No. 25-

IN THE

Supreme Court of the United States

MONICA MILLER AND SUZANNE ABDALLA,

Petitioners,

v.

LETITIA JAMES,
THE ATTORNEY GENERAL OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

During a press conference convened by the New York Attorney General to announce the filing of a civil lawsuit against Red Rose Rescue, a pro-life organization, and several of its members, the Attorney General declared that the organization was a "terrorist group" and that those associated with the organization were "terrorists." There were no allegations of terrorism in the civil lawsuit, and neither Red Rose Rescue nor anyone associated with the organization has ever been charged with the crime of terrorism nor any other violent felony. The Attorney General's appellation was designed to malign Red Rose Rescue and its associates in the eyes of the public and to reduce the effectiveness of their First Amendment activities.

1. Do Petitioners, who are members of Red Rose Rescue, have standing to advance their constitutional challenge to the actions of the Attorney General when they have alleged a chilling effect on their First Amendment rights and reputational harm?

2. Are the Attorney General's "terrorist" and "terrorist group" designations opinion protected by the First Amendment and thus immune from New York's defamation law?

PARTIES TO THE PROCEEDING

Petitioners are Monica Miller and Suzanne Abdalla (collectively referred to as "Petitioners").

Respondent is Letitia James, the Attorney General of New York ("Respondent" or "Attorney General").

STATEMENT OF RELATED PROCEEDINGS

Miller v. James, No. 1:23-cv-820, U.S. District Court for the Northern District of New York. Judgment entered Sept. 27, 2024.

Miller v. James, No. 24-2785, U.S. Court of Appeals for the Second Circuit. Judgment entered Apr. 9, 2025.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals appears at App. 1a and is available at No. 24-2785, 2025 U.S. App. LEXIS 8329. The opinion of the district court appears at App. 9a and is available at 751 F. Supp. 3d 21.

JURISDICTION

The opinion of the court of appeals was entered on April 9, 2025. App. 1a. The order denying Petitioners' petition for rehearing en banc was entered on May 1, 2025. App. 46a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III provides, in relevant part, "The judicial power shall extend to all Cases [and] Controversies. . . ." U.S. Const. art. III.

The First Amendment provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . ." U.S. Const. amend. I.

STATEMENT OF THE CASE

Respondent Letitia James, the Attorney General of New York, has weaponized her office to publicly attack political opponents, falsely declaring that private citizens who oppose abortion and associate with Red Rose Rescue

are "terrorists" and belong to a "terrorist group." Such false labeling, particularly by the chief law enforcement officer of the state, is injurious to those who associate with Red Rose Rescue, which includes Petitioners, and this was the very purpose of Respondent's actions. She chose her words carefully and intentionally, and they were made with actual malice and for the unlawful purpose of suppressing the lawful activities of pro-lifers who associate with Red Rose Rescue. Respondent's reckless and intentional disregard for the truth is harmful, particularly since she is the Attorney General and has thus placed the power of the government, with its authority, presumed neutrality, and assumed access to all the facts, behind an appellation designed to reduce the effectiveness of Red Rose Rescue in the eyes of the public, and thus infringing the rights of those who associate with Red Rose Rescue.

I. Procedural Background.

On July 7, 2023, Petitioners filed this federal action, alleging violations arising under the First and Fourteenth Amendments to the United States Constitution and New York defamation law. (Compl., R.1).

The Attorney General filed a motion to dismiss, and Petitioners responded. On September 27, 2024, the district court granted the Attorney General's motion, dismissing the case on standing grounds and for failure to state a claim. App. 9a-43a. Petitioners appealed.

On April 9, 2025, the U.S. Court of Appeals for the Second Circuit affirmed. App. 1a-8a. On May 1, 2025, the Second Circuit denied Petitioners' petition for rehearing en banc. App. 46a-47a.

This timely petition follows.

II. Statement of Facts.

Petitioners Miller and Abdalla[1] are active members of Red Rose Rescue. Petitioners engage in peaceful, nonviolent, First Amendment activity such as sidewalk counseling, holding pro-life signs, and distributing pro-life literature pursuant to their association with Red Rose Rescue. Petitioners also provide financial support to the organization. (Compl. ¶¶ 9-21, R.1).

Petitioner Miller is publicly known as a national leader of Red Rose Rescue, and Petitioner Abdalla speaks to the media on behalf of Red Rose Rescue. Thus, both Petitioners are publicly known as people who directly associate with Red Rose Rescue. (*Id.* ¶¶ 12-14, 20, 30).

On June 8, 2023, the Attorney General held a public press conference announcing a new civil lawsuit filed by the State of New York and her office against Red Rose Rescue, Christopher Moscinski, Matthew Connolly, William Goodman, Laura Gies, John Hinshaw, and John and Jane Does, alleging civil violations of the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248 (FACE), and the New York State version of this statute. (Compl. ¶ 28, R.1).

During the press conference, the Attorney General declared that those who associate with Red Rose Rescue are "terrorists," and she declared that Red Rose Rescue

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1. Petitioner Abdalla has a Middle Eastern name, so accusations of "terrorism" are particularly troublesome to her.

is a "terrorist group." (*Id.* ¶ 31). At the close of her press conference, the Attorney General doubled down and declared that Red Rose Rescue is in fact a "terrorist group." (*See id.* ¶ 33 [citing website where video of press conference remains published]).

The civil lawsuit contains no allegations of terrorism because Red Rose Rescue participants never engage in acts of terrorism or other acts of violence. That is, they are not "terrorists" nor is Red Rose Rescue a "terrorist group." Consequently, the Attorney General's defamatory and injurious statements, which are provably false, were not a fair and true report of any judicial proceeding, legislative proceeding, or other official proceeding. (*Id.* ¶ 29).

The Attorney General's false and defamatory remarks were of and concerning Petitioners as Petitioners are publicly associated with Red Rose Rescue. (*Id.* ¶¶ 9, 12, 13, 16, 19, 20, 31). The statements were made and published in such a way that allows for easy identification of the individuals within the group. A reader/viewer/listener could reasonably understand that the defamatory statements about Red Rose Rescue include Petitioners. (*Id.* ¶ 32). For example, a simple Internet search for "Red Rose Rescue" reveals a picture of Petitioner Miller on the organization's homepage. *See* https://www.redroserescue.com/ (last visited Oct. 27, 2023). And while Petitioner Miller was not a named defendant in the lawsuit, she was expressly named in the allegations of the complaint, and she was personally served with a copy of the complaint by the Attorney General's office as the agent for Red Rose Rescue. (Compl. ¶ 30, R.1). In the civil lawsuit—the basis for the press conference—the Attorney General states

in multiple paragraphs of her complaint that Petitioner Miller is a "member" of "Red Rose Rescue." (*See* Muise Decl., Ex. A [Civil Compl. ¶¶ 69, 76, 89] at Ex. 1, R.10-1). The civil lawsuit also names "John and Jane Does" as defendants "who are active in" Red Rose Rescue. (*Id.* [Civil Compl.] at 1). Petitioner Abdalla is "active" in Red Rose Rescue. (Compl. ¶¶ 16-20, R.1).

The Attorney General's defamatory statements that those associated with Red Rose Rescue are "terrorists" and that Red Rose Rescue itself is a "terrorist group" are published and remain published on the Attorney General's official website and have been republished by multiple media sources, including, *inter alia*, the *Washington Examiner* and the *Washington Times*. (*Id.* ¶ 33). As noted, these defamatory statements are part of official public records maintained by the Attorney General's office. (*See id.*).

The Attorney General held a public press conference to ensure that her defamatory statements were widely reported and repeated as she intended these statements to cause harm to pro-lifers, including Petitioners. The Attorney General's defamatory attack on pro-lifers had no legitimate governmental purpose; it was an abusive use of government authority and power. (*Id.* ¶¶ 34-35).

As the chief law enforcement officer of New York, the Attorney General is in a position to know that Red Rose Rescue is not a "terrorist group" and that the pro-lifers who associate with Red Rose Rescue are not "terrorists." If the Attorney General had any facts to substantiate these false accusations of criminal activity, she would have brought a criminal complaint for engaging in terrorist

activity and not a civil action seeking a mere 30-foot buffer zone. The Attorney General has not brought such a criminal complaint as no facts exist to do so, and she knows it. (*Id.* ¶¶ 36).

Terrorism is a crime punishable under New York law, *see* N.Y. Penal Law §§ 490.00, *et seq.*, and federal law, *see* 18 U.S.C. § 2331. Terrorism is widely considered to be one of the most heinous criminal acts. (*See* Compl. ¶ 37 ["[T]errorism is a serious and deadly problem that disrupts public order and threatens individual safety both at home and around the world. Terrorism is inconsistent with civilized society and cannot be tolerated. . . .] [quoting N.Y. Penal Law § 490.00], R.1).

The Attorney General's public dissemination of false information has had a chilling effect on Petitioners' rights to free speech and expressive association, and the defamatory statements have had a chilling effect on the rights to free speech and expressive association of other pro-lifers associated with Red Rose Rescue. The Attorney General's defamatory statements have caused, and will continue to cause, irreparable harm to Petitioners. The Attorney General's defamatory statements have also caused Petitioners to suffer humiliation and a loss of reputation. (Compl. ¶¶ 40, 42, R.1).

The Attorney General's false statements were designed to chill the exercise of constitutional rights by pro-lifers such as Petitioners and to chill those who would associate with Red Rose Rescue from exercising their constitutional rights. (*Id.* ¶¶ 43-44). The Attorney General's labeling of pro-lifers as "terrorists" creates a basis for government investigation, surveillance, punishment, condemnation,

and other disfavored treatment, and it has tarnished Petitioners' public reputation and subjects Petitioners to public retribution. (*Id.* ¶¶ 46, 50).

The Attorney General's actions have the purpose and effect of deterring pro-lifers from associating with Red Rose Rescue and deterring donors and volunteers from supporting the activities of Red Rose Rescue. The Attorney General's actions also legitimize the illegitimate attacks against pro-lifers in the public eye. Consequently, the challenged actions harm Petitioners' constitutionally protected activities and interests. (*Id.* ¶¶ 48-53).

The Attorney General's actions were motivated by malice against pro-lifers, including Petitioners, and their religious objection to abortion, and they were made with hatred, ill will, and spite. The Attorney General will continue to disseminate false information about Petitioners unless enjoined from doing so by a court of law. (*Id.* ¶ 41).

