No. 25-1684

United States Court of Appeals for the Sixth Circuit

AMERICAN FREEDOM LAW CENTER, INC.,

Plaintiff - Appellant,

v.

DANA NESSEL, in her official capacity as Attorney General of Michigan; **JOHN E. JOHNSON, JR.,** in his official capacity as Director, Michigan Department of Civil Rights, identified on initiating document as Agustin V. Arbulu,

Defendants - Appellees.

On Appeal from the United States District Court
for the Western District of Michigan
Honorable Paul L. Maloney
Civil Case No. 1:19-cv-153

APPELLANT'S REPLY BRIEF

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Defendants-Appellees Michigan Attorney General Dana Nessel ("AG") and the Director of the Michigan Department of Civil Rights John E. Johnson, Jr. ("MDCR") (collectively referred to as "Defendants") are weaponizing their powerful government offices and misusing government resources to target political opponents. It is one thing for a radically-partisan private organization like the Southern Poverty Law Center ("SPLC") to express its falsehoods about political opponents. However, when the AG and MDCR join and officially endorse this partisan attack by lending *government resources* and thus becoming a government enforcement agency for SPLC's radical agenda, the injury to Plaintiff-Appellant American Freedom Law Center ("Plaintiff" or "AFLC") is apparent and concrete, and the protections of the United States Constitution are triggered.

This is not a hard case. The combination of *Meese v. Keene*, 481 U.S. 465 (1987), and *Parsons v. United States DOJ*, 801 F.3d 701 (6th Cir. 2015), among others, compels this Court to reverse the district court's ruling on standing. Indeed, case law compels the Court to remand for entry of judgment in Plaintiff's favor on its constitutional claims. *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 242 (6th Cir. 2015) (reversing the grant of summary judgment by the district court in favor of the defendants and remanding for entry of judgment in favor of the plaintiffs).

In the final analysis, Defendants have placed the power of the State Government, with its authority, presumed neutrality, and assumed access to all the facts, behind an appellation designed to reduce the effectiveness of Plaintiff's speech and other constitutionally-protected activities in the eyes of the public. Such governmental action violates the First and Fourteenth Amendments.

I. Summary of Undisputed Material Facts.

Defendants offer this Court a tendentious view of the facts. The record confirms that there is no dispute as to the material facts that demonstrate a concrete harm to Plaintiff that is fairly traceable to Defendants and likely to be redressed by this Court. And these facts further demonstrate that Plaintiff is entitled to summary judgment on its constitutional claims.

- Defendants *officially* and *publicly* endorsed and promoted the false designation of Plaintiff as a "hate group," and *they utilized government resources to do so*. (R.77-2, AG Dep. at 22:18-25 to 23:1-7, PageID.904; R.77-2, AG Dep. Ex. 2. PageID.921-22; R.77-3, AG Admissions ¶¶ 13-16. PageID.951-52; R.77-4, MDCR Admissions ¶¶ 14-16, PageID.957).
- Plaintiff is labelled a "hate group" because of its legal and constitutionally protected activity. (R.77-8, AFLC Resp. to AG Interrogs. ¶ 4, PageID.982-85; R.24-1, Yerushalmi Decl. ¶¶ 2-13, PageID.443-46; *see also* R.77-2, AG Dep. Ex. 5 [acknowledging that "speak[ing] out" gets you on the "hate group" list],

PageID.927; R.77-2, AG Dep. at 38:14-25 to 40:1-3, PageID.908; R.77-2, AG Dep. Ex. 4 [SPLC "Intelligence Report"], PageID.924; *see also* R.91-2, Yerushalmi Dep. II at 67:13-25 to 68:1-7, PageID.1707).

