be identified as disabled because such a label could sour the perception of him by "people who can affect his future and his livelihood").

Plaintiff also presented evidence that Defendants' actions have harmed its economic interests. By giving the government's imprimatur to SPLC's designation, Defendants have given credibility to the widespread efforts to financially harm groups designated by SPLC as "hate groups." As just one example, the "hate group" designation causes Amazon to prohibit Plaintiff from participating in its charitable donation program.[7] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 184 (2000) (acknowledging that government actions injuring a plaintiff's "economic interests" create the necessary injury-in-fact to confer standing); *see also Jet Courier Services, Inc. v. Fed. Res. Bank*, 713 F.2d 1221, 1226 (6th Cir. 1983) (finding standing where "couriers will suffer economic losses flowing from actions which the private banks will take in response to the revised schedules of the Federal Reserve Banks," and noting

[7] This attack on conservative organizations by labeling them as "hate groups" is widespread. It is a concerted effort to financially and publicly harm these organizations, including Plaintiff. *See* Sludge, "America's Biggest Christian Charity Funnels Tens of Millions to Hate Groups," at https://readsludge.com/2019/03/19/americas-biggest-christian-charity-funnels-tens-of-millions-to-hate-groups/ (criticizing Christian charity organization for donating to SPLC-designated "hate groups," expressly including Plaintiff).

that "[t]hough the injury alleged by the plaintiffs is indirect, it is 'distinct and palpable' and 'fairly traceable' to the action of the Board of Governors").

There is no question that Plaintiff is a *subject* of Defendants' actions. Plaintiff is one of the 31 "hate groups" identified by Defendants in their official press release.

As this Court previously and correctly ruled:

> AFLC has established the three elements necessary for standing: injury in fact, causation and redressability. . . .
>
> AFLC has shown . . . that the announcement itself provides a basis *to initiate and maintain* this lawsuit. By implicitly endorsing SPLC's list of hate groups, which includes AFLC, the announcement of the Policy Directive injured AFLC. . . .
>
> By referencing SPLC's publications as part of the rationale of the Policy Directive, *the Press Release created an injury in fact*. SPLC has designated AFLC as a hate group located in Michigan. The Press Release relies on SPLC's reports as evidence of "an increase in active extremist and hate organizations in Michigan." (Press Release PageID.71.) The Press Release calls this evidence a "troubling trend." (*Id.*) Nessel commits the Office of the Attorney General to "stand up to hate in Michigan" by "establishing a hate-crimes unit in my office." (*Id.*) Similar to the enforcement of the statute defining "political propaganda" to describe the films at issue in *Meese*, as representatives of the State government, *Defendants' endorsement of the SPLC's list of hate groups constitutes a concrete and particular reputational injury to AFLC*. . . .
>
> AFLC has identified legal authority which, *on the facts* established with Yerushalmi's affidavit, demonstrate the causation and redressability elements for standing. Defendants cannot control who SPLC labels a hate group. By referencing SPLC's reports as the justification for the Policy Directive, . . . Defendants have placed the State's imprimatur on SPLC's list of hate groups in Michigan, which includes AFLC. . . . Notably, AFLC contends it does not engage in any criminal activity and further contends it has been placed on SPLC's list of hate groups because of its constitutionally-protected activities. Should the Court ultimately affirm this allegation and enjoin Defendants in some manner from applying the Policy Directive to AFLC, the outcome would provide some restoration of AFLC's reputation.

Am. Freedom Law Ctr., Inc., 2020 U.S. Dist. LEXIS 60622, at *16-19 (emphasis added).

II. Plaintiff's Claims Are Ripe.

The basic rationale of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580 (1985) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). "The problem is best seen in a twofold aspect, requiring [the courts] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149. We begin with the hardship prong.

As *Meese, et al.,* make plain, the injury to Plaintiff has already occurred, and it will continue without relief from this Court. *At minimum*, Defendants have already designated Plaintiff a "hate group" by officially citing to, embracing, and endorsing SPLC's designation in the February 22, 2019 press release. The AG further confirmed this in her public statements and in her public Facebook post. The AG's Chief of Staff confirmed in an email the AG's reliance on SPLC's "hate group" designation. The Hate Crimes Unit affirmed its reliance on SPLC in its "formal report" of its criminal investigation of Church Militant. Defendants' endorsement of Plaintiff as a "hate group" is now part of official government records. None of this has been recanted nor the harm remedied in any way. Consequently, this harm, and the hardship to Plaintiff caused by it, will persist without judicial relief.

