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; AGUSTIN V. ARBULU, in his official capacity as Director, Michigan Department of Civil Rights,
Defendants.

No. 1:19-cv-153

Hon. Paul L. Maloney

PLAINTIFF'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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

Christina M. Grossi (P67482)
Ann M. Sherman (P67762)
Kyla L. Ragatzki (P81082)
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)
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 Agustin V. Arbulu

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ARGUMENT

I. Defendants Have Officially Endorsed and Given the Government's Imprimatur to SPLC's "Hate Group" Designation of Plaintiff.

The Southern Poverty Law Center (SPLC) published its latest "hate" report on *February 19, 2019*, identifying Plaintiff American Freedom Law Center (AFLC) as one of the 31 "hate groups" operating in Michigan. (First Amended Compl. ¶ 22, Ex. 1 ["FAC"]; *see* https://www.splcenter.org/news/2019/02/19/hate-groups-reach-record-high).

On *February 19, 2019*, Defendant Nessel "made a presentation to the Michigan House of Representatives Judiciary Committee," which included a discussion of the Hate Crimes Unit. "During the Question and Answer session following her presentation, the Attorney General also answered the following question from Representative Ryan Berman regarding her comment about *those identifiable hate crimes*:

> Q. I was surprised to hear you say there's 28 hate groups in Michigan.[1] Can you give us more about that or the criteria of . . . who is saying that? [(*Id.*, at 35:08.)]
> A. *That information was received from the* ***Southern Poverty Law Center*** and they do a detailed analysis on that. . . ."

(Nessel Br. at 4-5 [Doc. No. 13] [emphasis added]).[2]

On *February 22, 2019*, Defendants published a *joint*[3] press release that was, and remains, posted on a Michigan government website, citing and providing hyperlinks to SPLC's most recent "Intelligence Report" and "Hate Map," which lists AFLC as one of the 31 "hate groups" operating

[1] Plaintiff was designated by SPLC as a "hate group" in prior reports, including in 2018. *See*, *e.g.*, https://www.splcenter.org/hatewatch/2018/05/15/anti-muslim-roundup-51518; Yerushalmi Decl. ¶ 5, Ex. A, attached hereto as Ex. 1). Plaintiff was one of the prior 28 groups mentioned by Defendant Nessel. (*See id*. at ¶ 5).

[2] These statements are admissible as statements of a party opponent. *See* Fed. R. Evid. 801(d)(2).

[3] During argument, counsel for Defendant Nessel sought to separate the actions of her office from those of the Michigan Department of Civil Rights (MDCR). Yet, both government agencies *joined in affirming* their reliance on SPLC's "hate group" designations and their cooperation in fighting so-called "hate" in Michigan. (FAC, Ex. 1).

in Michigan. In this public statement, Defendant Nessel stated, "Hate cannot flourish in our state . . . . 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*," referring to the "hate groups" designated by SPLC, which was the subject of the official release and which includes Plaintiff. (FAC, Ex. 1). As noted, this government endorsement of SPLC's designations was made in the context of discussing the formation of the Hate Crimes Unit and the MDCR's intent to create a database to collect, record, and share information regarding "hate" incidents, including "incidents" protected by the First Amendment. (FAC, ¶¶ 14, 19, 29, Ex. 1). Defendant Arbulu has confirmed his intent to create this database. (*See, e.g.*, Pl.'s Br at 3-4 [Doc. No. 19]).

On *February 28, 2019*, Plaintiff filed this lawsuit. (Compl. [Doc. No. 1]).

On *February 28, 2019*, Defendant Nessel, reacting to *this* lawsuit, publicly stated:

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

(FAC ¶ 52, Ex. 4).[4] The reasonable inference drawn from this public statement is that the "organizations" referred to in *thi*s partisan post about *this* lawsuit includes Plaintiff.

On March 12, 2019, Plaintiff filed its FAC,[5] principally to add Defendant Nessel's recent Facebook post. This post effectively confirms in the mind of the public the challenged policy directive; it underscores that pursuant to this directive she is "pursu[ing] organizations that engage

[4] Per the exhibit filed on March 13, 2019, this Facebook post received over a thousand likes (1.2K), 207 comments, and 192 shares. (FAC, Ex. 4). During argument, the Court questioned the relevance of such facts. Plaintiff responds by noting that this is a continuation of the reputational harm, as Defendant Nessel has a strong public following.

[5] A "corrected" FAC was filed on March 13, 2019. The Clerk of Court requested that the attached exhibits be re-filed as separate exhibits.

in illegal conduct against minority communities"; and it leaves little doubt that she considers Plaintiff to be one of these "organizations." (FAC ¶¶ 50-53, Ex. 4).

