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. Malony

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

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ISSUES PRESENTED

1. Whether Plaintiff has standing to advance its claims when it has demonstrated that the challenged government action has (1) a chilling effect on its constitutionally protected activity, (2) harmed its public reputation, and (3) harmed its economic interests.

2. Whether Plaintiff's claims are ripe for review where (1) ripeness is properly relaxed in the First Amendment context, (2) Plaintiff is suffering a current hardship, and (3) the case is fit for judicial resolution.

3. Whether Plaintiff has alleged cognizable legal claims against Defendants arising under the First and Fourteenth Amendments based on a challenged policy directive that designates Plaintiff a "hate group" because of its political views and subjects Plaintiff to government investigation, surveillance, and data collection, all of which will be maintained in an official government database.

4. Whether Defendants' actions violate the First and Fourteenth Amendments when they place the power of the State's government, with its authority, presumed neutrality, and assumed access to all the facts, behind the Southern Poverty Law Center's designation of Plaintiff as a "hate group"—a designation designed to harm Plaintiff.

5. Whether prospective relief against Defendants, the officials responsible for the challenged policy directive, is appropriate where declaratory and injunctive relief 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.

6. Whether Defendants have carried their burden to demonstrate that Plaintiff's claims are moot due to Defendants' alleged voluntary cessation of illegal conduct as a result of a

statement issued by Defendant Nessel that was "timed to anticipate suit" and that does not alleviate the harm alleged in the First Amended Complaint.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Meese v. Keene, 481 U.S. 465 (1987)

Parsons v. United States DOJ, 801 F.3d 701 (6th Cir. 2015)

Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate, 519 F.2d 1335 (3rd Cir. 1975)

Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972)

Presbyterian Church v. United States, 870 F.2d 518 (9th Cir. 1989)

United States v. W. T. Grant Co., 345 U.S. 629 (1953)

INTRODUCTION

A. Defendant Nessel's Motion.

Defendant Nessel's motion to dismiss confirms that she is weaponizing the Office of the Michigan Attorney General to publicly promote, and thus *give the government's imprimatur to and endorsement of*, a false political narrative advanced by the Southern Poverty Law Center ("SPLC")—a narrative that is intended to, and in fact has, harmed Plaintiff. Defendant Nessel's objective is patent, and it is unlawful.

In the "introduction" to her brief, Defendant Nessel states that Plaintiff "essentially alleges that it has been so successful in defending and protecting *hate* speech[1] that it must bear the burden of being labeled a '*hate group*' by [SPLC]." (Nessel Br. at 1 [emphasis added] [Doc. No. 13]). The crux of the problem is that now the Michigan AG—a government official who is the State's top law enforcement officer—has, through her policy directive, explicitly and by

[1] What precisely does the Michigan AG mean when she describes Plaintiff's speech as "hate speech"? There is no such category of speech under the First Amendment. *See United States v. Alvarez*, 567 U.S. 709, 717 (2012) (describing "the few historic and traditional categories of expression long familiar to the bar" that may be restricted, stating, "[a]mong these categories are advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called 'fighting words,' child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent") (internal punctuation, quotations, and citations omitted). But the question is rhetorical because the goal of Defendants (and SPLC) is obvious: falsely label your political opponents' speech as "hate speech" to marginalize their message in an effort to ultimately ban their ideas from public discourse. The pernicious effect is clear. Just recently, a leader in Defendant Nessel's party, State Representative Yousef Rabhi (D-Mich.), "told The Daily that he personally is involved in crafting civil rights legislation that would fight hate speech, as well as the hate organizations themselves. Rabhi is worried, however, that some representatives are protecting hate speech by filing it under free speech. 'Some of the negative legislation coming up, it generally is under the guise of free speech,' Rabhi said. 'So often times (sic) people who are wanting to support and defend these organizations like the American Freedom Law Center and others are doing it with (sic) the guise of free speech and saying that universities and other organizations denying the opportunity for hate speech to occur is a violation of free speech.'" (Michigan Daily, Apr. 17, 2019 at https://www.michigandaily.com/section/campus-life/two-new-bills-introduced-michigan-house-representatives-could-potentially-change). Defendants' policy fuels such efforts.

reasonable inference publicly designated Plaintiff an unlawful "hate group," *expressly* relying upon SPLC. Not once does Defendant Nessel reject SPLC's vicious and false attack on Plaintiff. Rather, she embraces SPLC, its radical agenda, and its false designations, and she has *expressly* relied upon them to develop the challenged policy. Her brief in support of her motion confirms this in spades, accepting SPLC's designation of Plaintiff as a "hate group" as "credible," confirming that she will investigate all "credible" tips, and thus creating the reasonable inference that Plaintiff *is* a target for investigation by her office. (*See, e.g.,* Nessel Br. 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"]; at 16-17 [pledging "to follow-up on every credible tip"] at 5 [responding to a question from Representative Berman confirming her reliance on SPLC as a credible source]). As stated in the First Amended Complaint,

> It is one thing for a radically-partisan private organization like SPLC to express its falsehoods about political opponents. However, when the Michigan Attorney General and the Director of the Michigan Department of Civil Rights join and officially endorse this partisan attack by lending government resources and thus becoming the government enforcement agency for SPLC's radical agenda, the protections of the United States Constitution are triggered.