This case is also fit for judicial review. "In considering the fitness of an issue for judicial review, the court must ensure that a record adequate to support an informed decision exists when the case is heard." *NRA of Am. v. Magaw*, 132 F.3d 272, 290 (6th Cir. 1997). A case that largely presents a legal issue based on undisputed facts, such as the challenge at issue here, is fit for judicial resolution. *See Thomas*, 473 U.S. at 581 (finding matter ripe where the issue presented was "purely legal, and will not be clarified by further factual development"); *Abbot Labs.*, 387

U.S. at 149 (same); *NRA of Am.*, 132 F.3d at 290-91 (same). Whether Defendants' actions violate the First and Fourteenth Amendments and whether Plaintiff is entitled to prospective relief against Defendants where declaratory and injunctive relief would restore Plaintiff's public reputation and reassure Plaintiff and those who associate with Plaintiff that they could freely participate in and support Plaintiff's constitutionally protected activity without being denigrated and labeled as a "hate group" by the government, appearing in government records as a "hate group," or being threatened by the government with investigation because they are deemed a "hate group" are legal are issues that are fit for resolution.

Moreover, the standing and ripeness requirements are appropriately relaxed in this case because it arises under the First Amendment. *See Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002) (relaxing ripeness requirements in the First Amendment context); *Cheffer v. Reno*, 55 F.3d 1517, 1523 n.12 (11th Cir. 1995) (same); *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1033 n.18 (5th Cir. 1981) (relaxing the injury-in-fact requirement for standing in First Amendment challenges); *Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997) (same).

In sum, Plaintiff is powerless against Defendants and the government resources they wield. Plaintiff's only recourse is to seek judicial relief. The hardship is real, and this case is fit for judicial resolution. The case is ripe for review.

III. Plaintiff's Claims Are Not Moot.

The AG asserts that Plaintiff's "claims are mooted by the Department's official press release about the Unit [issued on March 8, 2019], testimony to the Senate Judiciary Committee, and the operation of the Unit since March 2019." (AG Br. at 27). The AG is mistaken.

When a party seeks to escape liability by claiming that it has voluntarily ceased the offending conduct (or alleges to have done so via a public statement, leaving aside the fact that

this statement does not disavow the harm alleged and thus is not a "cessation" of illegal conduct in the first instance), "the *heavy burden* of persuading the court that the challenged conduct cannot reasonably be expected to start up again *lies with the party*" seeking to avoid liability. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (internal quotations and citation omitted). As the Court noted, not only is a defendant "free to return to [her] old ways," but also the public has an interest "in having the legality of the practices settled." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). Consequently, "[a]long with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *Id.* at 633. Thus, a claim for prospective relief may be improper only "if the defendant can demonstrate that 'there is no *reasonable expectation* that the wrong will be repeated.' The [defendant's] burden is a heavy one." *Id.* (emphasis added); *see also Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767-70 (6th Cir. 2019) (finding that the plaintiff's challenge to a university's speech restriction was not moot, noting that "*ad hoc*, discretionary, and easily reversible actions" are not granted much solicitude and stating that "[i]f the discretion to effect the change lies with one agency or individual, or there are no formal processes required to effect the change, significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim").

The Supreme Court has warned the lower courts "to beware of efforts to defeat injunctive relief by protestations of repentance and reform," particularly when timed to thwart litigation. *W. T. Grant Co.*, 345 U.S. at 632, n.5. Denying a plaintiff prospective relief "would be justified only if it were *absolutely clear* that the litigant *no longer had any need of the judicial protection that it sought*." *Adarand Constructors, Inc.*, 528 U.S. at 224 (emphasis added).

