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 SECOND 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

ARGUMENT

On February 22, 2019, Defendant Arbulu, joined by Defendant Nessel, published a *joint* press release that was posted on the official Michigan Department of Civil Rights website (michigan.gov/mdcr), citing and providing hyperlinks to the Southern Poverty Law Center's (SPLC) most recent "Intelligence Report" and "Hate Map," which lists Plaintiff as one of the 31 "hate groups" operating in Michigan. (First Amended Compl. ¶¶ 22-32, Ex. 1 [FAC]). In this public statement, Defendant Arbulu, specifically referring to the "SPLC Hate Map report," stated, "This is a troubling trend . . . These groups range in ideological extremes from anti-Muslim, to anti-LGBT to black nationalists and white nationalists. . . ." (FAC, Ex. 1). In this official *pre-lawsuit* statement, Defendants confirm that "MDCR is developing a process by which it can *document hate and bias incidents* in the state." (*Id*. [emphasis added]). The *specific* example of what Defendant Arbulu will "document" is as follows:

> Hate and bias incidents are those instances where an action does not rise to the level of a crime or a civil infraction. For instance, in (sic) Lansing's Old Town over the President's Day weekend experienced a spat of flyering by the white nationalists group *Patriot Front*.[1] Flyers removed by residents and visitors, but posted on social media, show the group was targeting immigrants as well as Jews with the flyers. The flyers are protected under the First Amendment and do not rise to a crime.
>
> "Hate and bias incidents serve to create a chilling effect in diverse communities, such as Old Town," Arbulu noted. *By documenting such incidents in a database*, MDCR, working with community partners, will be able to create targeted awareness and education programs to address and *combat such incidents* in general.

(FAC, Ex. 1 [emphasis added]). The Detroit News similarly reported the following:

> Arbulu pointed to a recent incident in Lansing over President's Day weekend, in which fliers saying "Keep America American" encouraged people to "report any and all illegal aliens." The fliers included a phone number for Immigration and Customs Enforcement and the website for *Patriot Front, a group the SPLC has labeled a white nationalist group.*

[1] It should not go unnoticed that Defendant Arbulu and his department specifically identified the group (Patriot Front) that was engaging in the objectionable free speech activity.

> In a statement, Arbulu said he was disappointed by the fliers, "but know this, *we are watching* and we won't allow hate to divide us."[2]

(emphasis added);[3] (FAC ¶ 28 [same]). Per Defendant Arbulu:

> Michigan has no system in place to *document, catalogue and share* information on [bias] incidents . . . to assist communities in confronting and tackling this kind of prejudice, harassment and *threat*. *It is time for that to change*.[4]

(Arbulu Br. at 6 [emphasis added] [Doc. No. 14-1]).[5]

In sum, the facts and allegations establish, at a minimum, two points that compel this Court to deny Defendant Arbulu's motion to dismiss. First, Defendant Arbulu has officially endorsed and given the government's imprimatur to SPLC's designation of Plaintiff as a "hate group." This alone establishes Plaintiff's standing, and it establishes that Plaintiff has alleged cognizable claims under the Constitution. (*See* Pl.'s Br. at 14-22 [Doc. No. 19]). This 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. (*See, e.g.*, Yerushalmi Decl. ¶¶ 2-13 [Doc. No. 24-1]). In short, 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."); *see also Parsons v. United States DOJ*, 801 F.3d 701, 711-12 (6th Cir.

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[2] "Nessel, civil rights unit to increase prosecution of hate crimes," The Detroit News at https://www.detroitnews.com/story/news/local/michigan/2019/02/22/ag-department-civil-rights-document-prosecute-hate-crimes/2954169002/.

[3] In his "testimony" before the Senate committee, Defendant Arbulu claims that this database "has nonetheless been characterized, unfortunately, often wrongfully, by others." (Tr. at 11:1-2 [Doc. No. 26-1]). Here, Plaintiff is relying on Defendant Arbulu's own words to "characterize" it.

[4] Thus, the "log" that was previously maintained and referenced by Defendant Arbulu in his "testimony" (Tr. at 6:18-25 to 7:1-4) is not the database at issue here.

[5] Defendant Arbulu's statements are admissible as statements of a party opponent. *See* Fed. R. Evid. 801(d)(2).

2015) ("Reputational injury . . . is sufficient to establish an injury in fact. . . . Stigmatization also constitutes an injury in fact for standing purposes.").