(First Am. Compl. ¶ 4 [Doc. No. 7]) (hereinafter "FAC"]).

Indeed, as soon as this lawsuit was filed, Defendant Nessel confirmed Plaintiff's concerns, her unlawful intentions, and her political bias, stating on her public Facebook page in response to the filing of *this* lawsuit:

> 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) (emphasis added). This is not the statement of an objective, clear-minded government official who is a top law enforcement officer disavowing an intention to abuse

government power and misuse government resources to unlawfully target Plaintiff. The opposite is true, requiring this Court to stop her unlawful abuse of power.

B. Defendant Arbulu's Motion.

Defendant Arbulu begins his motion with the inane comment: "What is good for the goose must be good for the gander." (Arbulu Br. at 1). But there are no "geese" of any gender in this matter. Plaintiff is a non-governmental, charitable organization. The Office of the Michigan Attorney General and the Michigan Department of Civil Rights ("MDCR") are government agencies with access to government resources and the ability to unlawfully focus those resources on political opponents. When government officials place 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"—a designation designed to reduce the effectiveness of Plaintiff's speech—these officials have violated the Constitution. Thus, our *constitutional* dispute *is* with Defendants—government officials who are abusing their positions of authority to target and harm political opponents. It is this *state action* that has triggered Plaintiff's constitutional protections.

And contrary to Defendant Arbulu's assertions, his motion does not alleviate the harms Plaintiff seeks to stop here. Rather, he simply underscores that Plaintiff and other law-abiding citizens will be spied[2] on by government officials in his department for engaging in speech activity that these officials oppose. Per Defendant Arbulu:

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

[2] *See* https://www.merriam-webster.com/dictionary/spy (defining "spy" as "to watch secretly usually for hostile purposes").

(Arbulu Br. at 6 [emphasis added]). Defendants Arbulu and Nessel are making this "change": they are expending government resources to put a "system in place to document, catalogue and share information" about political opponents, specifically including those individuals and groups designated by SPLC as "hate groups." (*See also* FAC ¶¶ 28, 29). And Defendant Arbulu effectively admits that through this policy directive the government will be targeting law-abiding organizations and lawful activity. (*See* Arbulu Br. at 6). The Detroit News 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.
>
> 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."[3]

(emphasis added); (FAC ¶ 28 [same]). Thus, according to Defendants, encouraging people to assist ICE by reporting illegal aliens brands you a "hate group" engaging in "hate" speech, thus subjecting you to being "watch[ed]" by Defendants.

Similar to Defendant Nessel, Defendant Arbulu's objective is unlawful. Both motions should be denied.

STATEMENT OF FACTS

Plaintiff is challenging Defendants' policy directive that targets Plaintiff for disfavored treatment because it is designated a "hate group" by the radical, left-wing SPLC—a designation that now has the *official* endorsement of the Michigan AG and the Director of MDCR. (FAC ¶¶ 1-5, 58).

[3] "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/.

The challenged policy was officially announced via a published news release issued by Defendants Nessel and Arbulu and posted on a Michigan government website. (FAC ¶¶ 22-28, Exs. 1-3). The news release contained hyperlinks to the recently published "Intelligence Report" and "hate map" produced by SPLC, a private organization that designates political opponents and those who express opposing political viewpoints as "hate groups." (FAC ¶¶ 24-25, 44, Exs. 2, 3). Plaintiff is designated a "hate group" by SPLC and is listed as the first group identified on the Michigan "hate map" produced by SPLC and relied upon by Defendants. (FAC ¶ 25, Ex. 2). Through their challenged policy directive, Defendants have given the government's imprimatur to SPLC's designation of Plaintiff as a "hate group." (FAC ¶¶ 4, 35, Ex. 1). Through the challenged policy directive, Defendants have purposefully and incorrectly created the public impression that Plaintiff is a criminal organization. (FAC ¶¶ 33, 52-54, Ex. 4).

Plaintiff is a lawful organization engaging in lawful activity protected by the First Amendment, and it is designated by SPLC (and Defendants) as a "hate group" because of this activity. (FAC ¶¶ 37-46).

Defendant Nessel is the Attorney General of Michigan, the State's top law enforcement official. As the Attorney General, Defendant Nessel is responsible for creating, adopting, implementing, and enforcing the challenged policy directive. As the Attorney General, Defendant Nessel has the authority to investigate and prosecute Plaintiff as a "hate group" pursuant to the challenged policy directive, and she has promised the public that she and her office would do so. As the Attorney General, Defendant Nessel is actively involved with administering the challenged policy directive, including the creation and operation of the state-wide "hate groups" database. As Attorney General, Defendant Nessel is responsible for the actions of the new Hate Crimes Unit, which is tasked with investigating and prosecuting "hate

groups" identified by SPLC. Pursuant to the challenged policy directive, Defendant Nessel has publicly disseminated false information about Plaintiff, which has irreparably harmed Plaintiff's interests. (FAC ¶¶ 11-16, Exs. 1, 2, 4).