In her brief filed on *April 16, 2019*, Defendant Nessel confirmed her pledge to *pursue* any "credible" tip, and that her office considers SPLC to be a credible source of such tips. She also confirmed that SPLC has "pointed the finger" at Plaintiff. (*See* Nessel Br. at 15 [explaining "that the Hate Crimes Unit will independently investigate all credible tips—including tips that originate from all sources, including, but not limited to, the Southern Law Poverty Center."]; *id*. at 5 [confirming reliance on SPLC as a credible source]); *id*. at 16 [not disputing that the "newly-created Hate Crimes Unit is reviewing a tip from a source [SPLC] that has pointed the finger at AFLC"]; *id*. at 16-17 [pledging "to follow-up on every credible tip"]).

On *April 23, 2019*, Defendant Nessel was invited to "discuss issues about hate crimes legislation and – and [her] work on the hate crimes issue." (Tr. at 3:4-5 [Doc. No. 23-1]). We highlight two initial matters regarding the transcript submission. First, Defendant Nessel did not provide any sworn testimony on the issues raised. And second, no one spoke on behalf of Defendant Arbulu or the MDCR. Thus, there is nothing in the transcript that affects the allegations against Defendant Arbulu. But more to the point, Defendant Nessel's post-lawsuit "testimony" does not alleviate the harm alleged nor can it be used to contradict allegations in the FAC.[6]

We also highlight one point of agreement. In her "testimony," Defendant Nessel quotes Elie Wiesel's observation that, "Whenever (sic) men or women are *persecuted* because of their . .

[6] For example, Defendant Nessel claims that she is not "working together with" SPLC. (Tr. at 41:16-18). That statement contradicts factual allegations in the FAC. (FAC ¶¶ 3-4). Also, Defendant Nessel's prosecutor asserted that there is no joint effort between the AG's office and the MDCR. (*See* Tr. at 31:22-25 to 32:1-20). That statement is also contradicted by the allegations in the FAC, including the fact that Defendants issued a *joint* press release on the very subject. (FAC ¶¶ 14, 19, 22-34, Ex. 1).

. political views, that place must – at that moment – become the center of the universe." (Tr. at 4:17-20 [emphasis added]). Here, Plaintiff is being "persecuted" because of its "political views."[7]

In her unsworn, post-lawsuit "testimony," Defendant Nessel confirmed that her Hate Crimes Unit "will investigate all credible allegations of criminal conduct." (Tr. at 9:7-8). Defendant Nessel has already confirmed her belief that SPLC is a "credible" organization that makes "credible" allegations. (*See supra*). While Defendant Nessel asserted that she was not "working together" with SPLC (Tr. at 41:14-19),[8] she never disavowed her official position that SPLC's "hate group" designations were legitimate. Indeed, she side-stepped that part of the inquiry by focusing on the "colluding" component. (*See* Tr. at 40:24-25 to 41:1-2 ["My concern was not the crime per se, but my understoo- -- - standing is that you considered [SPLC] a legitimate source for tracking and monitoring.").

In the final analysis, nowhere in her unsworn, post-lawsuit "testimony" to the Senate Committee does Defendant Nessel publicly confirm that Plaintiff is a lawful organization engaging in lawful activity in Michigan and throughout the country. Nowhere in her statements does she publicly confirm that Plaintiff is not a "hate group." Nowhere in her statements does she officially disavow SPLC's false designation of Plaintiff as a "hate group." Nowhere in her statements does she officially denounce SPLC's false and derogatory political propaganda as set forth in its "Intelligence Report" and "Hate Map." Nowhere in her statements does she confirm that her office will not rely in any way on SPLC's political propaganda (and even then, such a statement would

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[7] "Persecution" does not require prosecution. Persecution includes the government publicly attacking a private organization's reputation, as in this case. (*See* cases cited *infra*). Defendants' joint press release endorsing SPLC's designation of Plaintiff as a "hate group" is government "persecution" based on Plaintiff's political views. It is akin to political defamation.

[8] As noted, this assertion contradicts allegations in the FAC and thus should be given no credit by the Court at this stage of the proceedings. (*See, e.g.*, FAC ¶ 3). Nonetheless, such collusion is not necessary to hold Defendants liable. (*See infra* Sec. II).

contradict what she clearly stated before this lawsuit). Nowhere in her statements does she confirm that the MDCR will not be maintaining a database of "hate" incidents that includes constitutionally protected activity, as Defendant Arbulu expressly confirmed was the case.[9] Nowhere in the statements does she confirm that Plaintiff is not subject to surveillance or investigation or that its activities will not be "watched" by the MDCR and kept in a government database, which will then be shared with others. Indeed, as noted previously, in her brief filed in this Court and in official public statements made prior to the filing of this lawsuit, Defendant Nessel confirms the opposite, calling into question the credibility of these latest unsworn statements and further demonstrating the need for judicial relief. At a minimum, it demonstrates the need for this case to proceed to discovery, where document production requests and sworn deposition testimony can test the legitimacy of these unsworn, post-lawsuit statements.