REASONS FOR GRANTING THE PETITION

The Second Circuit held that Petitioners lacked standing to advance their constitutional claims and that the Attorney General's statements that Red Rose Rescue is a "terrorist group" and those who associate with this pro-life group are "terrorists" were opinion and not defamatory statements of fact.

Too often, the lower courts use standing as a way of avoiding decisions on the merits in controversial cases. And while the chilling effect on speech is real, the lower courts often cite *Laird v. Tatum*, 408 U.S. 1 (1972), to dismiss

such injuries, as in this case. However, reputational harm alone is sufficient for standing as this Court and other appellate courts have concluded, but apparently not for Petitioners in this controversial case.

The Second Circuit's decision is contrary to the decisions of this Court, the D.C. Circuit, and the Sixth Circuit. Those cases specifically include *Meese v. Keene*, 481 U.S. 465 (1987); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951); *Foretich v. United States*, 351 F.3d 1198 (D.C. Cir. 2003); and *Parsons v. United States DOJ*, 801 F.3d 701 (6th Cir. 2015). As discussed in this petition, the Second Circuit's decision is also contrary to its own circuit precedent.[2] *See* Sup. Ct. R. 10(a) & (c). Review is warranted.

ARGUMENT

I. The Second Circuit's Standing Decision Is Erroneous and Conflicts with this Court's and Other Circuits' Precedent.

The Attorney General has placed the power of the government, with its authority, presumed neutrality, and assumed access to all the facts (including whether facts exist to claim that Petitioners are terrorists), behind a designation *intended* to reduce the effectiveness of the Red Rose Rescue and its pro-life efforts protected by the First and Fourteenth Amendments. Case law makes plain that a chilling effect on expressive activity *coupled* with reputational harm are sufficient injuries to confer

2. *See Oneida Indian Nation v. United States DOI*, 789 F. App'x 271 (2d Cir. 2019).

standing to advance such claims. In fact, reputational harm alone is an injury in fact for standing purposes.

Contrary to the panel's decision, *see* App. 4a, this case is not *Laird v. Tatum*, 408 U.S. 1 (1972), in which the only alleged injury was a subjective chilling effect. *Compare Laird*, 408 U.S. at 10-11 (holding that subjective chill, "without more," was not sufficient for standing), *with Parsons v. United States DOJ*, 801 F.3d 701, 711-12 (6th Cir. 2015) (distinguishing *Laird* and finding an injury caused by the government's "hybrid-gang" designation). The "terrorist" and "terrorist group" labels alone are sufficient to confer standing in this case. And this is evident by this Court's precedent and the precedent of other circuit courts, including, ironically, the Second Circuit.

Indeed, the Second Circuit's opinion in *Oneida Indian Nation v. United States DOI*, 789 F. App'x 271 (2d Cir. 2019), confirms Petitioners' standing in this case. Per the court:

> Appellant argues that DOI's name change "vindicated the Wisconsin tribe's erroneous claim to the Oneida Nation legacy" and thereby "diminished the [New York Oneidas'] status and reputation as the original Oneida Nation, or its direct successor." Appellant Br. 38-39. To support its reputational injury argument, Appellant cites cases in which a plaintiff successfully asserted reputational injury based on a derogative or negatively perceived label applied to the plaintiff by the government. Appellant Br. 41-42 (citing, *inter*

alia, Meese v. Keene, 481 U.S. 465, 473-77 (1987) (state senator seeking to exhibit films had standing to challenge the Department of Justice's characterization of films as "political propaganda"); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139-40 (1951) (certain nonprofit organizations designated as "Communist," injuring their right to be free from defamatory statements); *Parsons v. United States Dep't of Justice*, 801 F.3d 701, 711-12 (6th Cir. 2015) (group labeled "hybrid gang" in a government report entitled "National Gang Threat Assessment")).

Those cases are distinguishable. *In each of them, the government attached a derogatory label to the plaintiff*, whereas here the government has said nothing about the New York Oneidas, let alone anything derogatory. *See Meese*, 481 U.S. at 469-70 (the Department of Justice applied label "political propaganda" to films pursuant to statutory definition); *McGrath*, 341 U.S. at 125 (government entities purported to act pursuant to Presidential authorization to designate organizations as Communist "after appropriate investigation and determination"); *Parsons*, 801 F.3d at 707 (government agency described group as "hybrid gang" in threat assessment report).

In any event, that DOI published the new name *does not imply that the federal government regards Appellant as lesser*. As Appellant admits, DOI's policy is to approve automatically

> any name chosen by a tribe. By contrast, *Meese, McGrath*, and *Parsons involved negative labels applied by the Government based on* certain statutory criteria or *the Government's own analysis*.

Oneida Indian Nation, 789 F. App'x at 277 (emphasis added).

Here, the Attorney General placed a "derogatory label" on Petitioners, who are members of Red Rose Rescue and who engage in constitutionally protected activity through this organization. At a minimum, Petitioners are members of Red Rose Rescue similar to how the plaintiffs in *Parsons* were members of the "Juggalos," the self-identified fan base of a musical group called "The Insane Clown Posse." *See Parsons*, 801 F.3d at 706 ("Plaintiffs self-identify as Juggalos"). This reputational harm to Petitioners is an injury in fact for standing purposes, regardless of whether other harms exist. *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").

On the issue of reputational harm, the panel made the following erroneous conclusion: "with respect to their assertion of reputational harm, [Petitioners] have alleged no facts to 'nudge[] their claims across the line from conceivable to plausible.' *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)." App. 4a-5a. What facts are missing? When the government, through its top law enforcement officer, labels someone a "terrorist" and belonging to a "terrorist group"—facts that are clearly established in this case—these false and derogatory labels

are at least as injurious (and certainly more so) than labeling an organization a "hybrid gang" or "communist" or labeling a film a politician intends to show as "political propaganda." *See Oneida Indian Nation*, 789 F. App'x at 277 (citing *Meese*, *Parsons*, and *McGrath*).

In *Meese v. Keene*, 481 U.S. 465 (1987), this Court found that Keene had standing to advance his First Amendment claim based on the reputational harm caused by the government's "political propaganda" label placed on films that he intended to show. Because of the indirect nature of the alleged harm, Keene supported his claim with additional evidence *to show how this label on the films* he wanted to show would harm *his* reputation. *See id.* Such evidence is unnecessary when the reputational injury is direct (and self-evident), as in this case. This Court, and many others, have long held that reputational harm is an injury in fact for standing purposes. *See*, *e.g.*, *Gully*, 341 F.3d at 161-62; *McGrath*, 341 U.S. at 139 (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"); *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*); *Parsons*, 801 F.3d at 712 ("Stigmatization also constitutes an injury in fact for standing purposes."); *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 unretracted government action, that injury satisfies the requirements of Article III standing to challenge that action.").

In *Parsons v. United States DOJ*, 801 F.3d 701 (6th Cir. 2015), the Sixth Circuit affirmed that reputational harm of the sort at issue here is sufficient to confer standing and made this following relevant observation regarding redressability:

> 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. . . . As in *Meese*, "[a] judgment declaring the [action in question] unconstitutional would eliminate the need to choose between [First Amendment-protected activity] and incurring the risk that public perception of this criminal enforcement scheme will harm appellee's reputation."
>
> The Agencies also assert that an order declaring the 2011 NGIC Report unconstitutional would not alleviate the alleged harm entirely because the information on Juggalo activity is available through the aforementioned alternate channels. But it need not be likely that the harm will be *entirely* redressed, as partial redress can also satisfy the standing requirement. *See Meese*,

> 481 U.S. at 476 ("enjoining the application of the words 'political propaganda' to the films would at least partially redress the reputational injury of which appellee complains"); [*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).

Finally, in *Foretich v. United States*, 351 F.3d 1198, 1213 (D.C. Cir. 2003), the D.C. Circuit stated that "[c]ase 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 that action." In *Foretich*, the plaintiff challenged the Elizabeth Morgan Act. The

D.C. Circuit found that the challenger, Dr. Foretich, had standing to advance his claims based on reputational harm even though the Act did not expressly name him nor did it expressly assert that he engaged in any criminal acts. The court cited the Act and stated that "it is clear from the terms of subsection (b) that 'the party' to whom the Act refers is Dr. Foretich and 'the child' is his daughter Hilary." *Id.* at 1204. Citing *Meese*, the D.C. Circuit agreed that the Act "directly damages [Dr. Foretich's] reputation and standing in the community by effectively branding him a child abuser and an unfit parent." *Id.* at 1214. Here, the Attorney General is "effectively" branding Petitioners "terrorists" that belong to a "terrorist group." *Parsons*, 801 F.3d at 712 ("Stigmatization also constitutes an injury in fact for standing purposes."). Petitioners have standing in this case.

In sum, as the facts and all reasonable inferences drawn from those facts show, the Attorney General has labeled Petitioners as "terrorists" and belonging to a "terrorist group." To claim that there is no reputational harm here is false. And this harm is sufficient to establish Petitioners' standing. *See supra; see also McGrath*, 341 U.S. at 139 (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").

The Second Circuit's decision conflicts with well-established precedent and should be reversed.

II. The Second Circuit's Decision that the New York Attorney General's Statements Were Opinion and Not Defamatory *Per Se* Is Patently Erroneous.

As stated by this Court, "'A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *McGrath*, 341 U.S. at 139 (quoting Restatement, Torts, § 559). Accusing someone of a heinous crime, such as "terrorism," is defamation *per se*. *Brandenburg v. Greek Orthodox Archdiocese of N. Am.*, No. 20-CV-3809 (JMF), 2021 U.S. Dist. LEXIS 102800, at *27 (S.D.N.Y. June 1, 2021) ("Accusing someone of a serious crime is defamatory *per se*. . . ."); *see also Van Der Linden v. Khan*, 535 S.W.3d 179, 198 (Tex. App. 2017) ("Khan alleges that falsely accusing someone of having admitted that he provided financial support to terrorists constitutes defamation *per se*. We agree."); *Grogan v. KOKH, Ltd. Liab. Co.*, 256 P.3d 1021, 1030 (Okla. Civ. App. 2011) ("It is undisputed that Grogan is not a terrorist, and that portrayal of him as a terrorist would be highly offensive to a reasonable person.").

The Second Circuit wrongly concluded that the Attorney General's statements were statements of opinion and not statements of fact and were thus immune from civil liability.