Defendant Arbulu is the Director of MDCR. In that capacity, Defendant Arbulu is responsible for creating, adopting, implementing, and enforcing the challenged policy directive. As MDCR Director, Defendant Arbulu is actively involved with administering the challenged policy directive, including the creation and operation of the state-wide "hate groups" database. Pursuant to the challenged policy directive, Defendant Arbulu has publicly disseminated false information about Plaintiff, which has irreparably harmed Plaintiff's interests. (FAC ¶¶ 18-20, Ex. 1).

On February 28, 2019, the very day Plaintiff filed its initial Complaint in this action, Defendant Nessel commented on her Facebook page about a news story published by the Detroit News regarding Plaintiff's lawsuit. The title of the Detroit News' story is "Law center files federal lawsuit against Nessel, state civil rights director." The "law center" referenced in the story is Plaintiff, and the story is about this legal action. (FAC ¶¶ 50-53, Ex. 4).

In her Facebook post, Defendant Nessel included a link to the Detroit News story and 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) (emphasis added).

Defendant Nessel's Facebook post effectively confirms the challenged policy directive; it underscores that pursuant to the challenged policy directive she is "pursu[ing] organizations that engage in illegal conduct against minority communities"; and it leaves little doubt that she

considers Plaintiff to be one of the "organizations that engage[s] in illegal conduct against minority communities." (FAC ¶¶ 50-53, Ex. 4). This post was yet again another public dissemination of false information about Plaintiff, which has irreparably harmed Plaintiff's interests.

Pursuant to the challenged policy, Defendants will conduct surveillance and utilize government resources to covertly gather and share information in order to deter the activities of those individuals and groups deemed to be "hate groups" by SPLC. (FAC ¶ 54, Ex. 1).

There are no safeguards for the use or distribution of the information collected by Defendants pursuant to the challenged policy. Consequently, this information will be available to Plaintiff's political opponents, and it can be used to harm the operations and activities of organizations deemed to be "hate groups," such as Plaintiff. (FAC ¶ 55).

The purposes and effects of the challenged policy are to silence political opposition to the policies of the Left, policies which Defendants support; to marginalize political opponents by officially and pejoratively labeling them as "hate groups"; to deter and diminish support for political opponents; and to provide a government-sanctioned justification for officials, including law enforcement officials and officials from MDCR, to harass and target political opponents, thereby creating a deterrent effect on political speech and expressive association. (FAC ¶ 56).

The challenged policy effectively brands individuals and groups such as Plaintiff as criminals on account of their political viewpoints, subjecting them to governmental scrutiny, investigation, surveillance, condemnation, and intimidation, which have a deterrent effect on their activities and their rights to freedom of speech and expressive association. (FAC ¶ 57).

The challenged policy, utilizing SPLC "data" and nomenclature, is a governmental attack on the reputation of Plaintiff that is designed to marginalize Plaintiff and its political viewpoints. (FAC ¶ 58).

The challenged policy deters donors and volunteers from supporting the activities of Plaintiff. It deters potential clients from seeking legal services from Plaintiff. It encourages organizations such as Amazon to prohibit Plaintiff from participating in their charitable donation programs. Indeed, it legitimizes the illegitimate, partisan attacks of SPLC in the public eye. (FAC ¶¶ 35, 59).

Defendants' official, public dissemination of false information about Plaintiff is injurious to Plaintiff's interests and has caused irreparable harm to Plaintiff and its public reputation. Pursuant to the challenged policy directive, Defendants will continue to disseminate false information about Plaintiff. (FAC ¶ 60).

The creation, adoption, and implementation of the challenged policy has caused, and will continue to cause, irreparable harm to Plaintiff. (FAC ¶ 61).

As Defendant Nessel confirms in her brief:

- During the Question and Answer session following her presentation about the Hate Crimes Unit, the Attorney General answered a question from Representative Ryan Berman "*regarding her comment about those identifiable hate crimes.*" The question was directed at the "criteria" used by the Attorney General, and she responded: "*That information was received from the Southern Poverty Law Center* and they do a detailed analysis on that . . . 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 and then they do a further assessment I believe to see if they think that group is a *threat* of any manner. . . ." (Nessel Br. at 5 [emphasis added]).

- In a Detroit Free Press article, 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]).
- In this same Detroit Free Press article, Defendant Nessel states, "We created a hate crimes unit . . . with *the express purpose* of protecting each and every person in this state against those who wish to *terrorize* the people who live here." (Nessel Br. at 7).
- Acknowledging "that the newly-created Hate Crimes Unit is reviewing a tip from a source [the "credible" SPLC] that *has pointed the finger at the AFLC*." (Nessel Br. at 16 [emphasis added]).
- Admitting that Defendant Nessel and her Hate Crimes Unit are "going to investigate *every* credible tip" (Nessel Br. at 3), thus admitting that Plaintiff is a target of investigation.

