IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

MONICA MILLER and SUZANNE ABDALLA, Plaintiffs, v. LETITIA JAMES, individually and in her official capacity as Attorney General of the State of New York, Defendant.	No. 1:23-cv-820 (LEK/DJS)

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Defendant Letitia James, the Attorney General of New York, has weaponized her office to publicly attack political opponents, falsely labeling private citizens who oppose abortion and associate with Red Rose Rescue as "terrorists" and belonging to a "terrorist group." Recent events in Israel should be a sober reminder that such false labeling, particularly by the chief law enforcement officer of the state, is exceedingly harmful and injurious to those who associate with Red Rose Rescue, which includes Plaintiffs. But that was the very purpose of Defendant James' actions. She chose her words carefully and intentionally, and they were made with actual malice, hatred, ill will, and spite, and for the unlawful purpose of suppressing the activities of pro-lifers who associate with Red Rose Rescue. Defendant James' reckless (and intentional) disregard for the truth is inexcusable, 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 the Red Rose Rescue, and thus the rights of those who associate with Red Rose Rescue, in the eyes of the public.

In her motion, Defendant James complains that "Plaintiffs' claims are so poorly pleaded that it is difficult to glean any articulable claim from them." (Def.'s Mem. at 8, Doc. No. 8-3). But the problem is not Plaintiffs' pleading. The problem is Defendant James' misapprehension of the law.

In the final analysis, Defendant James' motion to dismiss presents a tendentious view of the facts and law in a feckless attempt to avoid liability for her outrageous and unlawful conduct—conduct engaged in under the color of state law as the chief law enforcement officer for the State of New York. Her motion should be denied.

SUMMARY OF RELEVANT FACTS[1]

Plaintiffs Miller and Abdalla are pro-life based on their sincerely held religious beliefs, and they are active members of Red Rose Rescue. Plaintiffs 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. Plaintiffs also provide financial support to the organization. Plaintiffs abhor all violence, including the violence of abortion. (Compl. ¶¶ 9-11, 14-21, Doc. No. 1).

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

A Red Rose Rescue, properly understood in light of known and verifiable facts, never involves violence nor conduct that is proscribed by the Freedom of Access to Clinic Entrances Act (FACE) (18 U.S.C. § 248), or any state counterpart. (Compl. ¶¶ 12-14).

On June 8, 2023, Defendant James held a public press conference announcing a new *civil* lawsuit filed by the State of New York and the Attorney General against *Red Rose Rescue*, Christopher Moscinski, Matthew Connolly, William Goodman, Laura Gies, John Hinshaw, and *John and Jane Does*, alleging civil violations of FACE and the New York State version of this statute (the New York Clinic Access Act, N.Y. Civ. Rights Law § 79-m). This civil lawsuit principally seeks a 30-foot buffer zone around abortion centers. (Compl. ¶ 28).

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).

[1] For purposes of deciding this motion, the facts are those set forth in the Complaint. (*See* Compl., Doc. No. 1).

Indeed, at the close of her press conference, Defendant James doubled down and declared that Red Rose Rescue is in fact a "terrorist group." (*See* Def.'s Ex. A at 24:01 to 24:03, Doc. No. 8-2).

The civil lawsuit contains no allegations of terrorism as there is no evidence to support such allegations. Consequently, Defendant James' defamatory and injurious statements were not a fair and true report of any judicial proceeding, legislative proceeding, or other official proceeding. (Compl. ¶ 29).

Defendant James' false and defamatory remarks were of and concerning Plaintiffs as Plaintiffs are publicly associated with Red Rose Rescue. (Compl. ¶¶ 9, 12, 13, 16, 19, 20, 31). Indeed, 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 false and defamatory statements about Red Rose Rescue include Plaintiffs. (Compl. ¶ 32). For example, a simple Internet search for "Red Rose Rescue" reveals a picture of Plaintiff Miller on the organization's homepage. *See* https://www.redroserescue.com/ (last visited Oct. 27, 2023). And while Plaintiff 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 Attorney General James' office as the agent for Red Rose Rescue***.[2] (Compl. ¶ 30). In fact, in the civil lawsuit—the basis for the press conference—Defendant James states in multiple paragraphs of her complaint that Plaintiff Miller is a "***member***" of "*Red Rose Rescue*." (*See* Muise Decl., Ex. A [Civil Complaint ¶¶ 69, 76, 89] at Ex. 1). The civil lawsuit also names "John and Jane Does" as defendants "who are active in" Red Rose Rescue. (*Id*. [Civil Complaint at 1]). Plaintiff Abdalla is "active" in Red Rose Rescue.[3] (*See* Compl. ¶¶ 16-20).

[2] Defendant James' assertion that "Plaintiffs were not named in that litigation" (Def.'s Mem. at 10) is misleading.