- Plaintiff is not a criminal organization nor has it *ever* engaged in any criminal activity. (AG Dep. at 37:9-12; *see also id.* at 16:17-25 to 18:1-5, PageID.907, 902; AG Admissions ¶ 7 [admitting that the AG has "no credible information that Plaintiff has ever engaged in any criminal activity"], PageID.950; *see also* R.77-5, Yerushalmi Suppl. Decl. ¶ 2, PageID.960; R.24-1, Yerushalmi Decl. ¶ 4, PageID.443).
- The "hate group" label *is a harmful and pejorative label*. (R.77-2, AG Dep. at 16:8-13; 37:5-7, PageID.902, 907; *see also* R.77-5, Yerushalmi Suppl. Decl. ¶ 2, PageID.960; R.24.1, Yerushalmi Decl. ¶¶ 2-13, PageID.443-46).
- The "hate group" designation of Plaintiff has caused, and continues to cause, financial and reputational harm to Plaintiff. (R.77-8, AFLC Resp. to AG Interrogs. ¶ 4, PageID.982-85; R.24-1, Yerushalmi Decl. ¶¶ 2-13, PageID.443-46; R.77-10, Yerushalmi Dep. at 127:7-25 to 130:1-20, Errata, PageID.996-97).
- Plaintiff has to expend resources, *including valuable litigation resources*, in an effort to repair and rehabilitate the harm to its reputation caused by Defendants. (R.24-1, Yerushalmi Decl. ¶ 6, PageID.444; R.77-8, AFLC Resp. to AG

Interrogs. ¶ 4, PageID.982-85; R.91-2, Yerushalmi Dep. II at 94:7-9; 95:25 to 96:1-10, PageID.1712).

- Defendants' official and public endorsement of the false designation of Plaintiff as a "hate group" is now a matter of official *government* records, all of which are available to the public via FOIA. (R.77-2, AG Dep. at 34:4-6, PageID.907; R.77-4, MDCR Admissions ¶ 14, PageID.957; R.77-2, AG Dep. 94:10-25 to 96:1-6, PageID.914; R.77-2, AG Dep. Ex. 31 [Official Government Record: Spreadsheet listing of "Hate Groups," that includes Plaintiff], PageID.946-47; R.77-2, AG Dep. at 40:2-3, PageID.908).
- Defendants have *never* publicly apologized, recanted, or retracted in any way their public designation of Plaintiff as a "hate group." (*See* R.77-10, Yerushalmi Dep. at 128:21-24, Page ID.996; R.77-9, AG Resp. to Interrogs. ¶ 6, PageID.990; R.77-6, MDCR Am. Resp. to Interrogs. ¶ 8, PageID.966; R.91-2, Yerushalmi Dep. II at 87:23-25 to 88:1-4, PageID.1710).
- Defendants have *refused* to publicly acknowledge/make a public announcement, at least equal in scope, manner, and duration to the February 22, 2019 press release, affirming that Plaintiff is not a hate group and affirming that they disagree with SPLC's designation of Plaintiff as a "hate group." (R.77-9, AG Resp. to Interrogs. ¶ 6, PageID.990; R.77-6, MDCR Am. Resp. to Interrogs. ¶ 8, PageID.966).

- The AG has personally and publicly pledged to use her government power, including her Hate Crimes Unit, to "combat," "fight," and "tackle" the SPLC-designated "hate groups." (R.77-2, AG Dep. Ex. 5, PageID.927; R.77-2, AG Dep. Ex. 2, PageID.921-22; R.77-2, AG Dep. at 46:19-25 to 47:1-14, PageID.910; R.77-2, AG Dep. Ex. 10 [Chief of Staff email], PageID.940).
- The "AG has publicly stated that the [hate crimes] unit will be looking at [*i.e.*, investigating and surveilling] hate groups from the SPLC." (R.77-2, AG Dep. at 46:19-25 to 47:1-14, PageID.910; R.77-2, AG Dep. Ex. 10 [Chief of Staff email], PageID.940).
- The AG has used her Facebook page—a medium she uses for official purposes—to vilify Plaintiff, inferring that Plaintiff is an organization that "*engage*[*s*] *in illegal conduct against minority communities*." (R.77-2, AG Dep. at 41:1-25 to 42:1-22, PageID.908-09; R.77-2, AG Dep. Exs. 6 [Facebook post] & 7 [Detroit News story], PageID.928-32; R.77-2, AG Dep. at 41:10-12, PageID.908; R.77-3, AG Admissions ¶¶ 20-21, PageID.953).
- The AG, through her Hate Crimes Unit, has investigated an SPLC-designated "hate group" (Church Militant) based on activity by the organization that is constitutionally protected, and the AG expressly relied on the SPLC designation in the Unit's "formal report." (R.77-2, AG Dep. at 28:25 to 29:1-9;

78:7-25 to 79:1-9, PageID.905, 912; R.77-2, AG Dep. Ex. 24 ["Formal Report" of Church Militant], PageID.943-44).