To determine whether a statement is opinion or fact, the reviewing court considers: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the

full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact." *Mann v. Abel*, 885 N.E.2d 884, 886 (N.Y. 2008) (internal quotations and citations omitted). New York penal law, which the Attorney General is sworn to enforce, proscribes "act[s] of terrorism." (Compl. ¶ 37, R.1). As the Attorney General noted in her brief filed in the Second Circuit, a "terrorist" is someone who engages in (*i.e.*, a "practitioner of") "terrorism." Att'y Gen.'s Br. at 27 (citing *Merriam-Webster*). There was nothing equivocal about the Attorney General's statements. And the terms have a precise meaning (a meaning that is certainly injurious to one's reputation), particularly when they come from the top law enforcement officer of New York—a state that is no stranger to heinous acts of terrorism. The Attorney General's statements are also capable of being proven false as neither Red Rose Rescue nor any member of Red Rose Rescue has ever been convicted, let alone charged, with committing an act of terrorism. *See*, *e.g.*, *Grogan*, 256 P.3d at 1030 ("It is undisputed that Grogan is not a terrorist, and that portrayal of him as a terrorist would be highly offensive to a reasonable person."). The Attorney General, the chief law enforcement officer for the state, certainly knows this fact to be true. Finally, the context of the defamatory statements—a press conference called by the Attorney General of New York—makes it exceedingly likely that the reasonable listener would consider these statements to be statements of fact as the Attorney General placed the power of the New York government, with its authority, presumed neutrality, and assumed access to all the facts, behind an appellation designed to reduce the effectiveness of Red Rose Rescue and its associates in the eyes of the public.

The crux of the Second Circuit's defamation decision is as follows:

> A statement of opinion is one "accompanied by a recitation of the facts upon which it is based" or that "does not imply that it is based upon undisclosed facts." *Davis v. Boeheim*, 24 N.Y.3d 262, 269 (2014). Here, James fully explained the factual basis for her opinion. And in "the full context of the communication in which the statement appears," it is clear that James was using the term "terrorist" as rhetorical hyperbole to characterize the conduct she had described. *Gross*, 82 N.Y.2d at 153. Before she used the word "terrorist," and while discussing the events giving rise to the lawsuit described in the related press conference, James repeatedly described the defendants in that lawsuit as "terrorizing" patients in the colloquial sense. And she made clear that Red Rose Rescue and its associates were not designated terrorists in the formal legal sense, and that she called them terrorists "because of their activities"—that is, the activities she had just described. James Press Conference at 21:41–21:47. In this context, James used the term "terrorist" to express an opinion, not a fact, and her characterization is not subject to proof or disproof.

App. 7a. The panel is mistaken as there was no "colloquial sense" about her statements. The very terms the Attorney General used to describe "their activities" (the "disclosed facts") are criminal and convey the very same defamatory meaning as "terrorist" or "terrorism." A "terrorist"

is someone who "terrorizes people," similar to how a "murderer" is someone who "murders" people. The Attorney General left undisclosed whether the activities that "terroriz[ed]" patients were acts of violence or threatened acts of violence (*i.e.*, criminal acts of terrorism). *See also* Att'y Gen.'s Br. at 6 (quoting statements).

In light of the fact that the Attorney General is the top law enforcement officer of the state (and not a private citizen), the context is such that the listener would understand that she was conveying facts. *See* Att'y Gen.'s Br. at 6 (quoting video and stating, "The Attorney General stated that it is her 'responsibility to keep individuals safe from terrorists. And that's what they are.'").

Further, the fact that the Attorney General indicated that Red Rose Rescue had not been "designated" a terrorist group adds no "disclosed facts" or context rendering her statements hyperbolic opinion. A person or organization need not be "designated" a terrorist or terrorist group before being accused of or charged with the crime of terrorism.

Quite simply, if New York law (and the First Amendment) is that an otherwise defamatory statement becomes non-defamatory opinion by relying on a "disclosed fact" that is nothing more than the verb form of the defamatory noun descriptor, defamation becomes a nullity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED APRIL 9, 2025

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 24-2785

MONICA MILLER, SUZANNE ABDALLA,

Plaintiffs-Appellants,

v.

LETITIA JAMES, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendant-Appellee.[*]

Filed April 9, 2025

PRESENT:

ROBERT D. SACK,
BETH ROBINSON,
Circuit Judges,
JOHN G. KOELTL,[**]
District Judge.

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* The Clerk's office is respectfully directed to amend the caption as reflected above.

** Judge John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A

SUMMARY ORDER

Appeal from a judgment of the United States District Court for the Northern District of New York (Kahn, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on September 27, 2024, is **AFFIRMED**.

Plaintiffs-Appellants Monica Miller and Suzanne Abdalla allege that they engage in "peaceful, non-violent, and non-obstructive activities in defense of . . . human life" as part of a group called Red Rose Rescue. App'x at 7-9, ¶¶ 9, 16. In June 2023, Defendant-Appellee Letitia James, Attorney General of the State of New York, held a press conference to announce a civil lawsuit against Red Rose Rescue and several of its members—not including Plaintiffs. At this press conference, James described Red Rose Rescue activists as having "terrorized patients" during incidents in which they unlawfully entered or blocked access to three separate health care facilities. *See* Office of the New York State Attorney General, *Attorney General James Sues Militant Anti-Abortion Group for Invading Clinics and Blocking Access to Reproductive Health Care*, at 3:19-6:10 (June 8, 2023) ("James Press Conference"), https://ag.ny.gov/attorney-general-james-sues-militant-anti-abortion-group-invading-clinics-and-blocking-access, [https://perma.cc/RV5Q-S9ZY].[1]

1. We may properly consider the press conference video because the complaint incorporated it by reference. *See* App'x

She then stated, "[I]t is my duty and my honor and my responsibility to keep individuals safe from terrorists. And that's what they are." *Id.* at 8:09-8:18. Later in the press conference, however, James responded to a question by saying, "They haven't been designated as such. I refer to them as terrorists because of their activities." *Id.* at 21:41-21:47.[2] In response to another question, she said "This will apply to this terrorist group." *Id.* at 23:58-24:05.

Based on these statements, in July 2023, Plaintiffs sued James under 42 U.S.C. § 1983, alleging that in her official capacity she violated their First Amendment rights to freedom of speech and association and their Fourteenth Amendment right to equal protection. They also sued her in her individual capacity for defamation under New York law.

The district court dismissed the constitutional claims under Federal Rule of Civil Procedure 12(b)(1) for lack of standing, and the defamation claim under Rule 12(b)(6) for failure to state a claim. *Miller v. James*, 751 F. Supp. 3d 21, 30-42 (N.D.N.Y. 2024). Plaintiffs appealed.

We assume the parties' familiarity with the underlying facts, procedural history, and arguments on appeal, to

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at 12 ¶ 33; *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) ("[A] court may consider documents attached to the complaint as an exhibit or incorporated in it by reference. . . ." (internal quotation marks omitted)).

2. Because the reporter's question is inaudible, it is unclear whether James referred to Red Rose Rescue or to its members in her response to the question.

which we refer only as necessary to explain our decision to affirm.

I. Constitutional Standing

The district court dismissed Plaintiffs' First Amendment and Fourteenth Amendment claims for failure to establish Article III standing. *Id.* at *3-7. We review a district court's determination that a plaintiff lacked standing without deference to the district court, accepting as true all material factual allegations in the complaint. *See Cerame v. Slack*, 123 F.4th 72, 80 (2d Cir. 2024). To establish standing, Plaintiffs must plausibly allege that (1) they have suffered an injury in fact, which is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical," (2) the injury was "fairly traceable to the challenged action of the defendant," and (3) it is likely that the injury is "redress[able] by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).[3]

Plaintiffs allege that James's statements "have a chilling effect on Plaintiffs' rights to freedom of speech and expressive association" and caused irreparable harm to their "public reputation." App'x at 14, ¶ 40. But "[a]llegations of a subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972). And with

3. In quotations from caselaw and the parties' briefing, this summary order omits all internal quotation marks, footnotes, and citations, and accepts all alterations, unless otherwise noted.

respect to their assertion of reputational harm, Plaintiffs have alleged no facts to "nudge[] their claims across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

James described incidents in which Red Rose Rescue activists had unlawfully entered or blocked entry into health care facilities, and she referred to them as "terrorists." James Press Conference at 8:13. She later acknowledged that they were not "designated" terrorists but explained that she called them that because of their activities. *Id.* at 21:41. It is not at all apparent how these statements about the conduct of *other* Red Rose Rescue activists, and James's characterization of the organization in light of that conduct, have injured *Plaintiffs'* reputations simply by virtue of their association with Red Rose Rescue, and they have alleged no facts to support their conclusory assertion of reputational harm. "While the standard for reviewing standing at the pleading stage is lenient, a plaintiff cannot rely solely on conclusory allegations of injury or ask the court to draw unwarranted inferences in order to find standing." *Baur v. Veneman*, 352 F.3d 625, 636-37 (2d Cir. 2003).

For the same reason, Plaintiffs lack standing to pursue their Fourteenth Amendment claim. *See Cerame*, 123 F.4th at 80 n.11 ("Although standing is required for each claim, because the injury is the same for the First Amendment and Fourteenth Amendment claims in this case . . . we perform only one analysis.").

II. Defamation Claims

We review without deference the district court's ruling that Plaintiffs failed to state a claim of defamation, accepting the factual allegations in the complaint as true and drawing reasonable inferences in the Plaintiffs' favor. *See Krys v. Pigott*, 749 F.3d 117, 128 (2d Cir. 2014).

Only false statements of fact are actionable as defamation. *See Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 151, 623 N.E.2d 1163, 603 N.Y.S.2d 813 (1993). The district court ruled that James's statements are best understood as conveying non-actionable opinions, not facts that are capable of being true or false. *Miller*, 751 F. Supp. 3d at 37-40. To determine whether something is opinion or fact, the court must consider: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal [to] readers or listeners that what is being read or heard is likely to be opinion, not fact." *Gross*, 82 N.Y.2d at 153.

Although New York law defines an "act of terrorism," *see* N.Y. Penal Law § 490.05, the term "terrorist" can have a colloquial meaning other than identifying someone who has committed an act of terrorism under New York's criminal code. By analogy, a New York court concluded that a "defendant's statement that she was stalked and harassed was not an actionable statement of objective

fact because it did not have a precise, readily understood meaning," despite the fact that there is a legal definition of stalking and harassment. *Springer v. Almontaser*, 75 A.D.3d 539, 541, 904 N.Y.S.2d 765 (N.Y. App. Div. 2d Dept. 2010).