[3] Defendant James' claim that her injurious and defamatory statements were not "of or concerning"

Defendant James' false and 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 website at https://ag.ny.gov/attorney-general-james-sues-militant-anti-abortion-group-invading-clinics-and-blocking-access and have been republished by multiple media sources, including, *inter alia*, the Washington Examiner (https://www.washingtonexaminer.com/policy/healthcare/new-york-ag-anti-abortion-terrorist-lawsuit), and the Washington Times (https://www.washingtontimes.com/news/2023/jun/8/letitia-james-sues-block-pro-life-terrorists-abort/). (Compl. ¶ 33). As the video submitted by Defendant James in support of her motion illustrates, these defamatory statements are part of official public records maintained by Defendant James and her office. (*See* Def.'s Ex. A).

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

As the chief law enforcement officer of New York, Defendant James 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, including Plaintiffs, are not "terrorists." Indeed, if Defendant James 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 30-foot buffer zone. Defendant James has not brought a criminal complaint against Red Rose Rescue and those who

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Plaintiffs (*see* Def.'s Mem. at 19-20) is false as a matter of fact and law, *see infra* § V.B.

associate with Red Rose Rescue for committing terrorism (or any other crime of violence) as no such facts exist to do so, and Defendant James knows it. (Compl. ¶¶ 36).

Terrorism is a crime punishable under the New York Penal Law. *See* N.Y. Penal Law §§ 490.00, *et seq*. It is widely considered to be *one of the most heinous criminal acts*—and this point is reinforced yet again by the recent terrorist attacks on Israel. The legislative findings in support of New York's penal law proscribing terrorism emphasize this point. (*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. . . . Accordingly, the legislature finds that our laws must be strengthened to ensure that terrorists, as well as those who solicit or provide financial and other support to terrorists, are prosecuted and punished in state courts with appropriate severity."] [quoting N.Y. Penal Law § 490.00]). As the New York Attorney General, Defendant James is well aware of the New York Penal Law and its harsh treatment of terrorism. (Compl. ¶ 37).

Defendant James' public dissemination of false information has had a chilling effect on Plaintiffs' rights to freedom of speech and expressive association, and the defamatory statements have had a chilling effect on the rights to freedom of speech and expressive association of other pro-lifers associated with Red Rose Rescue. The false and defamatory statements by Defendant James have caused, and will continue to cause, irreparable harm to Plaintiffs. Defendants James' false and defamatory statements have also caused Plaintiffs to suffer humiliation and a loss of reputation. (Compl. ¶¶ 40, 42).

By branding religious opponents (pro-lifers) as "terrorists," Defendant James seeks to officially censor, correct, and/or condemn certain religious beliefs, views, and ideas. Her false statements were designed to chill the exercise of constitutional rights by pro-lifers such as

Plaintiffs and to chill those who would associate with Red Rose Rescue from exercising their constitutional rights. (Compl. ¶¶ 43-44).

Defendant James' identification of pro-lifers as "terrorists" provides a basis for government officials to abuse their positions of power by seeking to stifle certain religious beliefs and views. It also provides adversaries, such as Planned Parenthood and others pro-abortion extremists who were invited to participate in the press conference with Defendant James, with a government sponsored and endorsed basis for making and perpetuating false claims about pro-lifers, causing further harm to Plaintiffs. (Compl. ¶ 45). Indeed, 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. (Compl. ¶¶ 46, 50).

The purpose and effects of Defendant James' actions are to silence religious opposition to the pro-abortion policies that she supports; to marginalize pro-lifers by officially and pejoratively labeling them as "terrorists"; to deter and diminish support for pro-lifers; and to provide a government-sanctioned justification for officials, including law enforcement officials, to harass and target religious opponents, thereby creating a deterrent effect on religiously-motivated speech and views and the expressive association of pro-lifers, including Plaintiffs. (Compl. ¶ 48).

Defendant James' actions brand 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).

Defendant James' challenged actions have the purpose and effect of deterring pro-lifers from associating with Red Rose Rescue and those involved with Red Rose Rescue, including Plaintiffs, and deterring donors and volunteers from supporting the activities of Red Rose Rescue. Defendant James' actions also legitimize the illegitimate attacks against pro-lifers in the public eye. Consequently, the challenged actions harm Plaintiffs' constitutionally protected activities and interests. (Compl. ¶¶ 51, 53).

When Defendant James, the New York Attorney General, places pejorative labels on opponents who express religious beliefs and views contrary to those she espouses, she places the power of the state government, with its authority, presumed neutrality, and assumed access to all the facts, behind an appellation *designed* to reduce the effectiveness of the speech in the eyes of the public. (Compl. ¶ 52).

Defendant James' actions were motivated by malice against pro-lifers, including Plaintiffs, and their religious objection to abortion, and they were made with hatred, ill will, and spite. Defendant James will continue to disseminate false information about Plaintiffs unless enjoined from doing so by this Court. (Compl. ¶ 41).