- The AG, through her designated witness, *falsely* stated *under oath* in discovery filed in this case that "[t]he Hate Crimes Unit does not investigate groups."[1] (R.77-9, AG Resp. to Interrogs. ¶ 2, PageID.989; R.77-2, AG Dep. at 42:24-25 to 44:1-4, PageID.909; R.77-2, AG Dep. Ex. 8 [Aff. of Sunita Doddamani] ["attest[ing under oath] to the fact that the Hate Crimes Unit [was] in the midst of an open and ongoing criminal investigation involving . . . Church Militant"], PageID.933; *see also* R.77-2, AG Dep. at 28:25 to 29:1-9; 100:16-25 to 101:1-20, PageID.905, 915).
- The AG conducts investigations under the cloak of secrecy (adding to the chilling effect caused by threatening such investigations). (R.77-2, AG Dep. at 33:8-15, PageID.906).
- With the "click of a button," political opponents can make a complaint to the AG's Hate Crimes Unit similar to the complaint made against Church Militant and thus trigger the politically-charged Hate Crimes Unit into action. (*See*

[1] Doddamani is not a credible witness, and her testimony seeking to deflect the pernicious actions of the AG should be given no weight. Indeed, her efforts to explain away the AG's *actual* words (*i.e.*, admissions that she was targeting groups listed as "hate groups" by the SPLC) should be rejected regardless of her mendacity. (*See* AG Br. at 8-12, 43-44, 49 [relying extensively on the testimony of Doddamani]).

R.77-2, AG Dep. at 30:13-23 ["There's a button on the website to submit a complaint or contact the [hate crimes] unit."], PageID.906).

- The Director of MDCR, a government agency, publicly announced using government resources that Plaintiff is a "hate group" operating in Michigan. (R.77-2, AG Dep. Ex. 2, PageID.921-22; R.77-10, Yerushalmi Dep. at 127:7-25 to 130:1-20, Errata, PageID.996-97).
- The Director of MDCR, a government agency, publicly announced ***using government resources*** 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." (R.77-2, AG Dep. Ex. 2, PageID.921-22).
- The Director of MDCR has authority to post official, public announcements such as the February 22, 2019 press release on the official government website of the MDCR. (R.77-7, MDCR Dep. at 27:15-17, PageID.971).
- MDCR has previously "experimented" with a hate and bias incidents database. (R.77-6, MDCR Am. Resp. to Interrogs. at ¶ 6, PageID.965).
- There is ***no*** MDCR policy that prohibits the creation of a hate and bias incidents database as set forth in the February 22, 2019 release. (R.77-7, MDCR Dep. at 31:22-25 to 32:1, PageID.972).

- 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. (R.77-7, MDCR Dep. at 27:15-25 to 29:1; 31:22-25 to 32:1, PageID.971-72).

II. Plaintiff Has Established a Concrete Injury that Is Fairly Traceable to Defendants' Conduct and Likely to Be Redressed by the Court.

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). Defendants argue that Plaintiff cannot establish a concrete harm traceable to their conduct that is likely to be redressed by the Court. The record proves otherwise.

A. Concrete Harm.

1. Injury to Reputation and Stigmatization.

There is no reasonable dispute that the "hate group" label of Plaintiff that was publicly endorsed by Defendants *in official government records*, including a press release posted on the government's website for over a year utilizing government resources, causes harm to Plaintiff's reputation. Defendants acknowledge, as they must, that the "hate group" label is pejorative. Indeed, it was meant to be. Without question, the "hate group" label is used to describe Plaintiff "in a way that shows strong disapproval." https://www.merriam-webster.com/dictionary/stigmatize (defining stigmatize).

Harm to reputation, regardless of other harms that might flow from it, such as the economic harms that Plaintiff *also* suffered, is alone a sufficient injury for standing purposes. As this Court stated in *Parsons*, "[s]tigmatization . . . constitutes an injury in fact for standing purposes." *Parsons*, 801 F.3d at 712. This Court did not say "stigmatization" *plus* some additional harms. The fact remains that publicly designating a private (and lawful) organization a "hate group" is harmful to the organization's reputation. When Defendants made their announcement to the public on February 22, 2019, endorsing the SPLC "hate group" designation of Plaintiff, Defendants injured Plaintiff's reputation, and this injury is sufficient for standing purposes. *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 those organizations in their respective communities"); *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"); *NCAA v. Governor of N.J.*, 730 F.3d 208, 220 (3d Cir. 2013) ("As a matter of law, reputational harm is a cognizable injury in fact.") (citing *Meese*); *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."); *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"). The case law establishing this point is overwhelming.