ARGUMENT

Defendants ask this Court to dismiss Plaintiff's First Amended Complaint. They challenge this Court's jurisdiction to hear and decide Plaintiff's claims pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. More specifically, they assert that Plaintiff lacks standing to advance this challenge, and even if it has standing, its claims are not ripe for review. Defendants further assert that "even if AFLC has standing and its claims are ripe and plausible,

its claims are mooted by the Attorney General's intervening and clarifying public statements." (Nessel Mot. at 2-3 [Doc. No. 12]; Arbulu Mot. at ECF pg. 2 of 4 [Doc. No. 14]).

Defendants' motions also test the legal sufficiency of Plaintiff's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing that the "claims are not supported by factual allegations that are plausible on their face." (Nessel Mot. at 2; Arbulu Mot. at ECF pg. 2 of 4).

Finally, Defendants argue that declaratory and injunctive relief are not appropriate. (Nessel Mot. at 3; Arbulu Mot. at ECF pg. 2 of 4).

While jurisdiction is a threshold issue that must be resolved before reaching the merits on any claim, Plaintiff will first address Defendants' arguments under Rule 12(b)(6) since these arguments will further demonstrate and establish the appropriate context for why this Court has jurisdiction to resolve this case and why declaratory and injunctive relief are the appropriate remedies. We turn now to Defendants' arguments under Rule 12(b)(6).

I. Plaintiff's First Amended Complaint States Claims for Relief that Are Plausible on Their Face.

A. Standard of Review.

When reviewing Defendants' motions under Rule 12(b)(6), the Court must construe the First Amended Complaint in the light most favorable to Plaintiff, accept its factual allegations as true, and *draw all reasonable inferences in favor of Plaintiff*. *See Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir. 2008).

B. Neither *Twombly* nor *Iqbal* Compels Dismissal of *this* Case.

In their motions, Defendants rely principally on *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), but this reliance is unavailing. These cases, individually or in combination, do not bury every constitutional violation that comes their way.

And more fundamentally, they do not create a "heightened" pleading standard under the Federal Rules since that "can only be accomplished by the process of amending the Federal Rules, and not by judicial interpretation." *Twombly*, 550 U.S. at 569, n. 14 (internal quotations omitted). Indeed, the Court in *Twombly* stated, "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id*. at 570.

In *Erickson v. Pardus*, 551 U.S. 89 (2007), a case decided shortly after *Twombly*, the Supreme Court reversed a dismissal granted under Rule 12(b)(6). In doing so, the Court reemphasized the liberal Rule 8 pleading standard, which "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id*. at 93. Furthermore, the Court stated, "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). Upon application of this standard, the Court held that it was error for the Court of Appeals to conclude that the allegations were "too conclusory" for pleading purposes. *Id*. at 94.

In sum, the liberal Rule 8 pleading standard described in *Erickson* is the standard that governs in this case.

1. *Twombly* Does Not Compel Dismissal of this Case.

Twombly presented "the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act." *Twombly*, 550 U.S. at 554-55. Thus, in the context of a Rule 12(b)(6) motion to dismiss, the Court was deciding what a plaintiff must plead to properly state a claim under the Sherman Act's restraint of trade provision. In doing so, the Court reemphasized the liberal Rule 8 pleading standard and noted that while a complaint challenged under Rule 12(b)(6)

> does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions,

> and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Twombly, 550 U.S. at 555 (internal punctuation and citations omitted). The Court cited with approval *Nietzke v. Williams*, 490 U.S. 319, 327 (1989), which stated that "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations," and *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), which stated that a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely."

As the Court noted in *Twombly*, stating a claim under the restraint of trade provision of the Sherman Act requires a complaint with enough factual matter, taken as true, to suggest that an *agreement* was made. *Twombly,* 550 U.S. at 556. An allegation of parallel business conduct and a bald assertion of conspiracy are not sufficient to state a claim under this provision of the Act. *Id.* The Court observed that parallel business conduct, without more, does not suggest a conspiracy, and a conclusory allegation of agreement at some unidentified point in time does not supply facts adequate to show illegality. *Id*. at 556-57.

Needless to say, Plaintiff has not advanced a restraint of trade claim under the Sherman Act, nor has it advanced a conspiracy claim requiring some factual evidence of an agreement.[4] *Twombly* does not compel a dismissal of the First Amended Complaint in this case.

2. *Iqbal* Does Not Compel Dismissal of this Case.

In *Iqbal*, the plaintiff sought *damages* against high-ranking officials in their *individual* capacities pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), which creates an implied private cause of action for *damages* against federal officers. As the

[4] While Plaintiff believes that Defendants are colluding and conspiring with SPLC, contrary to Defendants' assertions, Plaintiff has not advanced a conspiracy claim. (*See* FAC at "Claims for Relief").

Court noted, "The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue." *Iqbal*, 556 U.S. at 676.