One final point to highlight. Defendant Nessel begins her "testimony" to the committee by invoking the emotionally charged issue of the Holocaust, stating, "I've been invited here today, as Senator McBroom indicated, to discuss the creation of Michigan's new Hate Crimes Unit. This is a poignant segue from my earlier engagement today where I attended and spoke at the State of Michigan Holocaust Commemoration." (Tr. at 3:18-22). At the conclusion of this hearing and immediately following Defendant Nessel's statements, Senator Moss noted that Defendant Nessel's "testimony is in very good timing with the Holocaust Commemoration ceremony that we had today" and that he "wanted to just at least give some support to her efforts," stating that they "are joined by a member of our community who survived the Holocaust [and] who wanted to make some remarks." (Tr. at 58:18-20, 24-25 to 59:1-2). The speaker was Rene Lichtman, who

[9] Nothing in this transcript undermines Plaintiff's claims against Defendant Arbulu. Neither Defendant Arbulu nor anyone from his office appears in this transcript.

apparently attended the commemoration where Defendant Nessel previously spoke and who sat and listened to the hearing. Mr. Lichtman, a member of the public paying attention to the actions and words of Defendant Nessel, stated, in relevant part: "I've been listening to the discussion about hate speech, and I think it's -- for me it's been a very important discussion." (Tr. at 6:5-7). He continues, "[F]rankly I think hate speech frankly leads -- leads to -- to -- can lead to hate crimes; not necessarily by the person who's doing the hate speech, but by the fact -- by the way it's interpreted by others. . . . they [referring to terrorists who recently attacked Jews and Muslims] were motived by the hate speech of others." (Tr. at 60:25 to 61:1-3, 8-9). Per Mr. Lichtman, "[P]eople are very fearful about the type of hate speech that they hear around them; hate speech against people of -- of -- homosexuals, about the gay community, against the gay community or against people of color." (Tr. at 62:6-9). He concludes by stating, "I followed Robert Miles and he was never -- he was never caught for hate speech. . . . I think he should be tried for -- for -- for hate speech." (Tr. at 62:16-18, 22-23). Defendants' submission supports Plaintiff's argument regarding the harm Defendants' actions cause to Plaintiff's reputation, as we see through the eyes of the public that are watching this matter unfold. (*See also* Yerushalmi Decl. ¶ 14 at Ex. 1).

II. Plaintiff Has Standing to Challenge Defendants' Official Endorsement of SPLC's "Hate Group" Designation.

Standing alone, Defendants' official press release of February 22, 2019, is Defendants' endorsement and thus the government's imprimatur of SPLC's designation of Plaintiff as a "hate group." This official endorsement has been confirmed by *contemporaneous* statements made by Defendants. At no time relevant has any Defendant officially and publicly disavowed SPLC's designation of Plaintiff as a "hate group." This official, public release is "an unexpired and unretracted government action." *Foretich v. U.S.*, 351 F.3d 1198, 1213 (D.C. Cir. 2003) ("Case law is clear that where reputational injury derives directly from an unexpired and unretracted

government action, that injury satisfies the requirements of Article III standing to challenge the action.").

Defendants' official, public affirmation and endorsement of SPLC's "hate group" designation of Plaintiff has harmed, *and continues to harm*, Plaintiff's reputation, regardless of any other actions taken pursuant to it. *Parsons v. United States DOJ*, 801 F.3d 701, 711-12 (6th Cir. 2015) ("Reputational injury . . . is sufficient to establish an injury in fact. . . . Stigmatization also constitutes an injury in fact for standing purposes.").

In addition to the reputational harm, economic loss has flowed, *and continues to flow*, from this very harm. As one example, Amazon denies Plaintiff access to its charitable giving program because of this "hate group" designation. (FAC ¶ 35). Both harms (reputational and economic), which are separate injuries for standing purposes, are concrete. Both harms are "fairly traceable" to Defendants since Defendants are now contributors to the harm as *government officials* endorsing the designation. *Parsons*, 801 F.3d at 714 ("The fact that a defendant was one of multiple contributors to a plaintiff's injuries does not defeat causation."); *see also id*. at 713 ("The causation need not be proximate. To that end, the fact that an injury is indirect does not destroy standing as a matter of course.").