STANDARDS OF REVIEW

Defendant's motion to dismiss tests the legal sufficiency of the Complaint. Pursuant to Rule 8(a), the pleading need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To survive a Rule 12(b)(6) motion, a complaint need only allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also id*. at 570 ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."). A claim is facially plausible when a plaintiff pleads "factual content that allows the

court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In reviewing the plausibility of a complaint, the court must accept factual allegations in the complaint as true and construe the pleading in the light most favorable to the nonmoving party. *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 108 (2d Cir. 2010) ("accepting all factual claims in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor" when reviewing a motion to dismiss).

Defendant's Rule 12(b)(1) motion is a facial challenge to standing as it is based on the allegations of the Complaint. "When the Rule 12(b)(1) motion is facial, *i.e.*, based solely on the allegations of the complaint or the complaint and exhibits attached to it . . ., the plaintiff has no evidentiary burden. . . . The task of the district court is to determine whether the [complaint] alleges facts that affirmatively and plausibly suggest that the plaintiff has standing to sue." *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016) (internal citations, quotations, and punctuation omitted). Accordingly, when reviewing Defendant's motion under 12(b)(1), the Court must accept as true all material factual allegations of the complaint and draw all reasonable inferences in favor of Plaintiffs. *See id*. at 56-57 (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.")). Moreover, "when evaluating standing, courts 'must assume that the party asserting federal jurisdiction is correct on the legal merits of his claim, that a decision on the merits would be favorable and that the requested relief would be granted.'" *Barry's Cut Rate Stores, Inc. v. Visa, Inc.*, No. 05-MD-1720 (MKB) (JO), 2019 U.S. Dist. LEXIS 205335, at *134 (E.D.N.Y. Nov. 20, 2019) (quoting *Cutler v. United States HHS*, 797 F.3d 1173, 1179 (D.C. Cir. 2015)).

With these standards as a guide, we turn now to Defendant's arguments.

ARGUMENT

I. The Eleventh Amendment Does Not Bar Plaintiffs' Claims under § 1983.

Defendant James argues that she is immune from suit under 42 U.S.C. § 1983 by virtue of the Eleventh Amendment. (Def.'s Mem. at 4-6). She is mistaken. To begin, Plaintiffs' § 1983 claims involve state action as Defendant James was acting in her capacity as the Attorney General at the time she made the false and injurious statements. That is, Defendant James' labeling of Plaintiffs as "terrorists" and Red Rose Rescue as a "terrorist group" is "a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed" it. *See Lee v. Weisman*, 505 U.S. 577, 587 (1992) (holding that a school official's decision to permit a member of the clergy to give an invocation and benediction at the school's graduation ceremony was "a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur").

And while a suit against a government official in her official capacity is essentially a suit against the government, *Ky. v. Graham*, 473 U.S. 159, 166 (1985), it is well established that prospective declaratory and injunctive relief are available in actions against state officials sued in their official capacities based on an allegedly unconstitutional official act, *Ex Parte Young*, 209 U.S. 123, 151-56 (1908). In other words, the Eleventh Amendment is not a bar to this action for declaratory and injunctive relief. *See id.* Furthermore, as the chief law enforcement officer for the State of New York and the person *directly* responsible for the alleged harm, Defendant James is a proper party in this case. *See id*. at 157 ("In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act.").

In sum, Defendant James does not enjoy Eleventh Amendment immunity against Plaintiffs' claims for declaratory and injunctive relief advanced against her in her official capacity under 42 U.S.C. § 1983. As the Complaint expressly states, Plaintiffs' claims arising under § 1983 are brought against Defendant James in her official capacity only. (Compl. ¶ 27). And *all* of the claims arising under § 1983 seek only declaratory and injunctive relief. (Compl. ¶¶ 57, 60, 63). Defendant James' Eleventh Amendment immunity argument lacks merit.

In the final analysis, Plaintiffs have advanced viable claims under § 1983, they have standing to advance these claims, and the requested relief would redress the ongoing violations and harm alleged. As discussed further below, Defendant James' motion with regard to the claims arising under § 1983 should be denied for the reasons articulated in *Meese v. Keene*, 481 U.S. 465 (1987), and *Parsons v. United States DOJ*, 801 F.3d 701 (6th Cir. 2015). *See also Am. Freedom Law Ctr., Inc. v. Nessel*, No. 1:19-cv-153, 2020 U.S. Dist. LEXIS 60622 (W.D. Mich. Jan. 15, 2020) (relying on *Meese* and *Parsons* and denying the Michigan Attorney General's motion to dismiss claims arising under the First and Fourteenth Amendments, finding that the plaintiff organization had standing to challenge the Attorney General's labeling of the organization as a "hate group" as the plaintiff pled "a chilling effect and reputational harm," and concluding that the plaintiff had advanced cognizable § 1983 claims for violations of the First and Fourteenth Amendment). We turn now to these arguments.