The AG's March 8, 2019, press release was published the *day after* Plaintiff filed its First Amended Complaint, which added the allegation setting forth the very damaging public statement made by the AG on her Facebook page the day the original complaint was filed (February 28, 2019). The March 8 release is precisely the sort of "protestation[] of repentance and reform . . . timed to anticipate suit" that the Supreme Court warned about. Moreover, the "formal report" of Church Militant, which is dated *April 2, 2019*, expressly references as a legitimate source of information SPLC's "hate group" designation. (AG Dep. Ex. 24 [Ex. 1]). And finally, the February 22, 2019, press release (AG Dep. Ex. 2 [Ex. 1]), the AG's testimony in February 2019 to the Michigan House Judiciary Committee in which she expressly relied upon SPLC's "hate group" designation and vowed to "tackle" such groups (AG Dep. at 38:14-25 to 40:1-3 [Ex. 1]), the email from the AG's Chief of Staff confirming the AG's public pledge to go after SPLC designated "hate groups," (AG Dep. Ex. 10 [Ex. 1]), and the spreadsheet listing Plaintiff as a "hate group" and relying on SPLC as the source for that designation (AG Dep. Ex. 31 [Ex. 1]), all remain today as government records available to the public via FOIA.

The main problem with the AG's argument is that nothing she has done alleviates or remedies the harm in any way. *Adarand Constructors, Inc.*, 528 U.S. at 224 (stating that denying a plaintiff prospective relief "would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought"). Nowhere in any public statement does the AG disavow SPLC's false designation of Plaintiff as a "hate group." And nowhere does the AG pledge not to publicly authenticate, endorse, promote, or rely upon SPLC's false and harmful "hate group" designations in the future. Defendants were given an opportunity to remedy the harm they have inflicted upon Plaintiff's reputation, and they refused to do so. (*See* AG Resp. to Interrogs. ¶ 6 [Ex. 8]; MDCR Am. Resp. to Interrogs. ¶ 8 [Ex. 5]).

The AG has already caused, and continues to cause, harm to Plaintiff and its public reputation. That bell has rung, and it continues to ring. There is nothing moot about this case.

IV. Defendants Violated Plaintiff's First Amendment Rights.

A. The First Amendment Protects Against Direct *and* Indirect Interference.

For official acts that infringe First Amendment liberties, the Supreme Court has "long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983). "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference." *Bates v. Little Rock*, 361 U.S. 516, 523 (1960); *see also NAACP v. Button*, 371 U.S. 415, 433 (1963) (stating that First Amendment "freedoms are delicate and vulnerable, as well as supremely precious in our society," and "[b]ecause [these] freedoms need breathing space to survive, government may regulate in the area only with narrow specificity"). As the Court stated in *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958), "[S]tate action which may have the *effect* of curtailing the freedom to associate is subject to the closest scrutiny." (emphasis added). In constitutional terms, "closest scrutiny" means "strict scrutiny," "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

Using the power and authority of the Office of the AG and the MDCR to pejoratively label and to threaten investigations and surveillance on law-abiding citizens, such as Plaintiff, solely because of their dissident political views does not promote a legitimate interest of government, and it has the calculated *and intended* effect of suppressing constitutional freedoms in violation of the First Amendment. *Cf. NAACP v. Ala.*, 357 U.S. at 461 ("In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court

recognize that abridgment of such rights, *even though unintended*, may inevitably follow from varied forms of governmental action.") (emphasis added).

"No state action that limits protected speech will survive strict scrutiny unless the restriction is narrowly tailored to be the least-restrictive means available to serve a compelling government interest." *Bible Believers*, 805 F.3d at 248. Defendants have no legitimate interest for their actions in this case. *See generally Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (internal quotations and citation omitted). Defendants' actions do not survive any level of constitutional scrutiny.

B. Defendants' Actions Deter the Exercise of Fundamental Rights.

Plaintiff's activities and associations—the very activities and associations that subject them to pejorative labeling and threats of investigation and surveillance by Defendants—are protected by the Constitution. *See Bible Believers*, 805 F.3d at 243. The Supreme Court "has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citations omitted).

"Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." *Healy v. James*, 408 U.S. 169, 181 (1972) (citations omitted). The Sixth Circuit echoed this fundamental understanding, stating, "Freedom to engage in association for the

advancement of beliefs and ideas is an inseparable aspect of freedom of speech." *Connection Distributing Co. v. Reno*, 154 F.3d 281, 295 (6th Cir. 1998) (citing *NAACP v. Ala.*, 357 U.S. at 460). "[I]mplicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as [the Supreme] Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." *NACCP v. Ala.*, 357 U.S. at 460; *see also NAACP v. Button*, 371 U.S. at 431 (noting that "association for litigation may be the most effective form of political association"). Thus, it cannot be gainsaid that Plaintiff's "[f]reedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference." *Bates*, 361 U.S. at 523; *see also Fed. Election Com. v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) ("The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities.").