A statement of opinion is one "accompanied by a recitation of the facts upon which it is based" or that "does not imply that it is based upon undisclosed facts." *Davis v. Boeheim*, 24 N.Y.3d 262, 269, 998 N.Y.S.2d 131, 22 N.E.3d 999 (2014). Here, James fully explained the factual basis for her opinion. And in "the full context of the communication in which the statement appears," it is clear that James was using the term "terrorist" as rhetorical hyperbole to characterize the conduct she had described. *Gross*, 82 N.Y.2d at 153. Before she used the word "terrorist," and while discussing the events giving rise to the lawsuit described in the related press conference, James repeatedly described the defendants in that lawsuit as "terrorizing" patients in the colloquial sense. And she made clear that Red Rose Rescue and its associates were not designated terrorists in the formal legal sense, and that she called them terrorists "because of their activities"—that is, the activities she had just described. James Press Conference at 21:41-21:47. In this context, James used the term "terrorist" to express an opinion, not a fact, and her characterization is not subject to proof or disproof. We must therefore affirm the district court's dismissal of Plaintiffs' defamation claims.[4]

4. Because we conclude that Plaintiffs fail to state a claim for defamation on this basis, we need not consider the district court's alternate rationale that Plaintiffs also failed to plead special

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For the reasons explained above, the district court's judgment is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court

/s/ Catherine O'Hagan Wolfe

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damages or per se actionability. *See Miller*, 751 F. Supp. 3d at 40-42. Likewise, we need not consider whether James's statements were "of and concerning" Plaintiffs. *Three Amigos SJL Rest., Inc. v. CBS News, Inc.*, 132 A.D.3d 82, 86, 15 N.Y.S.3d 36 (N.Y. App. Div. 1st Dept. 2015); *cf. id.* at 88 ("[A] statement made about an organization is not understood to refer to any of its individual members unless that person is distinguished from other members of the group.").

APPENDIX B — MEMORANDUM-DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, FILED SEPTEMBER 27, 2024

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

1:23-CV-820 (LEK/DJS)

MONICA MILLER AND SUZANNE ABDALLA,

Plaintiffs,

-against-

LETITIA JAMES,

Defendant.

Filed September 27, 2024

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

On July 7, 2023, Plaintiffs Monica Miller and Suzanne Abdalla filed a complaint against Defendant Letitia James. Dkt. No. 1 ("Complaint"). In the Complaint, Plaintiffs allege violations of the First and Fourteenth Amendments and defamatory speech. *See id.* ¶¶ 55-69. On October 12, 2023, Defendant filed a motion to dismiss. Dkt. No. 8-3 ("Motion"). Plaintiffs filed a response, Dkt. No. 10

("Response"), and Defendant filed a reply, Dkt. No. 13 ("Reply").

For the reasons that follow, Defendant's Motion is granted in part and denied in part.

II. BACKGROUND

The following facts are stated as alleged in Plaintiffs' Complaint.

Plaintiff Miller is a Michigan resident who identifies as Roman Catholic and as a "pro-life advocate." Compl. ¶ 9. Plaintiff Abdalla is a Michigan resident who identifies as Byzantine Catholic and as a "pro-life advocate." *Id.* ¶ 16. Both participate in activities as part of Red Rose Rescue, including "praying, distributing literature, holding pro-life signs, and counselling women on public sidewalks outside of abortion centers." *Id.* ¶¶ 11, 18; *see* ¶¶ 9, 16. Plaintiff Miller also enters reproductive care clinics as part of her advocacy, including entering clinics that provide abortion services. *See id.* ¶ 12. Plaintiffs state that they take these actions on the basis of their "sincerely held religious beliefs." *Id.* ¶¶ 10, 17. Defendant "is the Attorney General of the State of New York and a resident of the State of New York." *Id.* ¶ 22.

On June 8, 2023, Defendant held a press conference announcing the filing of a civil complaint,[1] ("AG Complaint")

1. *New York by James v. Red Rose Rescue*, No. 23-CV-4832, Dkt. No. 1 (S.D.N.Y. Jun. 8, 2023). A preliminary injunction was

against Red Rose Rescue and seven individuals. Plaintiffs were not parties to the suit. *See id.* ¶ 28; *see also* Dkt. No. 8-2 ("Krasnokutski Exhibit"). The AG Complaint alleged civil violations of the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, and the New York Clinic Access Act, N.Y. Civ. Rights Law § 79-m (together, "FACE Acts"). *See* Compl. ¶ 28; AG Complaint. While Plaintiff Miller's name was included in the allegations made in the AG Complaint, she was not named as a defendant in the lawsuit. *See* Compl. ¶ 30. Plaintiff Abdalla was not mentioned in the AG Complaint. *See* AG Complaint. During the press conference, "Defendant James labelled those who associate with Red Rose Rescue as 'terrorists,' and she labelled Red Rose Rescue a 'terrorist group.'" Compl. ¶ 31. Defendant did not bring any criminal charges relating to terrorism against Plaintiffs or against any of the named plaintiffs in the AG Complaint. *See id.* ¶ 36. Defendant's statements in the press conference were published on the Attorney General's website and covered by the media. *See id.* ¶ 33.

Based on her comments in the press conference, Plaintiffs allege that Defendant "has disseminated false and defamatory information about Plaintiffs, which irreparably harmed Plaintiffs' interests and will continue to cause harm to Plaintiffs," stating that, "[a]bsent relief from this Court, Defendant James will continue to take action that unlawfully designates and targets Plaintiffs as terrorists." *Id.* ¶ 26; *see also id.* ¶ 40 (alleging

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entered in favor of Plaintiff Letitia James on December 7, 2023. *See New York by James v. Rescue*, 705 F. Supp. 3d 104 (2023).

that "Defendant James' public dissemination of false information about Plaintiffs is injurious to Plaintiffs' interests, which has caused and will continue to cause irreparable harm to Plaintiffs and their public reputation" as well as having a "chilling effect" on both Plaintiffs' freedom of speech and right to expressive association). Plaintiffs allege that these comments were "motivated by malice" and "made with hatred, ill will, and spite." *Id.* ¶ 41. Plaintiffs speculate that "Defendant James will continue to disseminate false information about Plaintiffs unless enjoined from doing so by this Court," *id.*, and that Defendant's statements "create[] a basis for government investigation, surveillance, punishment, condemnation, and other disfavored treatment" and "subject[] Plaintiffs to public retribution," *id.* ¶ 46.

Plaintiffs allege four claims for relief: (1) violation of their First Amendment right to freedom of speech, *see id.* ¶¶ 55-57; (2) violation of their First Amendment right to expressive association, *see id.* ¶¶ 58-60; (3) violation of their Fourteenth Amendment right to equal protection, *see id.* ¶¶ 61-63; and (4) defamation under state law, *see id.* ¶¶ 64-69. Plaintiffs bring their constitutional claims under 42 U.S.C. § 1983 against Defendant in her official capacity and bring their defamation claim against Defendant in her personal capacity. *See id.* ¶ 27. Plaintiffs request a declaratory judgment that Defendant's speech violated the First and Fourteenth Amendments, a permanent injunction preventing Defendant from making similar statements in the future, and an award of "compensatory and punitive damages in the amount of $5,000,000" for defamation, as well as fees and expenses. *Id.* at 15-16.

III. LEGAL STANDARD

A district court will dismiss an action pursuant to Rule 12(b)(1) "for lack of subject matter jurisdiction if the court lacks the statutory or constitutional power to adjudicate it." *Conn. Parents Union v. Russell-Tucker*, 8 F.4th 167, 172 (2d Cir. 2021). When deciding whether to dismiss under Rule 12(b)(1), the court "must accept as true all material facts alleged in the complaint and draw all reasonable inferences in the plaintiff's favor." *Buday v. N.Y. Yankees P'ship*, 486 F. App'x 894, 895 (2d Cir. 2012) (quoting *Conyers v. Rossides*, 558 F.3d 137, 143 (2d Cir. 2009)). "However, argumentative inferences favorable to the party asserting jurisdiction should not be drawn." *Id.* (quoting *Atl. Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd.*, 968 F.2d 196, 198 (2d Cir. 1992)).

To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A court must accept as true the factual allegations contained in a complaint and draw all inferences in favor of a plaintiff. *See Allaire Corp. v. Okumus*, 433 F.3d 248, 249-50 (2d Cir. 2006). A complaint may be dismissed pursuant to Rule 12(b)(6) only where it appears that there are not "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Plausibility requires "enough fact[s] to raise a reasonable expectation that discovery

will reveal evidence of [the alleged misconduct]." *Id.* at 556. In considering whether a plaintiff has alleged enough in their complaint, a court may also consider "documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable LLC*, 622 F.3d 104, 111 (2d Cir. 2010). "[W]here a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (internal quotations omitted).

The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. The Supreme Court has stated that "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (citing *Twombly*, 550 U.S. at 555). Where a court is unable to infer more than the mere possibility of the alleged misconduct based on the pleading facts, the pleader has not demonstrated that she is entitled to relief and the action is subject to dismissal. *See id.* at 679.

Generally, a notice of dismissal by court order "operates as an adjudication on the merits." Fed. R. Civ. P. 41(b). Even so, a court should "freely give leave [to amend a complaint] when justice so requires." Fed. R. Civ. P. 15(a)(2). "However, the Court is not required to grant leave to amend where such amendment would be futile, or, in other words, when any amendment would not

be able to withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6)." *Ryle v. Rehrig Pac. Co.*, No. 19-CV-1478, 2020 U.S. Dist. LEXIS 195962, 2020 WL 6196144, at *5 (N.D.N.Y. Oct. 22, 2020) (citing *Byerly v. Ithaca Coll.*, 290 F. Supp. 2d 301, 305 (N.D.N.Y. 2003)).

IV. DISCUSSION

For the reasons discussed below, Plaintiffs' constitutional and tort claims are dismissed.[2]

A. Standing

Defendant argues that Plaintiffs' Section 1983 claims must be dismissed because Plaintiffs do not have standing to maintain a claim. *See* Mot. at 6-8. The Court agrees and finds that Plaintiffs have not established standing on their First Amendment or Fourteenth Amendment claims.

"To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likelihood' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S.

2. Since the Court dismisses Plaintiffs' First Amendment and Fourteenth Amendment claims on the basis of standing, the Court declines to evaluate Defendant's additional arguments: whether Plaintiffs' claims are barred by the Eleventh Amendment, whether Plaintiffs have failed to state a claim for relief, or whether Defendant is entitled to qualified immunity.