II. Plaintiffs Have Standing to Advance Their Claims.

In an effort to give meaning to Article III's "case" or "controversy" requirement, the courts have developed several justiciability doctrines, including standing. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (holding that an organization had standing to make a pre-enforcement challenge to a law that arguably infringed its political speech). "The doctrine of

standing gives meaning to these constitutional limits by identify[ing] those disputes which are appropriately resolved through the judicial process." *Id.* (internal quotations and citation omitted).

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth*, 422 U.S. at 498. To invoke the jurisdiction of a federal court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Plaintiffs satisfy this standard.

A. Personal Injury.

The Second Circuit has "repeatedly described [the injury-in-fact] requirement as "a low threshold, which helps to ensure that the plaintiff has a personal stake in the outcome of the controversy." *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 736 (2d Cir. 2017) (internal quotations and citations omitted).

Plaintiffs are suffering a personal injury, and this injury is not simply a "subjective" chill on speech, which distinguishes this case from *Laird v. Tatum*, 408 U.S. 1, 10-11 (1972) (holding that subjective chill, "without more," was not sufficient for standing). Plaintiffs have also alleged that Defendant's "terrorist" and "terrorist group" labelling has harmed their public reputation. "As a matter of law, reputational harm is a cognizable injury in fact." *NCAA v. Governor of N.J.*, 730 F.3d 208, 220 (3d Cir. 2013) (citing *Meese*); *Gully v. NCUA Bd.*, 341 F.3d 155, 161-62 (2d Cir. 2003) (stating that "[t]he Supreme Court has long recognized that an injury to reputation will satisfy the injury element of standing"); *see also Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 542-43 (3d Cir. 2007) (finding standing to challenge a sanction that "affect[s] [the plaintiff's] reputation"); *Foretich v. United States*, 351 F.3d 1198, 1213 (D.C. Cir. 2003) ("Case law is clear that where reputational injury derives directly from an unexpired and un-retracted

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

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

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

As *Meese* (*see infra*) and other cases make clear, Defendant's labelling of Plaintiffs as "terrorists" and belonging to a "terrorist group" is sufficient to establish Plaintiffs' standing to advance this challenge. *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139 (1951) (holding that charitable organizations designated as "Communist" by the Attorney General had standing to challenge their designations because of, *inter alia*, "damage [to] the reputation of the organizations in their respective communities"); *see also United States v. Accra Pac, Inc.*, 173 F.3d 630, 633 (7th Cir. 1999) (stating that "being put on a blacklist . . . is treated as immediately redressible harm because it diminishes (or eliminates) the opportunity to practice one's profession even if the list . . . does not impose legal obligations"); *Doe v. Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999) (holding that a student had standing to challenge a rule requiring that he be identified as disabled because such a label could sour the perception of him by "people who can affect his future and his livelihood"). Plaintiffs satisfy the injury-in-fact requirement.

B. Fairly Traceable.

"The 'causal connection' element of Article III standing, *i.e.*, the requirement that the plaintiff's injury be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court,' *does not create an onerous standard*. For example, it is a standard lower than that of proximate causation." *Carter*, 822 F.3d at 55 (internal quotations and citation omitted) (emphasis added). Here, the alleged harm to Plaintiffs is fairly traceable to the actions of Defendant James as it is *her actions* that are the very basis for this lawsuit.

C. Likely to Be Redressed.

For the reasons stated by the Sixth Circuit in *Parsons v. United States DOJ*, 801 F.3d 701 (6th Cir. 2015), the alleged harm is redressible. Per the Sixth Circuit:

> The Agencies argue that the alleged reputational harm and chilling effect would not be remedied by an order setting aside the 2011 [National Gang Intelligence Center or] NGIC Report because information about criminal activity performed by Juggalo subsets is available from a variety of other sources, including state and local law enforcement in the locations where the Juggalos were allegedly injured. . . . In *Meese*, the defendant, the Attorney General, espoused an analogous argument—that enjoinment of the DOJ's label of certain films as "political propaganda" would not stem negative reaction to the plaintiff's exhibition of the films. . . . The Supreme Court disagreed, articulating that the harm to plaintiff occurred because "*the Department of Justice has placed the legitimate force of its criminal enforcement powers behind the label of 'political propaganda*.'" . . . The Juggalos in this case ***also suffer alleged harm due to the force of a DOJ informational label***. While the 2011 NGIC Report is not the designation itself, it reflects the designation and includes an analytical component of the criminal activity performed by Juggalo subsets, classifying the activity as gang-like. As in *Meese*, "[***a***] ***judgment declaring the*** [**action in *question***] ***unconstitutional would eliminate the need to choose between*** [***First Amendment-protected activity***] ***and incurring the risk that public perception of this criminal enforcement scheme will harm appellee's reputation***."
>
> The Agencies also assert that an order declaring the 2011 NGIC Report unconstitutional would not alleviate the alleged harm entirely because the information on Juggalo activity is available through the aforementioned alternate channels. But it need not be likely that the harm will be *entirely* redressed, as partial redress can also satisfy the standing requirement. *See Meese*, 481 U.S. at 476