Additionally, in the First Amendment context, "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *see also N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996); *Minn. Citizens Concerned for Life v. Fed. Election Comm'n.*, 113 F.3d 129, 132 (8th Cir. 1997) ("Sufficient hardship is usually found if the regulation . . . chills protected First Amendment activity."). Even minimal infringement upon First Amendment values constitutes

irreparable injury sufficient to justify prospective relief. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

As the court in *Clark v. Library of Congress*, 750 F.2d 89, 94 (D.C. Cir. 1984), stated, "Exacting scrutiny is especially appropriate where the government action is motivated solely by an individual's lawful beliefs or associations, for government action so predicated is imbued with the potential for subtle coercion of the individual to abandon his controversial beliefs or associations."

In this case, the challenged actions plainly deter or "interfere" with protected First Amendment activity. As stated by this Court:

> Defendants' general disagreement with the scope and nature of their new initiative does not undermine the *effect* that the announcement of the new policy [has] on AFLC's reputation and activities, as established by the affidavit submitted by AFLC.

Am. Freedom Law Ctr., Inc., 2020 U.S. Dist. LEXIS 60622, at *26 (emphasis added). This "effect" violates the Constitution.

C. Designating Plaintiff a "Hate Group" Violates Plaintiff's Rights.

By designating Plaintiff a "hate group" on account of its political views, Defendants violated Plaintiff's fundamental rights. This principle was affirmed in *Meese v. Keene*, 481 U.S. 465 (1987).

In *Meese*, the plaintiff, a politician, sued to prevent the government from designating as "political propaganda" certain films he was sponsoring. The Court held that the plaintiff had standing to challenge this official designation as a violation of the First Amendment because the plaintiff's showing of the films with the designation would cause injury to his reputation. *Id*. However, because the Court believed that the term "political propaganda" was "neutral," "evenhanded," and without any "pejorative connotation," it concluded that the act placed "no

burden on protected expression" and was thus constitutional. *Id*. at 480. Consequently, it logically follows that had the Court determined that this official designation was *not* "neutral," "evenhanded," or without any "pejorative connotation," then a constitutional violation would have occurred. As the dissent points out, when the government places pejorative labels on speech, "[i]t places the power of the Federal Government, with its authority, presumed neutrality, and assumed access to all the facts, behind an appellation *designed* to reduce the effectiveness of speech in the eyes of the public" in violation of the First Amendment. *Id*. at 493 (Blackmun, J., joined by Brennan, J., and Marshall, J., dissenting).

This is precisely the situation presented here. Through the challenged policy directive, which was announced via an official press release posted on a Michigan government website on February 22, 2019, and reaffirmed by the AG in a public Facebook post, in her responses to questions from Representative Berman, and by her Chief of Staff, *inter alia*, Defendants have given the government's imprimatur to and official endorsement of the *designation of Plaintiff* as a "hate group," *identifying Plaintiff* as one of the 31 "hate groups" operating in Michigan and posting SPLC's "hate map" to prove it.

As stated by this Court:

> In *Meese*, the Supreme Court found that the injury to reputation was caused by the Department of Justice's enforcement of a statute that used the term "political propaganda." *Meese*, 481 U.S. at 476. And, enjoining *application of the term* "political propaganda" would "at least partially redress the reputational injury[.]" *Id.* Notably, AFLC contends it does not engage in any criminal activity and further contends it has been placed on SPLC's list of hate groups because of its constitutionally-protected activities. Should the Court ultimately *affirm this allegation* and enjoin Defendants in some manner from applying the Policy Directive to AFLC, the outcome would provide some restoration of AFLC's reputation.

Am. Freedom Law Ctr., Inc., 2020 U.S. Dist. LEXIS 60622, at *18-19 (emphasis added).