555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). "An Article III-sufficient injury, however, must be concrete and particularized and actual or imminent, not conjectural or hypothetical." *Picard v. Magliano*, 42 F.4th 89, 97 (2d Cir. 2022) (internal quotations omitted); *see also Spokeo, Inc. v. Robins*, 578 U.S. 330, 340, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016) ("A 'concrete' injury must be '*de facto*'; that is, it must actually exist.") (citing Black's Law Dictionary 479 (9th Ed. 2009)). "[A] plaintiff must demonstrate standing separately for each form of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006) (citing *Friends of Earth, Inc. v. Laidlaw Env. Servs., Inc.*, 528 U.S. 167, 185, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)).

A risk of future harm may only provide the basis for forward-looking, injunctive relief, and only if "the risk of harm is sufficiently imminent and substantial." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 435, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013) (noting that an injury must be "*certainly impending* to constitute injury in fact and that allegations of *possible* future injury are not sufficient") (cleaned up); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153-55, 130 S. Ct. 2743, 177 L. Ed. 2d 461 (2010) (describing the level of factual pleading required to demonstrate a substantial risk of harm); *Los Angeles v. Lyons*, 461 U.S. 95, 111, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983); (holding that plaintiffs lack standing to pursue injunctive relief when they are unable to establish a "real or immediate threat" of injury); *Nicosia v. Amazon.com,*

Inc., 834 F.3d 220, 239 (2d Cir. 2016) ("Although past injuries may provide a basis for standing to seek money damages, they do not confer standing to seek injunctive relief unless the plaintiff can demonstrate that she is likely to be harmed again in the future in a similar way.").

1. First Amendment Claims

"A plaintiff has standing [for a First Amendment claim] if he can show *either* that his speech has been adversely affected by the government [action] or that he has suffered some other concrete harm," including "non-speech related harms." *Dorsett v. City of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013) (per curiam); *see also Gill v. Pidlypchak*, 389 F.3d 379, 383 (2d Cir. 2004) ("[S]tanding is no issue whenever the plaintiff has clearly alleged a concrete harm independent of First Amendment chilling. It is only a problem where no harm independent of the First Amendment is alleged.).

a. Chilling

First, the Court assesses whether Plaintiffs have alleged an adverse effect on speech, or actual chilling, sufficient to allege an injury-in-fact.

"Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972). To allege chilling of speech, a plaintiff "must 'proffer some objective evidence to substantiate their claim that the

challenged conduct has deterred them from engaging in protected activity.'" *Nitke v. Ashcroft*, 253 F. Supp. 2d 587, 596 (S.D.N.Y. 2003) (quoting *Bordell v. Gen. Elec. Co.*, 922 F.2d 1057, 1061 (2d Cir. 1991)). Plaintiffs must plead that they were deterred from engaging in protected activity with specificity; conclusory statements will not suffice. *See Guan v. Mayorkas*, 530 F. Supp. 3d 237, 258 (E.D.N.Y. 2021) (finding that plaintiffs had not pled actual chilling of their First Amendment rights for standing purposes because, "[a]part from the conclusory statement that the CBP officers' past conduct 'would reasonably chill Plaintiffs and other journalists from travelling to Mexico to report on U.S.-Mexico border issues,' Plaintiffs do not allege that they were *actually* chilled from pursuing any journalistic activities.") (internal citations omitted). Fear of future consequences is insufficient. *See id.* (finding that fear of possible secondary inspections during border crossings was insufficient to establish standing).

Plaintiffs allege that Defendant's statements "also have a chilling effect on Plaintiffs' rights to freedom of speech and expressive association, and the defamatory statements have a chilling effect on the rights to freedom of speech and expressive association of other pro-lifers associated with Red Rose Rescue." Compl. ¶ 40; *see also id.* ¶ 53 (stating that, to establish a violation of the freedom of association, "[t]he risk of a chilling effect on association is enough, because First Amendment freedoms need breathing space to survive"). However, Plaintiffs do not plead that they were actually chilled from either pursuing any particular speech or associating with other individuals affiliated with Red Rose Rescue. While both

Plaintiffs list the speech they engage in to support Red Rose Rescue, *see id.* ¶¶ 11, 18, neither allege that they have been dissuaded from engaging in that speech by Defendant's press conference. *See Dorsett*, 732 F.3d at 161 (finding no chilling effect where the plaintiff remained politically active and maintained political associations).

Similarly, while Plaintiffs argue that Defendant's speech "brand[s] pro-lifers such as Plaintiffs as criminals on account of their religious beliefs and viewpoints, subjecting them to governmental scrutiny, investigation, surveillance, condemnation, and intimidation, which have a deterrent effect on Plaintiffs' constitutionally protected activities and their rights to freedom of speech and expressive association," Compl. ¶ 49, Plaintiffs do not allege that any of these speculative fears have chilled their speech or that "the risk of harm is sufficiently imminent and substantial" to imply future chilling, *TransUnion LLC*, 594 U.S. at 435. Plaintiffs have merely alleged that these harms may occur at some point in the future, but they provide none of the specifics required to suggest that they are likely or imminent. Accordingly, Plaintiffs have not alleged chilling or future risk of chilling of their speech or expressive association sufficient to justify either a declaratory judgment or injunctive relief.

b. Other Concrete Harms

Since Plaintiffs have not alleged actual chilling, the Court turns to whether they have alleged some other concrete harm. Plaintiffs offer two theories of concrete harm: reputational damage and increased risk

of disfavored government treatment. *See* Compl. ¶ 46. Neither are persuasive.

Various intangible harms can provide the basis for finding injury-in-fact, including reputational harms. *See TransUnion LLC*, 594 U.S. at 425; *but see Foretich v. United States*, 351 F.3d 1198, 1212-1213, 359 U.S. App. D.C. 54 (D.C. Cir. 2003) ("[W]here harm to reputation arises as a byproduct of government action, the reputational injury, without more, will not satisfy Article III standing *when that government action itself no longer presents an ongoing controversy*."). For example, "being put on a blacklist, or being formally censured for misconduct, is treated as immediately redressible harm because it diminishes (or eliminates) the opportunity to practice one's profession even if the list or the censure does not impose legal obligations." *United States v. Accra Pac, Inc.*, 173 F.3d 630, 633 (7th Cir. 1999) (holding that a report of current pollutants on land did not constitute concrete injury) (citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 71 S. Ct. 624, 95 L. Ed. 817 (1951)).

Plaintiffs allege that they have standing because of the reputational harm they have experienced. To support this point, Plaintiffs cite a number of cases—largely from other circuits—establishing that reputational harm can confer standing. *See* Resp. at 11-12. However, unlike the plaintiffs in those cited cases, Plaintiffs do not provide anything beyond conclusory assertions that their public reputation has been harmed. *Cf. Parsons v. U.S. Dept. of Justice*, 801 F.3d 701, 712 (6th Cir. 2015) (finding standing where allegations of chilling were "accompanied by allegations

of concrete reputational injuries resulting in allegedly improper stops, detentions, interrogations, searches, denial of employment, and interference with contractual relations"); *NCAA v. Governor of N.J.*, 730 F.3d 208, 220 (3d Cir. 2013) (finding standing where appellee cited legislative history, public opinion polls, and expert evidence to establish reputational harm); *Gully v. NCUA Bd.*, 341 F.3d 155, 161-62 (2d Cir. 2003) (finding manager of a federal credit union had standing to challenge a final determination that she breached her fiduciary duties); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 542-43 (3d Cir. 2007) (finding attorney had standing to challenge a public reprimand made in a sanctions order); *Foretich v. United States*, 351 F.3d 1198, 1213, 359 U.S. App. D.C. 54 (D.C. Cir. 2003) (finding vitiation of parental rights and demonstrated loss of business from passed legislation could confer standing).

Unlike in these cases, Plaintiffs rely on a press conference in which neither Plaintiff was mentioned by name. *See* Compl. ¶¶ 28, 31-32; Krasnokutski Ex. Plaintiffs do not establish that any reputational harm actually materialized or was likely to materialize. *See TransUnion LLC*, 594 U.S. at 433-435 (finding concrete reputational harm for class members for whom TransUnion provided misleading credit reports to third-parties but not to those class members whose files merely contained misleading information that could be transmitted to future third-parties); *Meese v. Keene*, 481 U.S. 465, 473, 107 S. Ct. 1862, 95 L. Ed. 2d 415 (1987) (finding reputational harm where a plaintiff alleged he wished to exhibit three films but did not because "his personal, political, and

professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired," supported by detailed affidavits, an opinion poll, and views of a political analyst); *Doe v. Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999) (finding an injury-in-fact where a plaintiff established that he had actually been identified as a disabled person against his will on already-promulgated score reports). Indeed, Plaintiffs do not allege that they were formally designated as "terrorists." *See McGrath*, 341 U.S. at 139 (finding standing where plaintiff was included on a blacklist of allegedly Communist organizations provided by the Attorney General to the Loyalty Review Board and disseminated to government agencies). In keeping with this line of cases, the Court finds that Plaintiffs have not alleged reputational harm sufficient to establish an injury-in-fact because they have not established that a concrete harm has occurred or is likely to occur.

Plaintiffs need not allege reputational harms to have standing if they allege the existence of other concrete harms. The Second Circuit has recognized standing in First Amendment cases when a plaintiff has alleged certain non-speech related harms, including lost government contracts, additional scrutiny at border crossings, revoked building permits, and refusal to enforce zoning laws. *See Dorsett*, 732 F.3d at 160 (collecting cases).

Plaintiffs do allege future, speculative harms that they believe are more likely because of Defendant's statements. *See* Compl. ¶ 46 ("Defendant James' labeling of pro-lifers as 'terrorists' creates a basis for government

investigation, surveillance, punishment, condemnation, and other disfavored treatment, and it has tarnished Plaintiffs' public reputation and subjects Plaintiffs to public retribution). However, Plaintiffs do not allege that they have actually experienced or are likely to experience any of these possible harms, which distinguishes their experience from the experiences of the plaintiffs in their cited cases. *Cf. NCAA*, 730 F.3d at 220; *Gully*, 341 F.3d at 161-62; *Bowers*, 475 F.3d at 542-43; *Foretich*, 351 F.3d at 1213.