The constitutional claim at issue in *Iqbal* was for discrimination based on the suspect classifications of race, religion, and national origin. *Id*. at 677. As the Court noted, in order to recover *damages* for a claim based on *invidious discrimination*, the plaintiff must plead and prove that *each* individual defendant acted with a discriminatory purpose. *Id*. at 676-77. The plaintiff's claim for civil *damages* against former Attorney General John Ashcroft and FBI Director Robert Mueller, however, was based on conclusory allegations devoid of any factual basis demonstrating that it was even remotely plausible that these high-ranking officials were *personally* liable for the alleged discrimination. *Id*. at 680-84. Consequently, the Court dismissed the complaint, stating, "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Accordingly, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id*. at 679. Because the plaintiff only provided conclusory allegations with no facts demonstrating that either the former Attorney General or the FBI Director, *as individuals*, acted with a discriminatory purpose, the complaint failed to meet the minimal pleading standard of Rule 8 to support a claim for *damages* against these high-ranking government officials.

Unlike *Iqbal*, Plaintiff is not seeking to hold any government official personally liable for damages under a *Bivens* cause of action. Rather, Plaintiff is seeking prospective declaratory and injunctive relief against certain government officials who are responsible in their *official*

capacities for creating, implementing, and enforcing the challenged policy.[5] More fundamentally, Plaintiff does not rely on "threadbare recitals" and "mere conclusory statements" to support its claims. Rather, the First Amended Complaint alleges many detailed and specific facts, which must be accepted as true, *along with every reasonable inference*, even if the Court or Defendants do not believe them to be true. *See Nietzke*, 490 U.S. at 327.

In the final analysis, the pleading sets forth sufficient facts to give Defendants fair notice of what the claims are and the grounds upon which they rest, as required by the Federal Rules.

We turn now to the substantive claims.

II. The First Amended Complaint Alleges Plausible Constitutional Violations.

A. The Policy Directive Is Not Immune from Constitutional Challenge.

To begin, Defendants' policy directive involves an official government act that is subject to constitutional challenge. It is "a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed" the policy. *See Lee v. Weisman*, 505 U.S. 577, 587 (1992) (holding that a school official's decision to permit a member of the clergy to give an invocation and benediction at the school's graduation ceremony was "a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur").

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.*

[5] A suit against a government official in his or her official capacity is essentially a suit against the government. *Ky. v. Graham*, 473 U.S. 159, 166 (1985). And prospective declaratory and injunctive relief are available in actions against state officials sued in their official capacities based on an allegedly unconstitutional statute or official act. *Ex Parte Young*, 209 U.S. 123, 151-56 (1908).

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." Indeed, using the power and authority of the Office of the Michigan Attorney General and MDCR to pejoratively label, investigate, and conduct 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).

B. Defendants' Policy Deters the Exercise of Fundamental Rights.

There can be no dispute in fact or law that Plaintiff's activities and associations—the very activities and associations that subject them to intrusive and coercive government action and pejorative labeling by the Michigan AG and the Director of MDCR pursuant to the challenged policy directive—are protected by the Constitution. As the Sixth Circuit has long recognized, "The right of an American citizen to criticize public officials and to advocate peacefully ideas for change is 'the central meaning of the First Amendment.'" *Glasson v. City of Louisville*, 518 F.2d

899, 904 (6th Cir. 1975) (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 273 (1964)). 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).

And "[a]mong 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). And "[e]ffective 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. 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.

Additionally, in the First Amendment context, it is well established that "[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). This fundamental principle is echoed throughout the case law. *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996) ("[A]n actual injury can exist when the plaintiff is chilled from exercising her right to free expression or foregoes expression in order to avoid enforcement consequences."); *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 judicial 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,[6] 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 policy directive plainly deters protected First Amendment activity in violation of the Constitution.

C. Designating Plaintiff a "Hate Group" Violates Plaintiff's Fundamental 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). The reasoning in *Meese* is dispositive on the issue of whether the First Amended

[6] Defendant Nessel's brief confirms that her actions are motivated by Plaintiff's lawful beliefs and associations. (Nessel Br. at 1 [stating that Plaintiff is "free . . . to engage in *hate* speech" and "to bond with other organizations and individuals even if that bond is based solely on *hatred* for those who might look or act differently than them"] [emphasis added]).

Complaint states plausible claims for relief and on the issue of whether Plaintiff has standing to advance its claims (*see infra*).

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 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 Defendant Nessel in a public Facebook post and in her responses to questions from Representative Berman, 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. *Compare Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365,

373 (6th Cir. 2011) ("Without any plausible statements as to when, where, in what, or by whom such a designation was made, this allegation ['right-wing extremist'] amounts to a 'naked assertion[] devoid of further factual enhancement' that is not entitled to a presumption of truth."). In her brief, Defendant Nessel further embraces SPLC's designation, describing it as "credible," and falsely asserts that SPLC conducts some form of "threat" assessment before actually listing an organization as a "hate group." (*See, e.g.*, Nessel Br. at 15 ["[T]he Attorney General has explained 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 [responding to a question from Representative Berman confirming Defendant Nessel's reliance on SPLC as a credible source]). Thus, by placing pejorative labels on Plaintiff and its speech (such as designating Plaintiff a "hate group" and its speech as "hate" speech), Defendants "place[] 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 speech in the eyes of the public" in violation of the First Amendment. *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."). *Meese* compels the denial of Defendants' motions.