The undisputed facts "affirm" that Plaintiff "does not engage in any criminal activity and [that] it has been placed on SPLC's list of hate groups because of its constitutionally-protected activities," warranting the Court to enter judgment in Plaintiff's favor and grant prospective relief to "provide some restoration of [Plaintiff's] reputation."

D. Threatening Investigations and Surveillance Violates Fundamental Rights.

By threating investigations and surveillance of private citizens, such as Plaintiff, on account of their dissident political views, Defendants have violated the Constitution. Indeed, the investigation of Church Militant by the AG, as described above, creates a chilling effect on all groups that come within the sights of the AG and her "Hate Crimes Unit." This investigation was politically-motivated as there was no semblance of any criminal activity on the part of the organization from the beginning, and it is chilling for all groups listed by SPLC as a "hate group," particularly in light of the AG's *public* pledge to "combat," "fight" and "tackle" them. This chilling effect is exacerbated by the nature of criminal investigations, which the AG conducts under the cloak of secrecy. (*See* AG Dep. at 33:8-15 [Ex. 1]). With the "click of a button" (AG Dep. at 30:13-23 ["There's a button on the website to submit a complaint or contact the [hate crimes] unit."] [Ex. 1]), political opponents can make a complaint to the AG's Hate Crimes Unit similar to the bogus complaint made against Church Militant, and thus trigger the politically-charged "Hate Crimes Unit" to leap into action. When government officials, specifically law enforcement officials, weaponize their office like Defendants have done here, our Constitution, especially the First Amendment, is undermined.

The Supreme Court has repeatedly acknowledged the constitutional infirmities associated with the threat of government surveillance and investigations, which in turn dampen the exercise of First Amendment rights. *DeGregory v. N.H. Atty. Gen.*, 383 U.S. 825, 829 (1966)

("Investigation is a part of lawmaking and the First Amendment, as well as the Fifth, stands as a barrier to state intrusion of privacy."); *Gibson v. Fla. Legislative Comm.*, 372 U.S. 539, 560-61 (1963) ("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); *NAACP v. Ala.*, 357 U.S. at 449; *Barenblatt v. United States*, 360 U.S. 109, 126 (1959) ("The provisions of the First Amendment . . . of course reach and limit . . . investigations."); *Socialist Workers Party v. Att'y Gen.*, 419 U.S. 1314, 1319 (1974) (noting the dangers inherent in investigative activity that "threatens to dampen the exercise of First Amendment rights"); *Clark*, 750 F.2d at 89 (applying strict scrutiny in a case challenging the federal government's investigation into an employee's political beliefs and associations); *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.").

The AG has publicly pledged to "combat," "fight," and "tackle" "hate groups" in Michigan, which includes Plaintiff. "A judicial determination" that Defendants' have violated the First Amendment "would reassure" Plaintiff and those who associate with Plaintiff "that they could freely participate in" their constitutionally protected activity without "being recorded [or surveilled] by the government and becoming part of official records."

V. Targeting Plaintiff for Adverse Treatment Based on Its Political Views Violates the Equal Protection Clause.

"[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny

use to those wishing to express less favored or more controversial views." *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Thus, when government officials target individuals or groups for disparate treatment based on their political *views*, as Defendants have done here, their actions violate the Equal Protection Clause *in addition to* the First Amendment.

The AG has not pledged to "combat," "fight," or "tackle" ACLU Michigan (https://www.aclumich.org/), for example, even though this organization engages in similar nonprofit work as Plaintiff, but from a different political perspective and view.[8] In fact, the Hate Crimes Unit "collaborates" with the ACLU. (AG Dep. Ex. 37 [Ex. 11]). SPLC targets Plaintiff because of its political views, and Defendants have employed government resources to join this attack for the same reason. This fact is self-evident as Defendants admit that Plaintiff does not engage in any criminal or illegal activity—it engages in activity that is fully protected by the Constitution. And the AG admitted during her "testimony" to the Michigan Legislature that "speaking out" publicly and expressing a particular viewpoint gets you on the list of "hate groups." (*See, e.g.,* AG Dep. Ex. 5 [Ex. 1]). This "disparaging" or offensive speech that lands you on the "hate group" list is fully protected by the First Amendment. *See, e.g., Am. Freedom Def. Initiative v. Suburban Mobility Auth.*, 978 F.3d 481, 501 (6th Cir. 2020) (holding that the restriction of an ad that was offensive to Muslims was unconstitutional and noting that "a speech restriction disfavoring ideas that offend discriminates based on viewpoint, in violation of the First Amendment") (internal citations, quotations, and punctuation omitted).