> ("enjoining the application of the words 'political propaganda' to the films would at least partially redress the reputational injury of which appellee complains"); [*Friends of the Earth, Inc. v.*] *Laidlaw* [*Envtl. Servs., Inc.*, 528 U.S. 167, 185 (2000)] (finding civil penalties sufficient to satisfy redressability noting that they have at least "*some* deterrent effect") (emphasis added). "It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of a suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress." *Laidlaw*, 528 U.S. at 185-86. An order declaring the 2011 NGIC Report unconstitutional and setting it aside would abate the reflection of Juggalo criminal activity as gang or gang-like by the Agencies. . . . ***The declaration the Juggalos seek would likely combat at least some future risk that they would be subjected to reputational harm and chill due to the force of the DOJ's criminal gang or gang-like designation***.

Parsons, 801 F.3d at 716-17 (internal citations omitted) (emphasis added).

A judicial determination that Defendant's false statements violate federal law would reassure Plaintiffs and those who associate with Red Rose Rescue that they could freely participate in their constitutionally protected activities without being denigrated and labeled as "terrorists" or belonging to a "terrorist group" by the government, appearing in government records as "terrorists" or belonging to a "terrorist group," or even being threatened by the government with investigation because of their association with Red Rose Rescue. Furthermore, the requested relief will help repair Plaintiffs' public reputation—a reputation that Defendant James purposely tarnished through her false and injurious statements.

Accordingly, the Court could redress the harm by granting judgment in Plaintiffs' favor and declaring, at a minimum, that Defendant James' false and injurious labeling of Plaintiffs violates their rights, as set forth further below. The Court could also enter an order enjoining Defendant James from making such false and harmful public statements about Plaintiffs in the future. *See, e.g., Rooks v. Krzewski*, No. 306034, 2014 Mich. App. LEXIS 604, at *91 (Mich. Ct. App. Apr. 3, 2014) ("Numerous other courts, both federal and state, have held that a trial court may enjoin a defendant from making defamatory statements after there has been a determination

that the speech was, in fact, false.") (citing cases). And the Court could issue an order expunging all official government records that label Plaintiffs as "terrorists" and Red Rose Rescue as a "terrorist group." *See Smith v. Nixon*, 807 F.2d 197, 204 (D.C. Cir. 1986) (stating that "a court may order expungement of records in an action brought . . . directly under the Constitution, without violating the intricate statutory provisions that purport to be the 'exclusive' means by which [government records] may . . . be alienated or destroyed").

In sum, "[a] judgment declaring the [action in question] unconstitutional would eliminate the need to choose between [First Amendment-protected activity] and incurring *the risk that public perception* of this criminal enforcement scheme will harm [Plaintiffs'] reputation." *See Parsons*, 801 F.3d at 717 (emphasis added). The declaration Plaintiffs "seek would likely combat at least some future risk that they would be subjected to reputational harm and chill due to the force of [Defendant James'] designation." *Id*. Plaintiffs have established standing to advance their claims.

III. Plaintiffs Have Advanced Plausible Claims for Relief under § 1983.

First Amendment freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. Little Rock*, 361 U.S. 516, 523 (1960); *see also NAACP v. Button*, 371 U.S. 415, 433 (1963) (stating that First Amendment "freedoms are delicate and vulnerable, as well as supremely precious in our society," and "[b]ecause [these] freedoms need breathing space to survive, government may regulate in the area only with narrow specificity"). As the Court stated in *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958), "state action which *may have the effect* of curtailing the freedom to associate is subject to the closest scrutiny." (emphasis added). Indeed, using the power and authority of the Office of the Attorney General to pejoratively label peaceful citizens, such as Plaintiffs, solely because of their opposition to abortion does not promote a legitimate interest of government, and

it has the calculated *and intended* effect of suppressing constitutional freedoms in violation of the First Amendment. *Cf. NAACP v. Ala.*, 357 U.S. at 461 ("In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, *even though unintended*, may inevitably follow from varied forms of governmental action.") (emphasis added).

A. Freedom of Speech.

By labelling Plaintiffs as "terrorists" and members of a "terrorist group" because of their opposition to abortion, Defendant James has violated Plaintiffs' fundamental rights. This principle was affirmed in *Meese v. Keene*, 481 U.S. 465 (1987). The reasoning in *Meese* is dispositive on the issue of whether the Complaint states plausible claims for relief and on the issue of whether Plaintiffs have standing to advance their claims. *See supra*.