D. Threatening Intrusive and Coercive Investigations and Surveillance to Dissuade Political Opposition Violates Fundamental Rights.

By threating intrusive and coercive investigations and surveillance of private citizens, such as Plaintiff, on account of their dissident political views, Defendants have violated the Constitution. The Supreme Court has repeatedly acknowledged the constitutional infirmities associated with government surveillance and investigations that threaten to 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).

In *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989), for example, the plaintiff churches brought an action against the federal government and some of its officers for violating their First and Fourth Amendment rights by conducting covert surveillance on members of their congregations. The Ninth Circuit allowed the case to proceed, stating, in relevant part:

> When congregants are chilled from participating in worship activities, when they refuse to attend church services because *they fear the government is spying on them and taping their every utterance*, all as alleged in the complaint, we think a church suffers organizational injury because its ability to carry out its ministries has been impaired. . . . *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.*

Id. at 522-23 (emphasis added).

Because Plaintiff and those with whom it associates are inhibited from participating in First Amendment activities because "they fear the government is spying on them and taping their every utterance," Plaintiff's fundamental rights have been violated. *Compare Gordon v. Warren Consol. Bd. of Educ.*, 706 F.2d 778, 781 (6th Cir. 1983) (finding no constitutional violation caused by an undercover investigation for illegal drug activity where there was "*no indication* that the investigation had *any tangible and concrete inhibitory effect on the expression of particular socio-political views*") (emphasis added).

Indeed, in the official announcement of the challenged policy directive, Defendants made clear that they would be surveilling and collecting information for an official database of groups that engage in constitutionally protected free speech activity if the content and viewpoint of the speech is deemed to be "hate" speech by Defendants. (FAC ¶ 28, Ex. 1). Thus, "[a] judicial determination" that Defendants' policy directive violates 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."

E. Collecting and Sharing Information via the Challenged Policy Violates Fundamental Rights.

Sharing the information collected by Defendants' surveillance and investigation of "hate groups," including Plaintiff, to non-law enforcement entities violates the Constitution. In *Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate*, 519 F.2d 1335 (3rd Cir. 1975), a case challenging, *inter alia*, the disclosure of information collected pursuant to government surveillance, the Third Circuit stated:

> It is not apparent how making information concerning the lawful activities of plaintiffs available to non-police groups or individuals could be considered within the proper ambit of law enforcement activity, particularly since it is alleged that

> plaintiffs are subject to surveillance only because their political views deviate from those of the "establishment." 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 mere anticipation of the practical consequences of joining or remaining with plaintiff organizations may well dissuade some individuals from becoming members, or may persuade others to resign their membership. *We therefore conclude that . . . the allegations . . . state a claim sufficient to withstand a motion to dismiss*.

Id. at 1338 (emphasis added). Similarly here, the improper disclosure and sharing of information collected pursuant to the challenged policy is sufficient to withstand Defendants' motions to dismiss. (*See* FAC ¶¶ 54, 55).

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

The principle of law applicable here was articulated 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." 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 guarantee of the Fourteenth Amendment in addition to the First Amendment.

Because Defendants' disparate treatment of Plaintiff (pejoratively branding Plaintiff and targeting Plaintiff for investigation, surveillance, and data collection) burdens its fundamental rights as set forth in the First Amended Complaint, Defendants have violated the First and Fourteenth Amendments. *See Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 256 (6th Cir. 2015) (stating that to advance an equal protection claim, a plaintiff must allege disparate treatment that burdens a fundamental right, such as freedom of speech).

Having established the legal justification for the claims at issue, we now proceed to explain why Plaintiff has standing to advance the claims.

III. This Court Has Jurisdiction to Hear and Decide this Case, including Granting the Requested Relief.

A. This Case Presents a "Justiciable Controversy."

It is axiomatic that Article III of the Constitution confines the federal courts to adjudicating actual "cases" or "controversies." U.S. Const. art. III, § 2. As stated by the Supreme Court:

> A justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Where there is such a concrete case admitting of an immediate and definite determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised . . . .

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937) (citations omitted).

Here, there is nothing "hypothetical," "abstract," "academic," or "moot" about the constitutional claims advanced. This case presents "a real and substantial controversy" between parties with "adverse legal interests," and this controversy can be resolved "through a decree of a conclusive character." *Id*. It will not require the Court to render "an opinion advising what the law would be upon a hypothetical state of facts." *Id*. In sum, it presents a "justiciable controversy" in which "the judicial function may be appropriately exercised." *Id.*

We turn now to demonstrate Plaintiff's standing and this Court's jurisdiction to hear and decide this case.

B. Plaintiff Has Asserted an "Injury-in-Fact" that Is "Fairly Traceable" to the Challenged Action and "Likely to Be Redressed by the Requested Relief."