During argument, the Court asked Plaintiff's counsel for a concrete example of harm caused by Defendants' endorsement of the "hate group" designation. In *Meese v. Keene*, 481 U.S. 465, 473-74 (1987), the plaintiff presented expert opinion testimony and other evidence, including an opinion poll, to show that the "political propaganda" designation would cause harm to his political campaign. That was sufficient to satisfy standing. As noted, in *Meese*, the plaintiff submitted affidavits *during summary judgment proceedings* to demonstrate that the "political propaganda" *label* would (future tense) cause him harm. *See id*. at 473 ("We find, however, that

appellee has alleged and demonstrated more than a 'subjective chill'; *he establishes that the term 'political propaganda' threatens to cause him cognizable injury*.") (emphasis added). Here, it is self-evident that labeling a group a "hate group" is harmful to its reputation, particularly when the designation is endorsed and confirmed by the Michigan Attorney General, the top law enforcement officer in the state. Moreover, the designation is raised in the context of the state's Hate Crimes Unit, creating the reasonable inference that such a designation is not only a pejorative label but one that is attached to criminal organizations. Expert testimony is not necessary to demonstrate that this designation is pejorative and harmful to Plaintiff's reputation. The evidence also shows that such a designation causes economic harm to Plaintiff, *in addition to reputational harm*. It is without dispute that Amazon blocks Plaintiff from participating in its charitable giving program due to this designation. (FAC ¶ 35). In sum, Plaintiff has "establishe[d] that the term ['hate group'] threatens to cause [it] cognizable injury," and the fact of this cognizable injury is "uncontradicted." *See Meese*, 481 U.S. at 474; (*see also* Yerushalmi Decl. ¶¶ 4-13, Ex. A, at Ex. 1, setting forth evidence of injury caused by the "hate group" designation).

Because Defendants have joined in SPLC's "hate group" designation and have provided the *government's imprimatur* to it, the injury is concrete and fairly traceable to Defendants. It is no argument that because Amazon (or any other source of harm related to the "hate group" designation) is a third-party that this evidence of harm resulting from the "hate group" designation is not relevant here. Nor is it relevant to argue that relief against Defendants is improper because it will not stop SPLC from continuing to falsely label Plaintiff. As stated by the Sixth Circuit:

> In *Meese*, the defendant, the Attorney General, espoused an analogous argument—that enjoinment of the DOJ's label of certain films as "political propaganda" would not stem negative reaction to the plaintiff's exhibition of the films. . . . The Supreme Court disagreed, articulating that the harm to plaintiff occurred because "the Department of Justice has *placed the legitimate force of its criminal enforcement powers behind the label of 'political propaganda*.'" . . . 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*." . . .
>
> The Agencies also assert that an order declaring the 2011 NGIC Report unconstitutional would not alleviate the alleged harm entirely *because the information on Juggalo activity is available through the aforementioned alternate channels*. But it need not be likely that the harm will be *entirely* redressed, as partial redress can also satisfy the standing requirement. *See Meese*, 481 U.S. at 476 ("enjoining the application of the words 'political propaganda' to the films would at least partially redress the reputational injury of which appellee complains").

Parsons, 801 F.3d at 716 (emphasis added). As noted in *Foretich*, "Such a declaration [sought by Plaintiff] will remove the imprimatur of government authority" from the "hate group" designation in this case. *Foretich*, 351 F.3d at 1215.

III. Defendant Nessel's Unsworn, Post-Lawsuit "Testimony" Does Not Moot this Case.

Defendant Nessel seeks to escape liability by pointing to unsworn, post-lawsuit statements made during an oversight committee hearing on April 23, 2019—statements that purportedly exonerate her by contradicting her official, *pre*-lawsuit statements. To begin, Defendant Nessel can defeat claims for prospective relief only if she "can demonstrate that 'there is no *reasonable expectation* that the wrong will be repeated.' [Her] burden is a heavy one." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) (emphasis added). 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." *Id*. at 632. Thus, "[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. More importantly, the Court concluded 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." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000). Defendants' endorsement of SPLC's "hate group" designation remains posted on a Michigan government website. Defendants continue to endorse SPLC's designations as credible. Defendants have never publicly disavowed these false designations. This case is not moot.

IV. Defendants Misapprehend Plaintiff's Equal Protection Claim.

Defendants' criticism of Plaintiff's equal protection claim misapprehends the controlling law. The *principle of law applicable here* was articulated by the U.S. Supreme Court in *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), where the Court stated, "[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." Consequently, in the First Amendment context, when the government *targets* certain groups *based upon their viewpoints*, as in this case, not only is it a violation of the First Amendment, it is a violation of the Equal Protection clause. In *Mosley*, the Court held that the challenged law made an impermissible distinction between labor picketing and other peaceful picketing. Thus, the impermissible distinction was based on the viewpoint of the speakers—the case did not involve a suspect class or other category of persons. Here, Defendants are making an impermissible distinction between groups designated by SPLC as "hate groups" based on their *political viewpoints* and those that have not been so designated. This disparate treatment based upon the speaker's viewpoint violates the First Amendment and the equal protection guarantee of the Fourteenth Amendment.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2019, 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.