The district court's *first* ruling on standing makes the point quite clearly. Per the district court:

> 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*. . . .

Am. Freedom Law Ctr., Inc. v. Nessel, No. 1:19-cv-153, 2020 U.S. Dist. LEXIS 60622, at *16 (W.D. Mich. Jan. 15, 2020) (emphasis added).

It is one thing for a radically-partisan, private organization such as the Southern Poverty Law Center to designate Plaintiff a "hate group," but the *constitutional* injury occurs because the government has endorsed this false designation and *has used government resources to promote it*. To argue no reputational harm for standing purposes as Defendants do here (and the district court did below when ruling on the motions for summary judgment), is wrong as a matter of fact and law.

2. Economic Harm.

In *addition* to the reputational harm, Plaintiff has also suffered harm to its "economic interests." *See 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). The time, energy, and resources Plaintiff must devote through media releases, mailings, Internet postings, and *this* litigation to remedy the damage done to its public reputation by the false "hate group" designation and to rehabilitate that reputation are concrete injuries sufficient to maintain this action. (*See* R.24-1, Yerushalmi Decl. ¶ 6 ["Because of this harmful political propaganda effort, AFLC must spend money, time, effort, and other resources combating this false 'hate group'

designation. AFLC does this through its website, social media, direct mailing, and coordinating efforts with other groups that are in a similar situation."], PageID.444; R.77-8, AFLC Resp. to AG Interrogs. ¶ 4, PageID.982-85; Yerushalmi Dep. II at 94:7-9; 95:25 to 96:1-10, PageID.1712). As AFLC Co-Founder David Yerushalmi noted in his testimony,

> 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.

(R.77-10, Yerushalmi Dep. at 130:5-13, Page ID.997). Remarkably, Defendants seek to use Plaintiff's efforts to publicly combat the reputational harm as a basis to argue that there is no harm. (*See, e.g.,* MDCR Br. at 28; AG Br. at 33, 39, 43-45). But the very fact that Plaintiff must devote time and resources to do so *is evidence of harm*. And this effort to combat the reputational harm is stealing resources away from Plaintiff's litigation efforts. Plaintiff would prefer to focus all of its limited time and resources (it is a nonprofit organization) on litigation and not having to combat this public attack on its reputation *by the government*.

Additionally, as the record demonstrates without contradiction, the "hate group" label causes Plaintiff to suffer financial harm:

> 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. A news story regarding this effort can be found here: "America's Biggest Christian Charity Funnels Tens of Millions to Hate Groups," Sludge (March 19, 2019) (https://readsludge.com/2019/03/19/americas-biggest-christian-charity-funnels-tens-of-millions-to-hate-groups/).
>
> 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. A news story about this effort can be found here: "America's Biggest Charities Are Funneling Millions to Hate Groups From Anonymous Donors," Sludge (February 19, 2019) (https://readsludge.com/2019/02/19/americas-biggest-charities-are-funneling-millions-to-hate-groups-from-anonymous-donors/). *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. A news story about this effort can be found here: "Leftists Hound Mastercard, Demanding It Put Conservative 'Hate Groups Out of Business,'" PJ Media (June 27, 2019) (https://pjmedia.com/trending/leftists-hound-mastercard-demanding-it-put-conservative-hate-groups-out-of-business/).
>
> 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 Michigan Attorney General and the Director of the Michigan Department of Civil Rights 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.

(R.77-8, AFLC Resp. to AG Interrogs. ¶ 4 [emphasis added], PageID.982-85).

This Court in *Parsons* (and the Supreme Court in *Meese*) properly rejected the argument advanced by Defendants here that the alleged reputational harm and chilling effect would not be remedied by a decision favorable to Plaintiff because this "hate group" label is "available from a variety of other sources"—specifically including the SPLC. As this Court noted in *Parsons* (and the Supreme Court in *Meese*), the harm to Plaintiff occurred *because* the State "has placed the legitimate force of its" authority behind the pejorative label. *Parsons*, 801 F.3d at 716-17 (citing *Meese*); *see also infra* § II.B.

In conclusion, Plaintiff has suffered an injury sufficient to confer standing to challenge Defendants' (government officials) endorsement and promotion of the "hate group" label.