In an effort to give meaning to Article III's "case" or "controversy" requirement, the courts have developed several justiciability doctrines, including standing. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (holding that an organization had standing to make a pre-enforcement challenge to a law that arguably infringed its political speech). "The doctrine of standing gives meaning to these constitutional limits by identifying those disputes which are appropriately resolved through the judicial process." *Id.* (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). Consequently, 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). While the necessary injury-in-fact to confer standing is not susceptible to precise definition, it must be "distinct and palpable," *Warth*, 422 U.S. at 501, and not merely "abstract," "conjectural," or "hypothetical," *Allen*, 468 U.S. at 751. Put another way, the injury must be both "concrete and particularized," meaning "that the injury must affect the plaintiff in a *personal* and *individual* way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992) (emphasis added).

Here, 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) (holding that subjective chill, "without more," was not sufficient for standing). Plaintiff has alleged that the challenged policy directive, which designates Plaintiff as a "hate group," has harmed Plaintiff's public reputation. (*See* FAC ¶¶ 32, 46, 49, 58, 60, 64, 67, 70).

Consequently, under *Meese*, Plaintiff has standing. Indeed, "[a]s 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"); *see also 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 the 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 v. United States DOJ*, 801 F.3d 701, 711-12 (6th Cir. 2015) (citing *Meese* and distinguishing *Laird v. Tatum*, as "rejecting argument that the plaintiffs' First Amendment rights were being 'chilled by the mere existence, *without more*, of [the Army's] investigative and data-gathering activity'"); *see also Parsons*, 801 F.3d at 712 ("Stigmatization also constitutes an injury in fact for standing purposes.").

Thus, the "*concrete* allegations of reputation harm" in addition to the chilling effect caused by Defendants' actions as set forth in the *specific* factual allegations of the First Amended Complaint are sufficient to show injury in fact and for this Court to exercise its jurisdiction to hear and decide this case.

As *Meese* makes clear, Defendants' designation of Plaintiff as a "hate group" engaging in "hate speech" (as Defendants acknowledge in their briefing), and thus giving the government's imprimatur to SPLC's similar designation, is sufficient to establish Plaintiff's standing to

advance this challenge. *See 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").

Closely related and in addition to the reputational harm, Plaintiff has alleged that Defendants' policy harms Plaintiff's economic interests. By giving the government's imprimatur to SPLC's designation, Defendants' policy gives credibility to the widespread efforts to financially harm groups designated by SPLC as "hate groups." As alleged in the First Amended Complaint, the "hate group" designation causes companies such as Amazon to prohibit Plaintiff and other groups from participating in its charitable donation program, thereby harming Plaintiff's economic interests.[7] (FAC ¶ 35). *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*

[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 the American Freedom Law Center). Defendants are the first government officials that Plaintiff is aware of that have added their endorsement to this political attack.

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 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").

Finally, Defendants confirm that Plaintiff is currently a target of their investigation and data collecting because of the "credible" accusations of SPLC and its designation of Plaintiff as a "hate group," all based on some phantom threat assessment. As stated by the Supreme Court, "One recurring issue in our cases is determining when the threatened enforcement of a law creates an Article III injury," noting that "[w]hen an individual is *subject* to such a threat, an actual arrest, prosecution, or other enforcement action is *not a prerequisite to challenging the law*." *Susan B. Anthony List*, 573 U.S. at 158 (emphasis added); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) ("[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat.").

There is no question that Plaintiff is a *subject* of Defendants' targeting of "hate groups" for investigation and surveillance. Plaintiff is one of the 31 "hate groups" identified by Defendants in their official press release. (FAC ¶¶ 22-25, Exs. 1 & 2). *See Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 581 (1985) ("One does not have to await the consummation of threatened injury to obtain preventive relief."); *Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925) (same). The standing requirement is satisfied in this case.

C. Plaintiff's Claims Are Ripe for Review.

The basic rationale of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas*, 473 U.S. at 580 (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 by discussing 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 a minimum*, in their official press release announcing the policy directive, Defendants have already designated Plaintiff a "hate group" by officially citing to, embracing, and endorsing SPLC's designation. (FAC ¶¶ 22-32, Ex. 1). Defendant Nessel further confirmed this in her public statements (*see supra*) and in her public Facebook post. (FAC ¶¶ 50-53, Ex. 4). None of this has been recanted nor the harm remedied in any way. And Defendants have made clear that Plaintiff is a *subject* of their surveillance and data collection. (Nessel Br. at 5, 16-17 [confirming that Plaintiff is a target of government investigation and surveillance based on the "credible tip" from the "credible" SPLC]).