Plaintiffs do not specifically allege that their claim of defamation itself is sufficient to allege standing for their constitutional claims. In any event, the Court is skeptical that allegations of defamation without specific damages are adequate to create standing for either a free expression or free association claim. *See Zherka v. Amicone*, 634 F.3d 642, 646 (2d Cir. 2011) (noting that the presumed damages of defamation *per se* under New York law "do not establish a concrete harm sufficient for a federal claim of First Amendment retaliation"). Regardless, since Plaintiffs' claims for defamation are dismissed, as discussed below, such a claim would be unavailing.

In summary, the Court finds that Plaintiffs have not alleged standing to pursue either declaratory or injunctive relief for their free expression and expressive association claims, because they have failed to allege that they have experienced or will likely experience chilling or another related concrete harm.

2. Fourteenth Amendment Claims

Plaintiffs also allege violation of their equal protection rights as guaranteed by the Fourteenth Amendment. *See* Compl. ¶¶ 61-63. Specifically, Plaintiffs allege that Defendant "deprived Plaintiffs of the equal protection of the law . . . by targeting Plaintiffs for defamatory and disfavored treatment on account of Plaintiffs' religious viewpoint on abortion." *Id.* ¶ 62. For the reasons that follow, Plaintiffs do not have standing to pursue relief for their Fourteenth Amendment claims.

"An injury rooted in the stigmatizing effect of government conduct 'accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct.'" *Robinson v. Sessions*, 260 F. Supp. 3d 264, 276 (W.D.N.Y. 2017) (quoting *Allen v. Wright*, 468 U.S. 737, 755, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984), *abrogated in part on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)). "[M]ere dignitary harm resulting from the government's actions, without more, is not enough to confer standing upon a plaintiff." *Mehdi v. U.S. Postal Service*, 988 F. Supp. 721, 731 n.9 (S.D.N.Y. 1997).

"In seeking prospective relief like an injunction, 'a plaintiff must show that he can reasonably expect to encounter the same injury again in the future—otherwise there is no remedial benefit that he can derive from such a judicial decree." *Leder v. Am. Traffic Sols., Inc.*, 81 F. Supp. 3d 211, 222 (E.D.N.Y. 2015), *aff'd*, 630

F. App'x 61 (2d Cir. 2015) (quoting *MacIssac v. Town of Poughkeepsie*, 770 F. Supp. 2d 587, 593 (S.D.N.Y. 2011)); *see also Congregation Rabbinical Coll. of Tartikov, Inc. v. Village of Pomona, N.Y.*, 945 F.3d 83, 110 (2d Cir. 2019) ("'[C]onjectural' injuries do not suffice under Article III.") (alteration in original) (quoting *Lujan*, 504 U.S. at 560); *Nicosia*, 834 F.3d at 239 ("[The plaintiffs] lack standing to pursue injunctive relief where they are unable to establish a 'real or immediate threat' of injury.") (quoting *Lyons*, 461 U.S. at 111-12).

Plaintiffs allege that, as a result of the press conference, they "have suffered irreparable harm, including the loss of their constitutional rights and public reputation." Compl. ¶ 63. As discussed above, the Court is unpersuaded that Plaintiffs have alleged an injury-in-fact related to their reputations. *See* IV.A.1 Plaintiffs' Fourteenth Amendment claims fail for similar reasons, since Plaintiffs have not alleged that they were mentioned in the press conference or that they have experienced any actual harm to reputation—or, indeed, any other concrete harm—as a result of Defendant's statements. *See Robinson*, 260 F. Supp. 3d at 276 (finding that the plaintiffs did not have standing despite alleging that the defendants' conduct "associates them with terrorists" because the plaintiffs "[did] not allege that they have been subjected to the conduct that creates the stigma"). Since Plaintiffs do not allege that they have been personally affected, by or suffered any actual harm from, Defendant's statements, they have not established their standing to seek declaratory relief.

Additionally, Plaintiffs have not alleged how they are at risk of future harm to their rights under the Fourteenth Amendment. Their claims appear to allege that the Defendant's press conference creates a likelihood that Plaintiffs will be subject to "government investigation, surveillance, punishment, condemnation, and other disfavored treatment, and it has tarnished Plaintiffs' public reputation and subjects Plaintiffs to public retribution." Compl. ¶ 46. As discussed above, Plaintiffs have not alleged that they have a "reasonable expectation" of these future harms sufficient to survive the Supreme Court's guidance in cases like *Clapper*. As to the alleged damage to reputation, Plaintiffs have neither alleged how they would suffer continuing defamation absent an injunction barring speech nor that the speech is likely to continue. Absent more, Plaintiffs do not have standing to seek injunctive relief on their Equal Protection claims.

In summary, Plaintiffs have not established standing to pursue declaratory or injunctive relief for their Fourteenth Amendment Equal Protection claims.

B. Defamation Claims

1. Jurisdiction

Plaintiffs' remaining claims fall under state law. Plaintiffs state that the Court "has jurisdiction over Plaintiffs' state law claim pursuant to 28 U.S.C. § 1332 as there is complete diversity of citizenship and the amount in controversy exceeds $75,000." Compl. ¶ 5.

Appendix B

Under Section 1332(a), "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different states." "A party invoking the jurisdiction of the federal court has the burden of proving that it appears to a 'reasonable probability' that the claim is in excess of the statutory jurisdictional amount." *Scherer v. Equitable Life Assurance Soc'y of U.S.*, 347 F.3d 394, 397 (2d Cir. 2003) (citing *Tongkook Am., Inc. v, Shipton Sportswear Co.*, 14 F.3d 781, 784 (2d Cir. 1994)). "This burden is hardly onerous, however, for we recognize 'a rebuttable presumption that the fact of the complaint is a good faith representation of the actual amount in controversy.'" *Id.* (quoting *Wolde-Meskel v. Vocational Instruction Project Comty. Servs., Inc.*, 166 F.3d 59, 63 (2d Cir. 1999)). "[E]ven where [the] allegations leave grave doubt about the likelihood of a recovery of the requisite amount, dismissal is not warranted." *Zacharia v. Harbor Island Spa, Inc.*, 684 F.2d 199, 202 (2d Cir. 1982).

Plaintiffs are residents of Michigan, *see* Compl. ¶¶ 9, 16, and Defendant is a resident of New York, *see id.* ¶ 22. Therefore, Plaintiffs have demonstrated complete diversity and met the first prong for diversity jurisdiction. Plaintiffs also request an award of "compensatory and punitive damages in the amount of $5,000,000 against Defendant James in her individual and personal capacity for defaming Plaintiffs." Compl. at 15. Although Plaintiffs have not pled any basis to support such a number, absent a showing "'to a legal certainty' that the amount recoverable does not meet the jurisdictional threshold," *Scherer*, 347

F.3d at 397, the Court is satisfied that the requirements for diversity jurisdiction are met.

2. Merits of Plaintiffs' Claim

Defendant argues that Plaintiffs' defamation claim should be dismissed under Rule 12(b)(6) because the statements could not reasonably be understood to refer to Plaintiffs and because, in context, they are expressions of opinion "not properly subject to a defamation claim." Mot. at 18-19. The Court agrees with Defendant that Plaintiffs' defamation claims should be dismissed.

"Defamation is the injury to one's reputation either by written expression, which is libel, or by oral expression, which is slander." *Ganske v. Mensch*, 480 F. Supp. 3d 542, 551 (S.D.N.Y. 2020) (quoting *Biro v. Condé Nast*, 883 F. Supp. 2d 441, 456 (S.D.N.Y. 2012). "Under New York law, to state a claim for defamation, a plaintiff must allege "(1) a written [or spoken] defamatory statement of and concerning the plaintiff, (2) publication to a third party, (3) fault, (4) falsity of the defamatory statement, and (5) special damages or per se actionability." *Kesner v. Dow Jones & Co., Inc.*, 515 F. Supp. 3d 149, 169-70 (S.D.N.Y. 2021) (quoting *Palin v. N.Y. Times Co.*, 940 F.3d 804, 809 (2d Cir. 2019)) (alterations in original). "[T]he court must give the disputed language a fair reading in the context of the publication as a whole." *Elias v. Rolling Stone LLC*, 872 F.3d 97, 109 (2d Cir. 2017) (quoting *Armstrong v. Simon & Schuster, Inc.*, 85 N.Y.2d 373, 649 N.E.2d 825, 829, 625 N.Y.S.2d 477 (1995)).

Appendix B

Parties do not appear to contest the second or third prongs of the *Kesner* test. Mot. at 18-23; Resp. at 21-25. Accordingly, the Court will evaluate prongs one, four, and five.

a. Prong One: "Of and Concerning"

Defendant argues that Plaintiffs have failed to state a claim for defamation because her statements were not "of and concerning" Plaintiffs. Mot. at 19-20. Since the Court cannot conclusively determine the size of Red Rose Rescue based on the pleadings, the Motion is denied on this ground because of the group libel doctrine.

In assessing whether a plaintiff has stated a claim of defamation, "[t]he dispositive inquiry, under either Federal or New York law, is whether a reasonable reader could have concluded that the articles were conveying facts about the plaintiff." *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 623 N.E.2d 1163, 1167, 603 N.Y.S.2d 813 (N.Y. 1993) (cleaned up) (quoting *600 W. 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 603 N.E.2d 930, 934, 589 N.Y.S.2d 825 (N.Y. 1992); *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 288-89, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (finding the evidence did not support a determination that the allegedly libelous statements were made "of and concerning" respondent because "[t]here was no reference to respondent in the advertisement, either by name or official position" and the "statements could not reasonably be read as accusing respondent of personal involvement in the acts in question"). "Although the 'of and concerning' requirement generally presents a factual question for the

jury, 'the Court properly may dismiss an action pursuant to Rule 12(b)(6) where the statements are incapable of supporting a jury's finding that the allegedly libelous statements refer to plaintiff.'" *Diaz v. NBC Universal, Inc.*, 536 F. Supp. 2d 337, 342 (S.D.N.Y. 2008) (quoting *Church of Scientology Intern. v. Time Warner, Inc.*, 806 F. Supp. 1157, 1160 (S.D.N.Y. 1992)). "While a plaintiff may use extrinsic facts to prove that the statement is 'of and concerning' him, he must show the reasonableness of concluding that the extrinsic facts were known to those to whom the statement was made." *Three Amigos SJL Rest., Inc. v. CBS News Inc.*, 132 A.D.3d 82, 15 N.Y.S.3d 36, 42 (N.Y. App. Div. 2015).