In *Meese*, the plaintiff, a politician, sued to prevent the government from designating as "political propaganda" certain films he was sponsoring. The Court held that the plaintiff had standing to challenge this designation as a violation of the First Amendment because the plaintiff's showing of the films would cause injury to his reputation. *Id*. However, because the Court believed that the term "political propaganda" was "neutral," "evenhanded," and without any "pejorative connotation," it concluded that the act placed "no burden on protected expression" and was thus constitutional. *Id*. at 480. Consequently, it logically follows that had the Court determined that this official designation was <u>*not*</u> "neutral," "evenhanded," or without any "pejorative connotation," then a constitutional violation would have occurred. As the dissent points out, when the government places pejorative labels on those engaging in the right to freedom of speech, "[i]t places the power of the Federal Government, with its authority, presumed neutrality, and assumed access to all the facts, behind an appellation *designed* to reduce the

effectiveness of the speech in the eyes of the public" in violation of the First Amendment. *Id*. at 493 (Blackmun, J., joined by Brennan, J., and Marshall, J., dissenting); *see also Am. Freedom Law Ctr., Inc.*, 2020 U.S. Dist. LEXIS 60622, at *22-24 (concluding that the allegations challenging the Michigan Attorney General's false "hate group" designation of an organization stated a plausible claim under the First Amendment).

This is precisely the situation presented here. Through the labelling of Plaintiffs as "terrorists" and belonging to a "terrorist group"—terms that plainly have pejorative meaning—Defendant James has given the government's imprimatur to and official endorsement of the *labeling of Plaintiffs* and their organization, Red Rose Rescue, as *violent*, criminal threats. By placing pejorative labels on Plaintiffs, the pro-life group (Red Rose Rescue) with which they associate, and thus their concomitant pro-life activities,[4] Defendant James has "place[d] 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 speech in the eyes of the public" in violation of the First Amendment. *Fed. Election Com. v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) ("The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities."). *Meese* compels the denial of Defendant James' motion.

B. Expressive Association.

Plaintiffs are members of Red Rose Rescue, and they associate with this organization for the purpose of advancing their pro-life beliefs and engaging in constitutionally protected activity. "Among the rights protected by the First Amendment is the right of individuals to associate to

[4] As Defendant James states in the video, "I refer to them as terrorists because of their activities." (Def.'s Mem. at 4).

further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." *Healy v. James*, 408 U.S. 169, 181 (1972) (citations omitted). "Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of freedom of speech." *Connection Distributing Co. v. Reno*, 154 F.3d 281, 295 (6th Cir. 1998) (citing *NAACP v. Ala.*, 357 U.S. at 460). "[I]mplicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). And "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as [the Supreme] Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." *NAACP v. Ala.*, 357 U.S. at 460.

"Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Salvation Army v. Dep't of Cmty. Affairs*, 919 F.2d 183, 197 (3d Cir. 1990); *Bates*, 361 U.S. at 523 (stating that "[f]reedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference").

As the D.C. Circuit stated in *Clark v. Library of Congress*, 750 F.2d 89, 94 (D.C. Cir. 1984), "[e]xacting scrutiny is especially appropriate where the government action is motivated solely by an individual's lawful beliefs or associations, for government action so predicated is imbued with the potential for subtle coercion of the individual to abandon his controversial beliefs or associations." This point was more recently echoed by the Supreme Court:

> When it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. The risk of a chilling effect on association is enough, because First Amendment freedoms need breathing space to survive.

Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021) (quotations and citation omitted).

In this case, the challenged actions of Defendant James deter protected First Amendment activity in violation of the Constitution.[5] Her arguments to the contrary are wrong.

C. Equal Protection.

When the government treats an individual disparately "as compared to similarly situated persons and that such disparate treatment . . . burdens a *fundamental right*, targets a suspect class, or has *no rational basis*," such treatment violates the equal protection guarantee of the Fourteenth Amendment. *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 256 (6th Cir. 2015) (internal quotations and citation omitted) (emphasis added). "In determining whether individuals are 'similarly situated,' a court should not demand exact correlation, but should instead seek relevant similarity." *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 987 (6th Cir. 2012) (internal