B. Causation and Redressability.

Plaintiff also satisfied the causation and redressability elements for standing. Once again, the district court had it right in its *first* ruling on standing. Per that ruling:

> 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.[2]

Am. Freedom Law Ctr., Inc., 2020 U.S. Dist. LEXIS 60622, at *16-19. The district court's complete about face on standing is inexplicable.

This Court in *Parsons* explained the redressability issue that is applicable here, and, as noted above, this explanation properly dispenses with the erroneous arguments that Defendants advance in this case:

> The Agencies argue that the alleged reputational harm and chilling effect would not be remedied by an order setting aside the 2011 [National Gang Intelligence Center or] NGIC Report *because information about criminal activity performed by Juggalo subsets* ***is available from a variety of other sources****, including state and local law enforcement* in the locations where the Juggalos were allegedly injured. . . . 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

[2] These "allegations" have now been proven as undisputed facts. *See supra* § I.

> 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"); [*Friends of the Earth, Inc. v.*] *Laidlaw* [*Envtl. Servs., Inc.*, 528 U.S. 167, 185 (2000)] (finding civil penalties sufficient to satisfy redressability noting that they have at least "*some* deterrent effect") (emphasis added). "It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of a suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress." *Laidlaw*, 528 U.S. at 185-86. 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 Defendant's endorsement of the false label that Plaintiff is a "hate group" violates federal law would reassure Plaintiff and those who associate with and donate to Plaintiff that they could freely participate in their constitutionally protected activities without being denigrated and labeled as a "hate group" by government officials (who possess authority and power that the SPLC does not possess) and appearing in government records as a "hate group." Furthermore, the requested relief will help repair Plaintiff's public reputation—a reputation that Defendants purposely tarnished through their false and injurious actions.

Accordingly, the Court could redress the harm by granting judgment in Plaintiff's favor and declaring, at a minimum, that Defendants' false and injurious

endorsement of the "hate group" label of Plaintiff violates its constitutional rights. The Court could also enter an order enjoining Defendants from making such false and harmful public statements about Plaintiff in the future. *See, e.g., 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 could issue an order expunging all official government records that label or identify Plaintiff as a "hate group."[3] *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").

In sum, "[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." *See Parsons*, 801 F.3d at 717 (emphasis added). The declaration Plaintiff "seek[s] would likely combat at least some future risk that they

[3] In addition to the press release, which is a government record subject to FOIA, 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. (R.77-2, AG Dep. 94:10-25 to 96:1-6, PageID.914; R.77-2, AG Dep. Ex. 31, PageID.946).

would be subjected to reputational harm and chill due to the force of [Defendants'] designation." *Id*.

The Court could also declare that the MDCR's "hate and bias incident" database is unconstitutional. The MDCR continues to make a straw man argument (*i.e*., that the database was discontinued as it was no longer a "priority" for the department, *see* MDCR Br. at 13)—an argument which not only ignores the gravamen of this case (the public designation of Plaintiff as a "hate group"), but also is entirely disingenuous. Everyone was on board with the former director's plan for this database. No one objected to or criticized his plan, which he made very public and which he officially announced on February 22, 2019, using government resources. Indeed, there is no dispute that MDCR previously "experimented" with such a database. There is no dispute that nothing prevents MDCR from implementing such a database in the future (absent relief from this Court). And there is no doubt that this lawsuit caused MDCR to push "pause" on this plan. This voluntary cessation of the Orwellian governmental database does not preclude declaratory and injunctive relief related to this issue. *See, e.g., United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953) ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e*., does not make the case moot. A controversy may remain to be settled in such circumstances, *e. g*., *a dispute over the legality of the challenged practices*. The defendant is *free to return to his old ways*.

This, together with *a public interest in having the legality of the practices settled*, militates against a mootness conclusion. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.") (internal citations omitted) (emphasis added).

This Court's ruling in *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019), in which the Court found that the plaintiff's challenge to a university's speech restriction could advance, is informative here. Per the Court:

> While all governmental action receives some solicitude, *not all action enjoys the same degree of solicitude*. Determining whether the ceased action "could not reasonably be expected to recur," . . . takes into account the totality of the circumstances surrounding the voluntary cessation, including the manner in which the cessation was executed.
>
> Where the government voluntarily ceases its actions by enacting new legislation or repealing the challenged legislation, that change will presumptively moot the case unless there are clear contraindications that the change is not genuine. . . .
>
> On the other hand, where a change is merely regulatory, the degree of solicitude the voluntary cessation enjoys is based on whether the regulatory processes leading to the change *involved legislative-like procedures or were ad hoc, discretionary, and easily reversible actions*.
>
> *If 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*. . . .
>
> Here, the University notes that the new definitions were "approved by senior University officials, including the University's president." The University has not, however, pointed to any evidence suggesting that it