Because Defendants' disparate treatment of Plaintiff burdens its fundamental rights, Defendants have violated the First and Fourteenth Amendments. *See Bible Believers*, 805 F.3d

[8] Many consider the ACLU to be anti-Christian, so why is this organization not designated a "hate group"? *See, e.g.*, F. LaGard Smith, *ACLU: The Devil's Advocate: The Seduction of Civil Liberties in America* (1996).

at 256 (stating that disparate treatment that burdens a fundamental right, such as freedom of speech, violates equal protection).

VI. Declaratory and Injunctive Relief Are Appropriate.

The requested relief is appropriate for the reasons stated by the Sixth Circuit in *Parsons*:

> The Juggalos in this case *also suffer alleged harm due to the force of a DOJ informational label*. While the 2011 NGIC Report *is not the designation itself, it reflects the designation* and includes an analytical component of the criminal activity performed by Juggalo subsets, classifying the activity as gang-like. As in *Meese*, "[*a*] *judgment declaring the* [action in *question*] *unconstitutional would eliminate the need to choose between* [*First Amendment-protected activity*] *and incurring the risk that public perception of this criminal enforcement scheme will harm appellee's reputation*."
>
> * * *
>
> 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 (internal citations omitted) (emphasis added).

A judicial determination that Defendants violated the Constitution would reassure Plaintiff and those who associate with it that they could freely participate in Plaintiff's constitutionally protected activities without Plaintiff (and, by extension, those who associate with Plaintiff) being denigrated and labeled as a "hate group" by the government, appearing in government records as a "hate group," or being threatened by the government with investigation because they are deemed a "hate group." The requested relief will also help repair Plaintiff's public reputation that Defendants have damaged.

Accordingly, the Court should grant judgment in Plaintiff's favor and declare, at a minimum, that Defendants' public endorsement of SPLC's designation of Plaintiff as a "hate group" violates Plaintiff's constitutional rights and that threatening investigations of Plaintiff because of this designation violates Plaintiff's constitutional rights. The Court should enter an

order enjoining Defendants from making such false and harmful public statements about Plaintiff. *See Rooks v. Krzewski*, No. 306034, 2014 Mich. App. LEXIS 604, at *91 (Mich. Ct. App. Apr. 3, 2014) ("Numerous other courts, both federal and state, have held that a trial court may enjoin a defendant from making defamatory statements after there has been a determination that the speech was, in fact, false.") (citing cases). And the Court should issue an order expunging all official government records that list, endorse, affirm, infer, or include Plaintiff as a "hate group," *see Smith v. Nixon*, 807 F.2d 197, 204 (D.C. Cir. 1986) (stating that "a court may order expungement of records in an action brought . . . directly under the Constitution, without violating the intricate statutory provisions that purport to be the 'exclusive' means by which [government records] may . . . be alienated or destroyed"), which includes, *at a minimum*, all of the records identified during discovery.

"A judgment declaring the [action in question] unconstitutional would eliminate the need to choose between [First Amendment-protected activity] and incurring ***the risk that public perception*** of this criminal enforcement scheme will harm [Plaintiff's] reputation." *Parsons*, 801 F.3d at 717 (emphasis added). The declaration Plaintiff "seek[s] would likely combat at least some future risk that they would be subjected to reputational harm and chill due to the force of [Defendants' 'hate group'] designation." *Id*.

CONCLUSION

Plaintiff respectfully requests that the Court deny Defendants' motions.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq. (P62849)
PO Box 131098
Ann Arbor, Michigan 48113
Tel: (734) 635-3756; Fax: (801) 760-3901
rmuise@americanfreedomlawcenter.org

CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

I hereby certify that this brief contains 10,788 words, exclusive of the case caption, cover sheets, any table of contents, any table of authorities, the signature block, attachments, exhibits, and affidavits, and is thus within the word limit allowed under Local Civil Rule 7.2(b)(i). The word count was generated by the word processing software used to create this brief: Word for Microsoft Office 365, Version 1904.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.