[5] When the chief law enforcement officer for the state labels you a "terrorist" and belonging to a "terrorist group," the threat of being subject to government surveillance and investigation is real, particularly since the Attorney General possesses the power to do so. (*See* Compl. ¶¶ 45-46). And this threat of investigations and surveillance also chills the exercise of First Amendment activity. *See, e.g., DeGregory v. N.H. Atty. Gen.*, 383 U.S. 825, 829 (1966) ("Investigation is a part of lawmaking and the First Amendment, as well as the Fifth, stands as a barrier to state intrusion of privacy."); *Gibson v. Fla. Legislative Comm.*, 372 U.S. 539, 560-61 (1963) ("We deal here with the authority of a State to investigate people, their ideas, their activities. . . . When the State or Federal Government is prohibited from dealing with a subject, it has no constitutional privilege to investigate it.") (Douglas, J., concurring); *NAACP v. Ala.*, 357 U.S. 449; *Barenblatt v. United States*, 360 U.S. 109, 126 (1959) ("The provisions of the First Amendment . . . of course reach and limit . . . investigations."); *Socialist Workers Party v. Att'y Gen.*, 419 U.S. 1314, 1319 (1974) (noting the dangers inherent in investigative activity that "threatens to dampen the exercise of First Amendment rights"); *Clark*, 750 F.2d 89 (applying strict scrutiny in a case challenging the federal government's investigation into an employee's political beliefs and associations).

quotation marks omitted). Such disparate treatment is "subject to strict scrutiny." *Bible Believers*, 805 F.3d at 256.

The rights to freedom of speech and association are "fundamental," *see supra; see also Bible Believers*, 805 F.3d at 256 ("Freedom of speech is a fundamental right."), and disparate treatment that burdens these rights violates the equal protection guarantee of the Fourteenth Amendment, *see id*. at 256-57.

Targeting Plaintiffs for adverse treatment based on their opposition to abortion and their association with a pro-life group that too opposes abortion on religious grounds (Red Rose Rescue) violates the equal protection guarantee of the Fourteenth Amendment. This principle of law was articulated in *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972). As stated by the Court, "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Id*. at 96. In other words, when a government official targets an organization or individuals associated with an organization for disparate treatment because the official opposes the beliefs of the organization or the individual, the Equal Protection Clause stands as a barrier to such targeting. As noted in the Complaint,

> Defendant James largely ignores the *violent* crime that is ravaging New York, and she has failed to take any legal action against the *violent* acts committed by Antifa and the Black Live Matter movement, but yet she weaponizes her office to target peaceful pro-lifers because she is a pro-abortion extremist and pro-lifers are her opponents while Antifa and Black Lives Matter are her allies.

(Compl. ¶ 39).

In sum, Defendant James' actions were motivated by an intent to unlawfully discriminate on the basis of Plaintiffs' beliefs in opposition to abortion. (*See, e.g.,* Compl. ¶¶ 24, 41, 48-50

[describing Defendant's intent and motivations]). Plaintiffs have advanced a plausible claim for relief under the Equal Protection Clause.

IV. Defendant James Does Not Enjoy Qualified Immunity.

Defendant's argument for qualified immunity is wrong as a matter of law. It is well established that qualified immunity does not shield a defendant from claims for declaratory and injunctive relief. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841, n.5 (1998) (noting that qualified immunity is unavailable "in a suit to enjoin future conduct"); *Pearson v. Callahan*, 555 U.S. 223, 242-43 (2009) (noting that the qualified immunity defense is not available in "cases against individuals where injunctive relief is sought instead of or in addition to damages"); *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982) (describing qualified immunity as "immunity from suits for damages"). Defendant James' qualified immunity claim is without merit as all of Plaintiffs' claims arising under § 1983 only seek prospective relief. (Compl. ¶¶ 57, 60, 63).

V. Defendants James' Statements Are Actionable.

Defendant James argues that Plaintiffs have failed to state a claim for defamation because (1) the allegedly defamatory statements could not "be reasonably understood as referring to plaintiffs" and (2) that her "statements are expressions of opinion." (Def.'s Mem. at 18-19). She is mistaken. We will address her second contention first.

A. Defendant's Statements Are Actionable as Defamation *Per Se*.

A defamatory statement is "one that exposes an individual 'to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or . . . induces an evil opinion of one in the minds of right-thinking persons, and . . . deprives one of . . . confidence and friendly intercourse in society.'" *Celle v. Filipino Reporter Enters., Inc.*, 209

F.3d 163, 177 (2d Cir. 2000) (quoting *Kimmerle v. N.Y. Evening Journal*, 262 N.Y. 99, 186 N.E. 217, 218 (NY 1933)).

"The four categories of statements that have historically constituted slander *per se* in New York are those that (i) charge the plaintiff with a serious crime; (ii) tend to injure the plaintiff in his or her trade, business or profession; (iii) imply that the plaintiff has a loathsome disease; or (iv) impute unchastity to a woman." *Albert v. Loksen*, 239 F.3d 256, 271 (2d Cir. 2001) (citation omitted). Accordingly, "[a]ccusing someone of a serious crime is defamatory *per se*. . . . A crime is 'serious' for the purposes of defamation if it is punishable by imprisonment or is 'regarded by public opinion as involving moral turpitude.'" *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). "Terrorism" plainly fits this "serious crime" category. As New York Penal Law acknowledges,

> [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. . . . Accordingly, the legislature finds that our laws must be strengthened to ensure that terrorists, as well as those who solicit or provide financial and other support to terrorists, are prosecuted and punished in state courts with appropriate severity.