And second, the facts and allegations establish Defendant Arbulu's intent to "document, catalogue and share information on [bias] incidents," which includes documenting, cataloguing, and sharing information about "hate groups" engaging in free speech activity and operating in Michigan—and per the joint press release, this expressly includes Plaintiff. (FAC, Ex. 1).

Defendant Arbulu's unsworn, post-lawsuit "testimony" before the Senate Oversight Committee on May 21, 2019, does not change this conclusion. At this stage of the proceedings, the Court should not credit Defendant Arbulu's unsworn statements, particularly insofar as they contradict allegations in the FAC and his *pre-lawsuit* statements. At a minimum, such a conflict does not compel dismissal. If anything, it highlights the need for this case to proceed to discovery.

Nonetheless, nowhere in his "testimony" does Defendant Arbulu confirm that Plaintiff is a lawful organization engaging in lawful activity in Michigan and throughout the country. Nowhere in his "testimony" does he publicly confirm that Plaintiff is not a "hate group." Nowhere in his "testimony" does he officially disavow SPLC's false designation of Plaintiff as a "hate group." Nowhere in his "testimony" does he officially denounce SPLC's false and derogatory political propaganda as set forth in its "Intelligence Report" and "Hate Map." Nowhere in his "testimony" does he confirm that his department will not rely in any way on SPLC's partisan, political propaganda. Nowhere in his "testimony" does he confirm that the MDCR will not be maintaining a database of "hate" incidents that includes constitutionally protected activity, as he previously and expressly confirmed was the case. And nowhere in his "testimony" does Defendant Arbulu confirm that Plaintiff's 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 his brief filed in

this Court and in official public statements made prior to the filing of this lawsuit, Defendant Arbulu confirms the opposite, demonstrating the need for judicial relief.

In the transcript submitted by Defendant Arbulu, Mr. Daniel Levy, the Director of Law and Policy for MDCR, made an interesting comment that turns out to be a tacit admission. He stated, "The First Amendment comes into concern if we . . . target somebody or log somebody, an - - an organization with a label." (Tr. at 41:13-16). Mr. Levy then states, "None of that is happening." (*Id*. at 41:16). But that is precisely what *is* happening . . . and *has* happened. In the joint press release, Defendant Arbulu has already publicly endorsed and given the government's imprimatur to the "hate group" label of Plaintiff. (FAC ¶¶ 22-34, Ex. 1). Defendant Arbulu has already admitted that his "database" will include targeting groups that engage in First Amendment activity that he apparently considers "hate" speech.[6] (*See* FAC ¶¶ 22-28, Ex. 1).

Defendant Arbulu claims that he and his department have yet to put into place specific protocols for the database creation and collection efforts, arguing that the case, therefore, is not ripe. He is mistaken for at least three reasons. First, 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) (noting that the ripeness requirements are relaxed in the First Amendment context). Second, we certainly have enough concrete information from Defendant Arbulu himself to demonstrate that the creation of this database and its use violate the First Amendment. *See, e.g., Phila. Yearly Meeting of the Religious Soc'y of Friends v. Tate*, 519

[6] In a Detroit Free Press article cited in Defendant Nessel's brief filed in support of her motion to dismiss, Defendant Arbulu is quoted as follows: "Hate is a disease, and *we've got to find ways to get rid of it*. . . . Children, when they're born, they don't hate, they don't have biases. It's our society when we began to tell them . . . or how we begin to talk about people. And so, *words have an impact*. We have to be very vigilant." (Nessel Br. at 7, n.6 [citing article] [emphasis added] [Doc. No. 13]).

F.2d 1335, 1338 (3rd Cir. 1975) ("We think these allegations, at a minimum, show immediately threatened injury to plaintiffs by way of a chilling of their rights of freedom of speech and associational privacy. . . ."). The "practical effect" of this database, including Defendant Arbulu's *confirmed intent to create it*, is the chilling of free speech. *See 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."). And finally, a judicial determination that the creation of this database violates the Constitution would reassure Plaintiff and those who associate with it that they could freely participate in their constitutionally protected activities without having their political expression being recorded and surveilled by the government and becoming part of official records. *See Presbyterian Church v. United States*, 870 F.2d 518, 522-23 (9th Cir. 1989). In other words, a judicial determination is necessary to halt and prevent this chilling effect on free speech. Without it, there is nothing preventing Defendants from doing what they pledged to do prior to the filing of this lawsuit. For similar reasons, this case is also not moot: the relief sought would, if granted, make a difference to the legal interests of the parties. *See McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc) ("The test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties.") (internal quotations and citation omitted).

In sum, Defendants' motions to dismiss should be denied, and this case should proceed to discovery.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 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.