In short, the hardship factor weighs in favor of finding the case ripe for review. As demonstrated previously, the challenged policy directive is causing a present injury to Plaintiff, whose public reputation has been irreparably harmed by Defendants' designation of Plaintiff as a "hate group" engaging in "hate speech." The harm to Plaintiff 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." *Nat'l Rifle Assoc. of Am.*, 132 F.3d at 290. A case that largely presents a

legal issue, such as the challenge at issue here, is fit for judicial resolution. *See Thomas*, 473 U.S. at 581 (holding the matter was 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); *Nat'l Rifle Assoc. of Am.*, 132 F.3d at 290-91 (same). The ultimate issue of whether it is lawful for Defendants to designate Plaintiff a "hate group" engaging in "hate" speech, thereby subjecting Plaintiff to investigation and surveillance, all of which will be maintained in an official government database, is ultimately a legal issue for the Court to decide. *See Presbyterian Church*, 870 F.2d at 522-23 ("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.").

Furthermore, when the government chills a citizen's First Amendment rights, the case is ripe and the citizen need not wait for some adverse consequence before challenging the action. As noted by the Supreme Court, "[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Dombrowski*, 380 U.S. at 486 ("Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights.").

Indeed, 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); *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) (noting that the injury-in-fact requirement for standing is properly relaxed for 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 against Defendants is to seek judicial relief in a court of law. The hardship is real, and this case is fit for judicial resolution. The case is ripe for review.

D. Defendant Nessel's March 8, 2019 Statement Does Not Moot this Case.

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, as discussed further below), "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) (italics in original) (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." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, n. 10 (1982). Consequently, "[a]long with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *W. T. Grant Co.*, 345 U.S. at 633. Thus, a claim for injunctive 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).

Moreover, the Supreme Court has warned the lower courts to be particularly vigilant in cases such as this, stating, "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *Id.* at 632, n. 5. As the Court concluded, 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).

Defendant Nessel's March 8, 2019, statement was made the *day after* Plaintiff filed its First Amended Complaint, which added the allegation setting forth the very damaging public statement made by Defendant Nessel on her Facebook page the day that the original complaint was filed (February 22, 2019). The March 8 statement is an obvious attempt to escape liability and is precisely the sort of "protestation[] of repentance and reform . . . timed to anticipate suit" that the Supreme Court warned about.

The main problem with the statement, however, is that it does <u>*not*</u> alleviate the harm. *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 the statement does Defendant Nessel confirm that Plaintiff is a lawful organization engaging in lawful activity in Michigan and throughout the country. Nowhere in the statement does Defendant Nessel publicly confirm that Plaintiff is not a "hate group." Nowhere in the statement does Defendant Nessel disavow SPLC's false designation of Plaintiff as a "hate group." Nowhere in the statement does Defendant Nessel denounce SPLC's false and derogatory political propaganda as set forth in its "Intelligence Report" and "Hate Map." Nowhere in the statement does Defendant Nessel confirm that her

office will not rely in any way on SPLC's political propaganda (and even then, such a statement would contradict what she clearly stated before this lawsuit). Nowhere in the statement does Defendant Nessel 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. Nowhere in the statement does Defendant Nessel 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, Defendant Nessel confirms the opposite, further demonstrating the need for judicial relief.

Moreover, this March 8 statement is not credible in light of Defendant Nessel's public statement that she posted on her Facebook page as soon as this lawsuit was filed. That contemporaneous statement belies Defendant Nessel's attempt here to disguise the true intent and purpose of the message sent by Defendants' public announcement of their express reliance on SPLC as a credible source to target the 31 "hate groups" operating in Michigan. And Defendant Nessel's brief confirms that Plaintiff is subject to government investigation based on the "credible tip" from the "credible" SPLC. (Nessel Br. at 5, 16-17).

In the final analysis, the public press release citing (and linking to) SPLC's "Intelligence Report" and "Hate Map" and pledging to go after the groups identified by SPLC (which expressly includes Plaintiff) has already caused, and continues to cause, harm to Plaintiff and its public reputation. That bell has rung, and Defendant Nessel continues to ring it loud and clear. There is nothing moot about this case.

E. Declaratory and Injunctive Relief Are Appropriate.

Prospective relief is appropriate for the reason stated by the Ninth Circuit in *Presbyterian Church*: "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." *Presbyterian Church*, 870 F.2d at 522-23.

A judicial determination that Defendants' policy directive 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. Furthermore, the requested relief will help repair Plaintiff's public reputation—a reputation that Defendants seek to destroy.

CONCLUSION

What Justice Douglas stated in his concurrence in *Gibson v. Florida Legislative Committee*, 372 U.S. 539, 570 (1963), rings true here:

> For the views a citizen entertains, the beliefs he harbors, the utterances he makes, the ideology he embraces and the people he associates with are no concern of government. That article of faith marks indeed the main difference between the Free Society which we espouse and the dictatorships both on the Left and on the Right.

Due in large part to the watchful eye of the judiciary, the government has not been allowed to abridge—whether directly, indirectly, forcefully, or subtly—the precious and vulnerable First Amendment freedoms of law-abiding citizens, regardless of political ideology. A private citizen's first defense against such government abuse is the Constitution. Consequently, the challenged policy at issue here, which takes us a step closer to the

"dictatorship . . on the Left," cannot exist in the Free Society described by Justice Douglas.

Plaintiff respectfully requests that the Court deny Defendants' motions to dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

I hereby certify that this brief contains 10,772 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.

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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 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.

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