N.Y. Penal Law § 490.00.

Thus, falsely accusing Plaintiffs of being "terrorists" and belonging to a "terrorist group" is defamation *per se*. *See, e.g., 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.").

And this is particularly true when the false accusation is made by the Attorney General of New York—the chief law enforcement officer of the state. The accusation is not from a private

individual with no law enforcement authority making a comment on a blog post. To suggest that these two factual contexts are similar is absurd on its face. In her memorandum, Defendant James cites *LeBlanc v. Skinner*, 955 N.Y.S.2d 391 (N.Y. App. Div. 2012), for the proposition that her terrorist accusations are simply rhetorical and hyperbolic statements and thus not actionable. (*See* Def.'s Mem. at 22-23). However, the case at bar is nothing like *LeBlanc*, which involved a "terrorist" accusation made by citizens on a publicly accessible blog. The context largely involved a personal dispute between the parties. Moreover, while the *LeBlanc* court concluded that "[s]uch a statement was likely to be perceived as 'rhetorical hyperbole, a vigorous epithet,'" it noted with importance that "[t]his conclusion is especially apt in the digital age, where it has been commented that readers give less credence to allegedly defamatory Internet communications than they would to statements made in other milieus." *Id*. at 400.

Here, Defendant James, the New York Attorney General, called a press conference to address Red Rose Rescue and to issue official statements of her office about this organization and those who associate with it. By doing so, she 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. (Compl. ¶ 52). And she did so with actual malice. (*See* Compl. ¶¶ 2, 12-14, 24, 41).

It is wrong as a matter of facts and law to conclude that her statements are not actionable. Indeed, they constitute defamation *per se*.

B. Defendant's Defamatory Statements Were "of and Concerning" Plaintiffs.

As stated by the Second Circuit:

> a defamation plaintiff must allege that the purportedly defamatory statement was "of and concerning" him or her, *i.e.*, that "[t]he reading public *acquainted with the parties and the subject*" would recognize the plaintiff as a person to whom the statement refers. *Carlucci v. Poughkeepsie Newspapers, Inc.*, 57 N.Y.2d 883, 885,

> 442 N.E.2d 442, 456 N.Y.S.2d 44 (1982); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 288-91 (1964). Whether a plaintiff has satisfied this requirement is typically resolved by the court at the pleading stage. *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 173 (2d Cir. 2001). "'It is not necessary that the world should understand the libel; it is sufficient if those who know the plaintiff can make out that she is the person meant.'" *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980) (quoting *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650, 651 (2d Cir. 1966)) (alteration omitted).

Elias v. Rolling Stone LLC, 872 F.3d 97, 104-05 (2d Cir. 2017). Here, those acquainted with Plaintiffs would recognize them as associates of Red Rose Rescue and thus individuals who engage in pro-life activities pursuant to this association. That is, the reading public acquainted with Plaintiffs and the subject would recognize Plaintiffs as the "terrorists" and members of the "terrorist group" referred to by Defendant. In fact, Defendant James knows for certain that Plaintiff Miller is associated with Red Rose Rescue as she said so in the civil complaint she filed against the organization, and her office officially served Plaintiff Miller with the civil lawsuit as the principal agent for Red Rose Rescue. And as noted, the civil lawsuit was the basis for calling the press conference in the first instance.

Moreover, "[i]n order to overcome the group libel doctrine, the plaintiff must demonstrate that 'the circumstances of the publication reasonably give rise to the conclusion that there is a particular reference to the member.'" *Church of Scientology Int'l v. Time Warner*, 806 F. Supp. 1157, 1160 (S.D.N.Y. 1992) (quoting Restatement (Second) of Torts, § 564A(b)). Here, the circumstances of the publication (the civil lawsuit against Red Rose Rescue and certain individuals associated with Red Rose Rescue, the identification of Plaintiff Miller as a member of the organization in the civil complaint, and officially serving Plaintiff Miller with the civil complaint as the principal agent for Red Rose Rescue) demonstrate that the group libel doctrine does not preclude this action. *See also Brady v. Ottaway Newspapers, Inc.*, 445 N.Y.S.2d 786, 790 (N.Y. App. Div. 1981) ("In contrast to the treatment of an individual in a large group which has been

defamed, an 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. . . . Because the group is small and includes few individuals, reference to the individual plaintiff reasonably follows from the statement and the question of reference is left for the jury.").

The defamatory statements were "of and concerning" Plaintiffs.

CONCLUSION

Defendant James' motion to dismiss is without merit and should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2023, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

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