> would have to go through the same process or some other formal process to change the definitions again. Thus, the solicitude the University receives is the same as any *ad hoc* regulatory action would. *Which is to say that the solicitude does not relieve the University of much of its burden to show that the case is moot*. . . .
>
> *The timing of the University's change also raises suspicions that its cessation is not genuine*. The University removed the definitions after the complaint was filed. If anything, this increases the University's burden to prove that its change is genuine. . . .
>
> Significantly, the University continues to defend its use of the challenged definitions. Although not dispositive, the Supreme Court has found whether the government "vigorously defends the constitutionality of its . . . program" important to the mootness inquiry. . . .
>
> In sum, *the University has not put forth enough evidence to satisfy its burden to show that its voluntary cessation makes it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur*." . . . Therefore, Speech First's claim challenging the definitions of bullying and harassing behavior is not moot.

Id. at 767-70 (internal citations and quotations omitted) (emphasis added); *see also Johnson v. City of Cincinnati*, 310 F.3d 484, 490 (6th Cir. 2002) ("[W]e note that the City's assurance that it no longer enforces the Ordinance . . . does not render the present appeal moot. '[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'") (citations omitted).

As the evidence shows, the timing of the decision to not go forward with the database was a result of this lawsuit (at a minimum, the timing "raises suspicion"). But even more to the point, as Defendants admit, MDCR has previously

"experimented" with a hate and bias incidents database. (R.77-6, MDCR Am. Resp. to Interrogs. at ¶ 6, PageID.965). There is *no* MDCR policy that prohibits the creation of a hate and bias incidents database as set forth in the February 22, 2019 release. (R.77-7, MDCR Dep. at 31:22-25 to 32:1, PageID.971). And 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. (R.77-7, MDCR Dep. at 27:15-25 to 29:1; 31:22-25 to 32:1, PageID.971-72). In sum, declaratory and injunctive relief are entirely appropriate against Defendant Johnson (the director of the MDCR sued in his official capacity), and such relief would redress the injuries to Plaintiff.

III. The Undisputed Material Facts Compel the Court to Grant Judgment in Plaintiff's Favor as Targeting Plaintiff for Adverse Treatment Based on Its Political Views Violates the First and Fourteenth Amendments.

There can be no serious dispute that Plaintiff's activities are fully protected by the First and Fourteenth Amendments. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (stating that "implicit 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"); *NAACP v. Ala.*, 357 U.S. 449, 460 (1958) ("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.");

NAACP v. Button, 371 U.S. 415, 431 (1963) (noting that "association for litigation may be the most effective form of political association"); *Bible Believers*, 805 F.3d at 256 (*en banc*) (stating that disparate treatment that burdens a fundamental right, such as freedom of speech, violates equal protection).

There is no serious dispute that Plaintiff is on the "hate group" list because of its constitutionally protected activity.[4]

And there is no serious dispute that Defendants' actions have harmed those activities, as the arguments and evidence above demonstrate. *See supra*.

The fact that Plaintiff has persisted through this governmental attack on their constitutional rights does not exonerate Defendants of their illegal action. It is not necessary that Plaintiff completely shut down before it can seek remedy for its constitutional injuries in this case. *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."); *Bates v. Little Rock*, 361 U.S. 516, 523 (1960) ("Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."); *NAACP v.*

[4] (R.77-8, AFLC Resp. to AG Interrogs. ¶ 4, PageID.982-85; R.24-1, Yerushalmi Decl. ¶¶ 2-13, PageID.443-46; *see also* R.77-2, AG Dep. Ex. 5 [acknowledging that "speak[ing] out" gets you on the "hate group" list], PageID.927; R.77-2, AG Dep. at 38:14-25 to 40:1-3, PageID.908; R.77-2, AG Dep. Ex. 4 [SPLC "Intelligence Report"], PageID.924; *see also* R.91-2, Yerushalmi Dep. II at 67:13-25 to 68:1-7, PageID.1707).

Button, 371 U.S. at 433 (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"); *NAACP v. Ala.*, 357 U.S. at 460-61 ("[S]tate action which may have the *effect* of curtailing the freedom to associate is subject to the closest scrutiny."); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (stating that in the First Amendment context, "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions").