"[A]n individual plaintiff must be clearly identifiable [in an allegedly defamatory statement] to support a claim for defamation." *Algarin v. Town of Wallkill*, 421 F.3d 137, 139 (2d Cir. 2005) (quoting *Abramson v. Pataki*, 278 F.3d 93, 102 (2d Cir. 2002)). "[A]n individual belonging to a small group may maintain an action for individual injury resulting from a defamatory comment about the group, by showing that he is a member of the group . . . [b]ecause the group is small and includes few individuals, reference to the individual plaintiff reasonably follows." *Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 445 N.Y.S.2d 786, 790 (N.Y. App. Div. 1981). However, "[u]nder the group libel doctrine, when a reference is made to a large group of people, no individual within that group can fairly say that the statement is about him, nor can the 'group' as a whole state a claim for defamation." *Diaz*, 536 F. Supp. 2d at 343 (citing, *inter alia*, *Sullivan*, 376 U.S. at 288); *see also Three Amigos.*, 15 N.Y.S.3d at 41

(same). While "New York Courts have not set a particular number above which defamation of a group member is not possible," the Southern District has noted the absence of "any cases where individual members of groups larger than sixty have been permitted to go forward [with a libel claim]." *Anyanwu v. Columbia Broad. Sys., Inc.*, 887 F. Supp. 690, 693 (S.D.N.Y. 1995); *see also* Restatement (Second) of Torts § 564A cmt. b. (1977) ("It is not possible to set definite limits as to the size of the group or class, but the cases in which recovery has been allowed usually have involved numbers of 25 or fewer.").

Here, Defendant's statements did not name Plaintiffs. *See* Compl. ¶¶ 28, 31-32; Krasnokutski Ex. Plaintiff Abdalla is not named at all in the AG Complaint and was not mentioned in the press conference, nor has she alleged that she would be publicly known as a member of Red Rose Rescue other than by stating that she has previously "spoken to the media on behalf of Red Rose Rescue." Compl. ¶ 20. While Plaintiff Miller is referenced in the AG Complaint, she was not mentioned in the press conference. *See id.* ¶ 30.[3] Thus, both Plaintiffs must overcome the group libel doctrine to support their defamation claims based on their affiliation with Red Rose Rescue. Since neither Plaintiffs nor Defendant have definitively established

3. Even if Plaintiffs had based the Complaint on the pleadings in the AG Complaint, such a claim would be barred because "a party who files a pleading . . . in a judicial proceeding has absolute immunity . . . if they relate to the subject of the inquiry." *Woodford v. Cmty. Action of Greene Cty, Inc.*, 103 F. Supp. 2d 97, 101 (N.D.N.Y. 2000) (Kahn, J.) (quoting *Sacks v. Stecker*, 60 F.2d 73, 75 (2d Cir. 1932)).

the number of individuals who are members of Red Rose Rescue, the Court cannot conclusively determine the applicability of the group libel doctrine based on the size of the group. *But see New York by James*, 705 F. Supp. at 121-22 (S.D.N.Y. 2023) (noting that the AG Complaint lists at least twenty-eight purported "Red Rose Rescues" that occurred in at least eight states and Washington D.C.).[4] Accordingly, the Motion is denied on this basis.

b. Prong Four: Falsity of the Defamatory Statement

In the alternative, Defendant argues that her statements are not capable of being proven false because they are best understood as non-actionable statements of opinion. *See* Mot. at 20-23. The Court agrees, and accordingly dismisses Plaintiffs' defamation claims.

"Since falsity is a necessary element of a defamation cause of action and only 'facts' are capable of being proven false, it follows that only statements alleging facts can properly be the subject of a defamation action." *Gross*, 623 N.E.2d at 1168; *see also Enigma Software Grp. USA,*

4. The AG Complaint, discussed at length in the Complaint, *see* Compl. ¶¶ 13, 28, 29, 30, 36, names thirty-two individuals affiliated with Red Rose Rescue and references additional unnamed affiliated individuals. *See* AG Complaint ¶¶ 11-16, 64, 67-70, 72, 75, 79, 83-84, 89. Plaintiff Abdalla was not mentioned in the AG Complaint. *See id*; *see also In re Synchrony Fin.*, 988 F.3d 157, 171 (2d Cir. 2021) (noting that, when ruling on a motion to dismiss pursuant to Rule 12(b)(6), courts "may consider any written instrument attached to the complaint, statements or documents incorporated into the complaint by reference").

LLC v. Bleeping Computer LLC, 194 F. Supp. 3d 263, 281 (S.D.N.Y. 2016) ("New York law absolutely protects statements of pure opinion, such that they can never be defamatory."). In New York, "[d]istinguishing between fact and opinion is a question of law for the courts, to be decided based on 'what the average person hearing or reading the communication would take it to mean.'" *Davis v. Boeheim*, 24 N.Y.3d 262, 998 N.Y.S.2d 131, 22 N.E.3d 999, 1004-05 (N.Y. 2014) (quoting *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 501 N.E.2d 550, 553, 508 N.Y.S.2d 901 (N.Y. 1986). Courts look to three factors to distinguish facts from opinion in the defamation context:

> (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers or listeners that what is being read or heard is likely to be opinion, not fact.

Gross, 623 N.E.2d at 1165. The plaintiff bears the burden of proving "that in the context of the entire communication a disputed statement is not protected opinion." *Celle v. Filipino Report Enters., Inc.*, 209 F.3d 163, 179 (2d Cir. 2000).

Generally, "rhetorical hyperbole" or "imaginative expression" is not considered defamatory because it "cannot 'reasonably [be] interpreted as stating actual facts'

about an individual" that could be proved false. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988)); *see also Greenbelt Co-op Pub. Ass'n v. Bresler*, 398 U.S. 6, 13-14, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970) (finding that a statement calling a negotiating tactic "blackmail" did not constitute defamation even when the speakers knew that no blackmail had been committed because "[n]o reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging [respondent] with the commission of a criminal offense" and it was clear that "the word was no more than rhetorical hyperbole"); *Johnson v. Riverhead Cent. Sch. Dist.*, 420 F. Supp. 3d 14, 32-33 (E.D.N.Y. 2018) (finding principal's statement that called plaintiff a threat to the safety and security of a school because of a prior weapons charge, compared plaintiff to the Columbine and Newtown school shooters, and stated that plaintiff would have to be "pat down" every time they entered the building" was "clear hyperbole"); *Ratajack v. Brewster Fire Dep't Inc.*, 178 F. Supp. 3d 118, 165 (S.D.N.Y. 2016) (finding statements in which the defendant "articulated concerns that Plaintiff was a racist or a future threat to others" was "nonactionable opinion"); *LeBlanc v. Skinner*, 103 A.D.3d 202, 955 N.Y.S.2d 391, 400 (N.Y. App. Div. 2012) (finding that a comment on a newspaper's internet forum referring to a plaintiff as "a terrorist" did not constitute defamation, since such a statement "was likely to be perceived as rhetorical hyperbole" or a "vigorous epithet" and thus "constituted an expression of opinion") (internal quotations omitted); *Gisel v. Clear Channel*

Comm's, Inc., 94 A.D.3d 1525, 942 N.Y.S.2d 751, 752 (N.Y. App. Div. 2012) (finding statements calling the plaintiff "a cold-blooded murderer" after plaintiff was acquitted of criminally negligent homicide was a "nonactionable expression of pure opinion"); *Lukashok v. Concerned Residents of North Salem*, 160 A.D.2d 685, 554 N.Y.S.2d 39, 40 (N.Y. App. Div. 1990) (finding statements published in an environmental newsletter stating that plaintiff "has resorted to what can only be called terrorism by suing every member of the Town Board and Planning Board personally" was "nonactionable opinion").

"A statement of 'pure opinion' is one which is either 'accompanied by a recitation of the facts upon which it is based' or 'does not imply that it is based upon undisclosed facts.'" Biro, 883 F. Supp. 2d at 461 (noting that "use of the terms 'shyster,' 'con man,' and finding an 'easy mark' is the type of 'rhetorical hyperbole' and 'imaginative expression' that is typically understood as a statement of opinion") (internal citation omitted). "A statement may still be actionable if it 'impl[ies] that the speaker's opinion is based on the speaker's knowledge of facts that are not disclosed to the reader.'" *Lan Sang*, 951 F. Supp. 2d at 520 (quoting *Levin v. McPhee*, 119 F.3d 189, 197 (2d Cir. 1997)).

Plaintiffs challenge Defendant's use of the words "terrorist" and "terrorist group." Compl. ¶ 66. The relevant question is whether these words are best understood in their context as an expression of opinion or as a statement of fact, based on the factors discussed in Gross.

Appendix B

First, the Court considers the precise meaning of the language at issue. Courts have been hesitant to apply one definition of a word when there is a colloquial meaning, even if there is also a specific legal or political definition. *See Springer v. Almontaser*, 75 A.D.3d 539, 904 N.Y.S. 2d 765, 767 (N.Y. App. Div. 2010) (finding that "defendant's statement that she was stalked and harassed was not an actionable statement of objective fact because it did not have a precise, readily understood meaning, and would clearly be understood by a reasonable listener to be a figurative expression of how she felt"); *Schwartz v. Nordstrom, Inc.*, 160 A.D.2d 240, 553 N.Y.S.2d 684, 685 (N.Y. App. Div. 1990) (finding that statement in arbitration calling the plaintiff a "Nazi" was "an expression of opinion which is not actionable"); *Lukashok*, 554 N.Y.S.2d at 40 (finding that a stating a plaintiff had resorted to "what can only be called terrorism" was a "nonactionable opinion"). While "terrorist" as a term is not specifically defined in New York's laws governing terrorism, *see* N.Y. Pen. L. § 490.05, the word "terrorist" can be legally understood to refer to someone who commits acts of terrorism proscribed by New York's criminal code, *see* N.Y. Pen L. §§ 490.00 *et seq.* However, as Defendant states, the word "terrorist" also refers more generally to those who engage in "the use of violent action in order to achieve political aims or to force a government to act." Mot. at 21 n.5. Given that multiple meanings of the word "terrorist" are available—and the fact that, despite Defendant's status as the Attorney General of New York, the statement was made in a press conference rather than a complaint or courtroom and was not accompanied with any language stating or suggesting a forthcoming charge linked to

terrorism—the Court is not persuaded that Defendant intended to use the specific, legal definition of the word "terrorist." As such, the Court is not convinced that the language at issue has a precise meaning that is readily understood.