In sum, the evidence which proves the harm for standing purposes also proves the harm to Plaintiff's First and Fourteenth Amendment rights, warranting judgment in its favor on its constitutional claims. *See, e.g., Bible Believers*, 805 F.3d at 242 (reversing the grant of summary judgment in favor of the defendants and remanding for entry of judgment in favor of the plaintiffs); *Bevan & Assocs., LPA v. Yost*, 929 F.3d 366, 370 (6th Cir. 2019) ("We therefore REVERSE the district court's grant of summary judgment in favor of Appellees and remand with instructions to grant summary judgment in favor of Bevan."); *Williams v. City of Cleveland*, 907 F.3d 924, 928 (6th Cir. 2018) (same); *Allen v. Butler Cty. Comm'r*, 331 F. App'x 389, 390 (6th Cir. 2009) (same); *Lombardo v. Ernst*, 553 F. App'x 489, 492 (6th Cir. 2014) (same); *Zillow, Inc. v. Miller*, 126 F.4th 445, 451-52 (6th Cir. 2025) (same); *Wuliger v. Mfrs. Life Ins. Co. (USA)*, 567 F.3d 787, 790 (6th Cir. 2009) (same); *Republic/NFR & C*

Parking v. Reg'l Airport Auth., 410 F.3d 888, 894-95 (6th Cir. 2005) (same).

CONCLUSION

The Court should reverse the district court and remand for the entry of judgment in Plaintiff's favor on its constitutional claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 5,984 words, excluding those sections identified in Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2025, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

No.	PageID #	DESCRIPTION
R.7	54-69	Corrected First Amended Complaint
R.7-1	70-78	Exhibits 1 – 4
R.24-1		Declaration of David Yerushalmi
R.35	631-51	Opinion and Order Denying Motions to Dismiss
R.77-2	897-947	**Exhibit 1:** Deposition of the Office of the Attorney General with Exhibits
	917-20	AG Deposition Exhibit 1: Notice of Deposition
	921-22	AG Deposition Exhibit 2: February 22, 2019 Press Release
	923	AG Deposition Exhibit 3: SPLC "Hate Map" of Michigan
	924	AG Deposition Exhibit 4: SPLC "Intelligence Report" (excerpt)
	925-27	AG Deposition Exhibit 5: AG Brief (excerpt)
	928	AG Deposition Exhibit 6: AG Facebook Post
	929-32	AG Deposition Exhibit 7: Detroit News Story
	933-35	AG Deposition Exhibit 8: Affidavit of Sunita Doddamani
	936-39	AG Deposition Exhibit 9: Nessel Email Approving Press Release

	940	AG Deposition Exhibit 10: Email from AG's Chief of Staff
	941-43	AG Deposition Exhibit 12: Nessel Email re: Changing "Hate Crimes" to "Hate Groups"
	943-44	AG Deposition Exhibit 24: "Formal Report" of Criminal Investigation of Church Militant
	945	AG Deposition Exhibit 29: Letter Declining Prosecution re: Church Militant
	946-47	AG Deposition Exhibit 31: Spreadsheet Identifying American Freedom Law Center as a "Hate Group"
R.77-3	948-54	**Exhibit 2:** Attorney General's Admissions (excerpts)
R.77-4	955-58	**Exhibit 3:** MDCR's Admissions (excerpts)
R.77-5	959-61	**Exhibit 4:** Supplemental Declaration of David Yerushalmi
R.77-6	962-67	**Exhibit 5:** MDCR's Amended Responses to Interrogatories (excerpts)
R.77-7	968-76	**Exhibit 6:** Deposition of MDCR (Mary Engelman) (excerpts)
R.77-8	977-86	**Exhibit 7:** Plaintiff's Responses to the Attorney General's Interrogatories (excerpts)
R.77-9	987-93	**Exhibit 8:** Attorney General's Responses to Interrogatories (excerpts)
R.77-10	994-99	**Exhibit 9:** Deposition of David Yerushalmi with attached Errata (excerpts)
R.77-11	1000-001	**Exhibit 10:** Declaration of Robert J. Muise

R.91-2	1703-15	Deposition of David Yerushalmi with attached Errata (additional excerpts)
R.102	1735-63	Opinion and Order Granting Defendants' Motions for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment
R.103	1764	Judgment
R.104	1765-66	Notice of Appeal