Second, the Court considers whether the statements can be proven true or false. "[W]here a statement is subjective and imprecise, it is not susceptible of being proven true or false." *Jacobus v. Trump*, 55 Misc. 3d 470, 51 N.Y.S.3d 330, 338 (N.Y. Sup. Ct. 2017). Whether someone meets the colloquial meaning of "terrorist" is likely to be a matter of judgment or opinion. *See Barber v. Premo*, No. 20-CV-906368, 74 Misc. 3d 1204(A), 158 N.Y.S.3d 756, 2021 NY Slip Op 51291(U), 2021 WL 6622496, at *10 (N.Y. Sup. Ct. Sep. 29, 2021) ("Indeed, there is no precise, readily understood meaning of what Turnell may have meant by the use of the term [assaulted], and it appears on its face to be a hyperbolic phrase, and thus not defamatory."); *Biro*, 883 F. Supp. 2d at 463 (finding a description of the plaintiff as a "con man" to be a "nonactionable expression of opinion" despite the fact that "con man" could be read to refer to specific criminal activity). Therefore, the imprecise nature of Defendant's statements suggests those statements are not capable of being proven false.

Third, the Court considers the context in which the statement was delivered and whether the circumstances suggest that the statement is being delivered as opinion or fact. In her remarks, Defendant specifically stated that associates of Red Rose Rescue had not been legally

designated as terrorists and that she "refer[s] to them as terrorists because of their activities." Resp. at 17 n.4; *see Live Face on Web, LLC v. Five Boro Mold Specialist Inc.*, No. 15-CV-4779, 2016 U.S. Dist. LEXIS 56601, 2016 WL 1717218, at *3 (S.D.N.Y. Apr. 28, 2016) (noting that the use of rhetorical indicators to signal personal opinion and couched meaning indicate that "the defendant's statements, read in context, are readily understood as conjecture, hypothesis, or speculation, [which] signals the reader that what is said is opinion, and not fact") (citing *Levin v. McPhee*, 119 F.3d 189, 195 (2d Cir. 1997)). Defendant made these comments in a press conference describing the AG Complaint, which alleged that associates of Red Rose Rescue "engaged in 'coordinated and repeated illegal conduct, ranging from criminal trespass to barricading clinic entrances in order to block access to abortion services in New York.'" *New York by James*, 705 F. Supp. 3d at 112 (granting preliminary injunction in part in civil case discussed in the press conference at issue) (internal citations omitted).

Plaintiffs argue that the context of the speech makes it less likely the statements presented were received by listeners as opinion. They distinguish between *LeBlanc*, which involved speech in an online forum, and the "press conference to address Red Rose Rescue and to issue official statements of her office about this organization and those who associate with it," which "placed the power of the state government, with its authority, presumed neutrality, and assumed access to all the facts, behind a false accusation *designed* to target pro-lifers associated with Red Rose Rescue." Resp. at 23. However, the Court

is unpersuaded. Since Defendant made this speech in a press conference, rather than in a complaint, hearing, or trial, it is unlikely a listener would receive the statement as a criminal charge of terrorism. The mere fact that a government official makes the challenged speech is not enough to convert the speech into a defamatory statement. *See Gavenda v. Orleans Cnty.*, No. 95-CV-251, 1997 U.S. Dist. LEXIS 1527, 1997 WL 65870, at *8 (W.D.N.Y. Feb. 10, 1997) (finding speech to be "nonactionable opinion" when made by the three defendant employees of the Orleans County Sheriff's Department). While the identity of the speaker is relevant when considering the context in which the speech is made, the Court finds that the circumstances suggest Defendant's comments were an expression of her opinion.

Finally, while statements of opinion can be actionable if based on undisclosed information, Defendant's comments do not appear to be based on any undisclosed facts, but rather on the activities described in the AG Complaint and during the press conference. *See Biro*, 883 F. Supp. 2d at 461 (stating "a proffered hypothesis that is offered after a full recitation of the facts on which it is based is readily understood by the audience as conjecture" and cannot be considered defamatory). Rather, Defendant's comments appear to be editorial notes describing her perception of the facts laid out in the press conference and in the AG Complaint. *See Ratajack*, 178 F. Supp. 3d at 165 (finding a statement to be opinion because "the context makes clear that [the defendant] is not asserting new facts against [the] [p]laintiff, but is expounding upon the corollaries of the purported facts he has presented"). Thus, the

Court concludes that a reasonable listener would find that these comments were an expression of Defendant's subjective opinion and analysis of the allegations in the AG Complaint.

c. Prong Five: Damages and Defamation Per Se

Plaintiffs argue in their Response that the Court should find that Defendant's statements constitute defamation *per se*. *See* Resp. at 21-23. Specifically, Plaintiffs suggest that the Court read Defendant's statements as accusing them of the type of crime contemplated by New York Penal Law, thus constituting defamation *per se*. *See id.* at 22.

"Under New York law, to recover on a defamation claim, a plaintiff must either plead special damages or that the statements are defamatory *per se*." *Kesner*, 515 F. Supp. 3d at 171. "Statements that are defamatory *per se* 'are actionable without pleading and proof of special damages.'" *Id.* (citations and quotations omitted). "[T]he law presumes that damages will result." *Liberman v. Gelstein*, 80 N.Y.2d 429, 605 N.E.2d 344, 348, 590 N.Y.S.2d 857 (N.Y. 1992). In New York, this doctrine applies when a plaintiff alleges that the speaker made statements "(i) charging [the] plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that [the] plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman." *Zherka v. Amicone*, 634 F.3d 642, 645 n.6 (2d Cir. 2011) (quoting *Liberman*, 605 N.E.2d at 347).

Usually, "certain statements . . . alleging criminal conduct on the part of [the] plaintiffs do not constitute defamation per se because 'reference to extrinsic facts is necessary to give them a defamatory import,' and that other statements, e.g. accusing [the] plaintiffs of terrorism, do not constitute defamation per se because they are 'likely to be perceived as 'rhetorical hyperbole [or] a vigorous epithet.'" *Crane-Hogan Structural Systems, Inc. v. Belding*, 142 A.D.3d 1385, 38 N.Y.S.3d 489, 489 (N.Y. App. Div. 2016) (citations omitted).

Plaintiffs put forward two out-of-circuit state court cases to support the proposition that Defendant's statements are defamation *per se*, both of which are easily distinguishable on their facts. *See* Resp. at 22; *see also Van Der Linden v. Khan*, 535 S.W.3d 179, 187, 198 (Tex. App. 2017) (denying motion to dismiss in defamation suit flowing from the defendant's claim that the plaintiff is "a Muslim who has told [the defendant], PERSONALLY (not via hearsay) that he has given money to the Taliban" because the statement alleged the specific crime of providing financial support to designated terrorist groups); *Grogan v. KOKH, LLC*, 2011 OK CIV APP 34, 256 P.3d 1021, 1029 (Okla. Civ. App. 2011) (denying motion for summary judgment because television news program's discussion of the plaintiff after lead-in "on the heels of terrorist threats at local schools and a shooting at NIU" could be found to portray the plaintiff as being involved with specific terrorist threats). Unlike in *Van Der Linden*, Defendant did not specifically accuse Plaintiffs of working with named, designated terrorist groups. Unlike in *Grogan*, Defendant did not link Plaintiffs to

specific terrorist threats from other groups or events like a local school shooting. These cases reflect the rule that a statement referring to potential criminal activity becomes defamation *per se* only when it suggests guilt or at least a charge related to a specific incident, rather than "rhetorical hyperbole." *Belding*, 38 N.Y.S.3d at 489.

Plaintiffs have not pled that Defendant referred to Plaintiffs in the context of comparable terrorist activity and specifically note that the "civil lawsuit contained no allegations of terrorism." Compl. ¶ 29. In the press conference, Defendant specifically noted that Red Rose Rescue had not been officially designated as a terrorist organization. *See* Mot. at 22 ("They *haven't been designated* as such. *I refer to them as terrorists because of their activities* . . . ") (quoting Krasnokutski Ex. at 21:40). Defendant's statements are best understood as a colloquial use of the word "terrorist," rather than as an accusation of criminal conduct. *See Lukashok*, 554 N.Y.S.2d at 40. Considering Defendant's statements in context, the press conference did not accuse Plaintiffs of a serious crime.

Accordingly, the Court finds that Defendant's statements do not constitute defamation *per se*. Nevertheless, even if defamation *per se* was found, Plaintiffs' defamation claims would still fail because Defendant's statements are properly understood as an expression of opinion. *See Thorsen*, 966 F. Supp. 2d at 165 ("Nevertheless, as discussed *supra*, even if Plaintiffs were excused from pleading special damages under a defamation *per se* theory, Plaintiffs still have failed to allege an actionable defamatory statement. Accordingly . . . Plaintiffs' defamation *per se* claim is dismissed.").

In summary, Plaintiffs' defamation claims are dismissed for failure to state a claim upon which relief can be granted because the statements are best understood as non-actionable opinion, Plaintiffs have not alleged damages, and Plaintiffs have not alleged defamation *per se*.

V. CONCLUSION

Accordingly, it is hereby:

ORDERED, that Defendants' Motion to Dismiss, Dkt. No. 8, is **GRANTED**; and it is further

ORDERED, that Plaintiffs' Complaint, Dkt. No. 1, is **DISMISSED without prejudice** for lack of standing and for failure to state a claim; and it is further

ORDERED, that the Clerk of the Court close this action; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

DATED: September 27, 2024
Albany, New York

/s/ Lawrence E. Kahn
LAWRENCE E. KAHN
United States District Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, FILED SEPTEMBER 27, 2024

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CASE NUMBER: 1:23-cv-820

MONICA MILLER AND SUZANNE ABDALLA,

Plaintiff(s),

vs.

LETITIA JAMES,

Defendant(s).

Filed September 27, 2024

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants' Motion to Dismiss, Dkt. No. 8, is GRANTED; and it is further ORDERED, that Plaintiffs' Complaint, Dkt. No. 1, is DISMISSED without prejudice for lack of standing and for failure to state a claim.

Appendix C

All of the above pursuant to the order of the Honorable **Lawrence E. Kahn**, dated September 27, 2024.

DATED: September 27, 2024

s/ John Domurad
Clerk of Court

s/
Daniel Krug
Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED MAY 1, 2025

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO: 24-2785

MONICA MILLER, SUZANNE ABDALLA,

Plaintiff-Appellants,

v.

LETITIA JAMES, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendant-Appellee.

Filed May 1, 2025

ORDER

Appellants Monica Miller and Suzanne Abdalla, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe