UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JERSEY CITY POLICE SUPERIOR OFFICERS ASSOCIATION, PAWEL WOJTOWICZ & JOHN FRIEND, Plaintiffs, v. CITY OF JERSEY CITY & CHRISTINE GOODMAN, individually and in her official capacity as Director of the City of Jersey City's Office of Cultural Affairs, & JOHN & JANE DOES 1-10, Defendants.	**Civil Action No. 24-8188 (JXN) (AME)** **OPINION**

NEALS, District Judge:

This matter comes before the Court on Defendants the City of Jersey City ("Jersey City" or "the City") and Christine Goodman's ("Ms. Goodman") (collectively "Defendants") motion to dismiss (ECF No. 3) the Jersey City Police Superior Officers Association ("JCPSOA"), Pawel Wojtowicz, and John Friend's ("Plaintiffs") Complaint ("Compl.") (ECF No. 1) pursuant to Federal Rule of Civil Procedure 12(b)(6). Jurisdiction is proper pursuant to 28 U.S.C. §§ 1331 and 1343. Venue is proper pursuant to § 1391. The Court has carefully considered the parties' submissions and decides this matter without oral argument pursuant to Federal Rule of Civil Procedure 78(b) and Local Civil Rule 78.1(b). For the reasons set forth below, Defendants' motion to dismiss is **DENIED**.

I. BACKGROUND AND PROCEDURAL HISTORY[1]

Plaintiffs allege a violation of their First Amendment rights to freedom of speech and association because Defendants refused to raise the "Thin Blue Line American Flag" ("Blue Line Flag") at Jersey City's City Hall in May of 2024, during National Police Week. (Compl. ¶ 10). For Plaintiffs the Blue Line Flag[2] "is a nationally recognized symbol of support and compassion for members of law enforcement who risk their lives daily with courage and dedication to protect the public and of belief in law and order" and "a solemn symbol of and tribute to fallen law enforcement members and their families, who made the ultimate sacrifice in giving their lives in the line of duty to protect the public." (*Id.* at ¶¶ 11, 13).

On February 16, 2024, Plaintiffs emailed Jersey City's Assistant Director of Cultural Affairs requesting to raise the Blue Line Flag during National Police Week, which was set to occur that upcoming May. (*Id.* at ¶ 14). Plaintiffs' correspondence noted that a review of the Cultural Affairs calendar on the City's website indicated no other flag raisings were scheduled to take place throughout the month of May. (*Id.* at ¶¶ 14-15). Plaintiffs requested a flag raising application for the week of May 12th to May 18th to correspond with National Police Week. (*Id.*).

On that same date, Plaintiffs served a request under the New Jersey Open Public Records Act ("OPRA") for other flag raising applications submitted by various groups. (*Id.* at ¶ 16). Subsequently, the City provided a list of the 2023 flag raising events and their applications.[3] (*Id.* at ¶¶ 17-22).

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[1] The following factual allegations are taken from the Amended Complaint, which are accepted as true. *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 262 n.27 (3d Cir. 2010).

[2] The Blue Line Flag is a black and white American flag. All of the horizontal stripes are black and white, except one stripe which is blue. (Compl. ¶ 25).

[3] Plaintiffs attached the list obtained from the City's Office of Cultural Affairs as a result of Plaintiffs OPRA request of flag raisings that occurred in 2023. (*See* Compl., Ex. A). Plaintiffs also provided the completed Jersey City application form for events including flag raisings. (*See* Certification of Jeffrey D. Catrambone, Esq. ("Catrambone Cert."), ¶ 3, Ex. 2, ECF No. 7-1). The Court properly considers these exhibits "without converting" Defendants' motion to dismiss "into [a motion] for summary judgment." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426

On March 14, 2024, Plaintiffs reiterated their request to Ms. Goodman, the Director of the City's Office of Cultural Affairs, for a flag raising application and forwarded a picture of the Blue Line Flag to be raised during the ceremony. (*Id.* ¶¶ 23-25). On that same date, Ms. Goodman responded "[w]e will move forward with the raising of the flag as attached in your previous email. I am looping in Migdalia Pagan-Milano from my office, who will be in touch shortly regarding the logistics." (*Id.* at ¶ 26).

On March 15, 2024, Ms. Pagan-Milano emailed Plaintiffs a form to fill out "for your flag raising[,]" advised that the only available date during the week requested was May 14, 2024, and further advised, "[r]egarding the flag to be hoisted, the size should be limited to a[] 3 [by] 5 flag that your organization will have to provide as we do not have the said flag in our inventory." (*Id.* at ¶¶ 28-29).

On April 10, 2024, Plaintiffs submitted the completed form and requested to raise the Flag at 12:00 p.m. (*Id.* at ¶ 30).[4] On April 16, 2024, Ms. Pagan-Milano replied that the City could accommodate 11:30 a.m. (*Id.* at ¶ 31). Plaintiffs confirmed the time. (*Id.* at ¶ 32). Thereafter, Ms. Pagan-Milano sent a draft flyer for the Blue Line Flag raising event requesting Plaintiffs' approval

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(3d Cir. 1997) (citations omitted). *See also Pinkney v. Meadville, Pa.*, No. 21-1051, 2022 WL 1616972, at *2 (3d Cir. May 23, 2022) (quoting *In re Asbestos Prods. Liab. Litig. (No. VI)*, 822 F.3d 125, 133 (3d Cir. 2016) (A court may look beyond the pleadings and "consider 'document[s] integral to or explicitly relied upon in the complaint,' or any 'undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document.'")).

[4] The "City Hall Events" form states it is used "for requests made to the Office of Cultural Affairs for any internal departmental or external organizational events that will take place inside City Hall . . . Events include but are not limited to: Flag Raisings . . . ." (Catrambone Cert., Ex. 2). The first section of the Form asks for details such as the name of the event, department or organization, date, set up and break down time, estimated number of attendees, whether the event will be open to the public, contact information for the event organizer, and a description of the requested event, which Plaintiffs filled in as "flag raising." (*Id.*). The Form's remaining four separate sections asks about the use of audio/visual information, whether City owned tables and chairs are being requested, if food vendor(s) will be in attendance, and for the organization to provide a certificate of insurance. (*Id.*). Plaintiffs left the audio/visual section blank and crossed out the "tables & chairs" and "food service" sections. (*Id.*). Plaintiffs obtained the insurance certificate and provided it to the City on May 10, 2024. (Compl. ¶ 55). The bottom of the Form contains the following disclaimer: "IMPORTANT The City of Jersey City prohibits any & all organizations from using Council Chambers or the Rotunda galleries to promote and/or advertise political campaigns or candidates being endorsed or elected by voters. Support is intended to promote and/or advertise ethnic, cultural, and other neighborhood/community activities that are free and open to the public . . . ." (*Id.*).

and any required edits. (*Id.*). The flyer identified Plaintiffs organization and indicated the flag raising would occur at City Hall. (*Id.* at ¶ 34). With the flyer complete, Plaintiffs sent out invitations and notices of the event. (*Id.* at ¶ 37).

On May 2, 2024, Plaintiffs' counsel inquired if anything else were required for the upcoming flag raising ceremony. (*Id.* at ¶ 46). On May 3, 2024, in response, Ms. Pagan-Milano requested that Plaintiffs confirm they understood that "we will be raising the standard American flag for this program." (*Id.* at ¶ 47). In response, Plaintiffs sought clarification if the standard American Flag was being raised in addition to the Blue Line Flag, advised that JCPSOA had the Blue Line Flag in the appropriate dimensions as the City instructed, and "look[ed] forward to raising it on May 14, 2024, and if there is any issue to provide explanation." (*Id.* at ¶ 48). Ms. Goodman replied, "writing to clarify that only the standard United States [F]lag will be raised. Please confirm that you understand." (*Id.* at ¶ 49). On May 7, 2024, Plaintiffs answered, and stated Plaintiffs had previously provided an image of the Flag and the City had not raised any concerns. (*Id.* at ¶ 50).

On May 9, 2024, Ms. Goodman responded, "that the City has chosen to use the American [F]lag at the City sponsored events during police week[,]" included Assistant Corporation Counsel Jacobsen ("Mr. Jacobsen") on the email, and indicated the location for the flag raising was at the Police Memorial. (*Id.* at ¶ 51). On that same date, Plaintiffs replied "[y]ou have still not explained why the City will not raise the JCPSOA's flag during the event[,]" noted the City had raised a variety of other flags for different groups, and expressed their belief that the City's actions were "content censorship in violation of the First Amendment." (*Id.* at ¶ 52). On May 10, 2024, Mr. Jacobsen responded that "[a] flag raising is a City-sponsored, City-run event on City property. It

is therefore government speech and any belief that it violates your [] First Amendment rights is incorrect." (*Id.* at ¶ 53).

On May 14, 2024, the flag raising ceremony occurred; however, the ceremony took place at the Police Memorial rather than City Hall as other flag raising ceremonies had, and only the standard American Flag was raised. (*Id.* at ¶¶ 56-57). The Blue Line Flag was not. (*Id.* at ¶ 57).

On July 31, 2024, Plaintiffs filed their Complaint alleging Defendants violated their rights to freedom of speech and association[5] under the First and Fourteenth Amendments to the Constitution[6] under 42 U.S.C. § 1983 (Count One)[7] and under Article I, Paragraphs 6 and 18 of the New Jersey Constitution as well as the New Jersey Civil Rights Act ("NJCRA"), N.J.S.A. 10:6-1, *et seq.* (Count Two).[8]

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[5] The Court notes that Defendants improperly refer to Plaintiffs' First Amendment association claim as a "right to assemble" First Amendment claim. (Defs.' Br. at 7). However, these are two separate distinct rights. The right to assemble is explicitly included in the First Amendment. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble . . . ."). "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental . . . 'The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.'" *De Jonge v. State of Oregon*, 299 U.S. 353, 364 (1937) (citation omitted). On the other hand, the Supreme Court has stated "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees,* 468 U.S. 609, 622 (1984); *see also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."); *303 Creative LLC v. Elenid*, 600 U.S. 570, 586 (2023) ([T]he First Amendment protects acts of expressive association.") (citation omitted).

[6] The First Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964).

[7] To bring a § 1983 claim, Plaintiffs must allege: (1) a violation of a right secured by the Constitution or federal law; and (2) that the alleged deprivation was committed by a person acting under the color of state law. *See Mikhaeil v. Santos*, 646 Fed. Appx. 158, 161-62 (3d Cir. 2016) (per curiam) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988)); *see also Schneyder v. Smith*, 653 F.3d 313, 319 (3d Cir. 2011).

[8] Courts in this District have repeatedly interpreted the NJCRA as analogous to § 1983. *See Szemple v. Corr. Med. Servs.*, 493 F. App'x 238, 241 (3d Cir. 2012) ("The NJCRA is interpreted as analogous to § 1983."); *Trafton v. City of Woodbury*, 799 F. Supp. 2d 417, 443-44 (D.N.J. 2011) (collecting cases); *Mervilus v. Union Cnty.*, 73 F.4th 185, 193 n.4 (3d Cir. 2023) (Since "[t]he [NJCRA] is interpreted analogously to § 1983[;]" the NJCRA claims "rise and fall with [the] parallel § 1983 claims."). Thus, this Court analyzes Plaintiffs' NJCRA and § 1983 claims together. *Id.*; *Burt v. Bolden*, No. 25-2265, 2025 WL 1065480, at *2 n.2 (D.N.J. April 9, 2025) ("[C]laims under the NJCRA are construed identically to an equivalent federal claim and are subject to the same defenses . . . This Court therefore[,] discusses both types of claims together under § 1983 as the same legal standards, elements, and defenses apply to both the federal and state statutes."); *see also Tucker v. City of Phila.*, 679 F. Supp. 3d 127, 137 (D.N.J. 2023).

On October 28, 2024, Defendants filed the instant motion to dismiss.[9] ("Defs.' Br.") (ECF No. 3). On December 23, 2024, Plaintiffs opposed. ("Pls.' Br.") (ECF No. 7). Defendants did not reply. This matter is now ripe for consideration.

II. LEGAL STANDARD

Rule 8 requires that a pleading include "a short and plain statement of the claim showing that the pleader is entitled to relief" and provide the defendant with "fair notice of what the claim is and the grounds upon which it rests[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation and internal quotations and ellipses omitted). On a Rule 12(b)(6) motion, the "facts alleged must be taken as true" and dismissal is not appropriate where "it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) (citation omitted). A complaint will survive a motion to dismiss if it provides a sufficient factual basis to state a facially plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

To determine whether a complaint is sufficient, the Third Circuit requires a three-part inquiry: (1) the court must first recite the elements that must be pled in order to state a claim; (2) the court must then determine which allegations in the complaint are merely conclusory and therefore need not be given an assumption of truth; and (3) the court must "assume the[] veracity" of well-pleaded factual allegations and ascertain whether they plausibly "give rise to an entitlement for relief." *Santiago v. Warminster Twp.*, 629 F.3d 121, 130 (3d Cir. 2010) (citations omitted).

[9] Pursuant to the Court's Individual Rules and Procedures, IV. A., "[i]n an effort to resolve cases expeditiously, before bringing a motion to dismiss . . . a party must submit a letter, not to exceed three (3) single-spaced pages, requesting a pre-motion conference" as described therein. The Court notes Defendants did not comply with this rule prior to filing their motion. Notwithstanding, Defendants' failure to request leave to file, the Court considers the merits.

III. DISCUSSION

Defendants argue the government speech doctrine applies; thus, Plaintiffs First Amendment rights were not violated, and accordingly, Plaintiffs state no parallel State constitutional or NJCRA claim. (Defs.' Br. at 1-7). Defendants further argue that Ms. Goodman is entitled to qualified immunity. (Defs.' Br. at 8-10). Plaintiffs oppose. (*See generally* Pls.' Br.).

A. First Amendment Jurisprudence

"When the government encourages diverse expression—say, by creating a forum for debate—the First Amendment prevents it from discriminating against speakers based on their viewpoint." *Shurtleff v. City of Bos.*, 596 U.S. 243, 247 (2022) (citation omitted). "But when the government speaks for itself, the First Amendment does not demand airtime for all views. After all, the government must be able to 'promote a program' or 'espouse a policy' in order to function." *Shurtleff*, 596 U.S. at 247-48 (citing *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015)); *see also Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.") (citing *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny")). "The line between a forum for private expression and the government's own speech is important, but not always clear." *Shurtleff*, 596 U.S. at 248.

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995). "Viewpoint discrimination is . . . an egregious form of content discrimination," and "[d]iscrimination against speech because of its message is presumed to be unconstitutional." *Id.* at 828-29. So, in any forum "[t]he government must abstain from regulating speech when the

specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* at 829.

Supreme Court First Amendment jurisprudence has soundly rejected viewpoint-based regulation of speech. *See, e.g., City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (the First Amendment "forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) ("[G]overnment, including a municipal government vested with state authority, 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"); *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) ("The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) ("St. Paul's brief asserts that a general 'fighting words' law would not meet the city's needs because only a content-specific measure can communicate to minority groups that the 'group hatred' aspect of such speech 'is not condoned by the majority.' The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.") (citations omitted).[10] *Accord Ne. Pa. Freethought Society v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424,

[10] Indeed, the First Amendment remains a bulwark for free speech, even speech deemed offensive or controversial. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) ("The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." (quotation marks omitted)); *Street v. New York*, 394 U.S. 576, 592 (1969) ("[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). *Accord Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988); *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 509-514 (1969); *Cox v. Louisiana*, 379 U.S. 536, 551 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 237-238 (1963); *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949); *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 161 (1939); *De Jonge*, 299 U.S. at 365. *See also Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death.")

432 (3d Cir. 2019) ("[N]o matter what kind of property is at issue, viewpoint discrimination is out of bounds . . . Rather than aiming at an entire subject, it targets particular views taken by speakers. And that violates the First Amendment's most basic promise.").

However, as noted above, "[w]hen [the] government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker*, 576 U.S. at 207; *Pleasant Grove City*, 555 U.S. at 468 (A "government entity has the right to 'speak for itself'" and "to select the views that it wants to express."); *see also Sons of Confederate Veterans, Inc. ex rel. Griffin v. Commissioner of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002) ("[E]ven ordinarily impermissible viewpoint-based distinctions drawn by the government may be sustained where the government itself speaks or where it uses private speakers to transmit its message."). This doctrine "reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech," and for that reason, "government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas." *Walker*, 576 U.S. at 207 (citations omitted); *see also Shurtleff*, 596 U.S. at 252 ("The Constitution therefore relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks.") (citation omitted).

For example, the Supreme Court has held that a government speaks for itself when it chooses which permanent monuments to display in a public park, even when the monuments were privately funded and donated, *Pleasant Grove City*, 555 U.S. at 470-73, and also determined that license plate designs proposed by private groups was government speech because the State that issued the plates "maintain[ed] direct control over the messages conveyed" by "actively"

reviewing designs and rejected over a dozen proposals. *Walker*, 576 U.S. at 213.[11] *Accord Johanns*, 544 U.S. at 561 (finding advertisements promoting the sale of beef products government speech where pursuant to a federal statute, Congress and the Secretary of Agriculture provided guidelines for the content of the ads, Department of Agriculture officials attended the meetings at which the content of specific ads was discussed, and the Secretary could edit or reject any proposed ad, thus, "[t]he message set out in the beef promotions [was] from beginning to end the message established by the Federal Government[.]"). Conversely, in *Matal v. Tam*, the Court concluded that trademarking words or symbols generated by private registrants did not amount to government speech because although the Patent and Trademark Office had to approve the proposed mark it did not exercise control over the content of the marks such that a governmental message was conveyed. 582 U.S. 218, 236, 239 (2017). Likewise, the Third Circuit has found that the government can speak through its employees or representatives when it is the job of those representatives to speak on behalf of the government. *See Amalgamated Transit Union Local 85 v. Port Auth. of Allegheny Cnty.*, 39 F.4th 95, 103 (3d Cir. 2022) ("If an employee's job is to speak, the First Amendment does not prevent a government employer from controlling the speech for which the employee is employed.").

However, the Supreme Court has cautioned, "while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Matal*, 582 U.S. at 235. Consequently, "[w]hile government speech is not restricted by the Free Speech

[11] In *Matal v. Tam*, the Court noted *Walker* "likely marks the outer bounds of the government speech doctrine." 582 U.S. at 238.

Clause, the government does not have a free hand to regulate private speech on government property." *Pleasant Grove City*, 555 U.S. at 469.

i. Plaintiffs Plausibly Allege a First Amendment Violation

Plaintiffs adequately allege a violation of their First Amendment rights.[12]

The Court's decision in *Shurtleff* is squarely on point.[13] In *Shurtleff*, the City of Boston had "allowed private groups to request use of the flagpole to raise flags of their choosing." 596 U.S. at 248. "Boston approved hundreds of requests to raise dozens of different flags." *Id.* However, in 2017, Boston denied "Camp Constitution" the ability to raise a "Christian flag." *Id.* Boston stated the problem was "not the content of the Christian flag," but rather Boston was concerned "that flying a religious flag at City Hall could violate the Constitution's Establishment Clause . . . ." *Id.* at 250. Boston advised that Camp Constitution "could proceed with the event if they would raise a different flag" but like Plaintiffs here, "they did not want to do so." *Id.* at 250.[14]

"The parties dispute[d] whether, on th[ose] facts, Boston reserved the pole to fly flags that communicate governmental messages, or instead opened the flagpole for citizens to express their own views." *Id.* The Court preemptively stated "[i]f the former, Boston is free to choose the flags it flies without the constraints of the First Amendment's Free Speech Clause. If the latter, the Free

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[12] The New Jersey Constitution's Free Speech Clause at Article I, Paragraph 6 is "generally interpreted as co-extensive with the First Amendment." *Palardy v. Twp. of Millburn*, 906 F.3d 76, 80 (3d Cir. 2018). The New Jersey Constitution's parallel First Amendment is similar to the First Amendment of the U.S. Constitution. Specifically, it provides "[t]he people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances." N.J. Con. Art. I, ¶ 18. Indeed, the Third Circuit has held that the New Jersey Constitution offers broader protections than the Federal Constitution. *See Monteiro v. City of Elizabeth*, 436 F. 3d 397, 404 (3d Cir. 2006).

[13] The Court also acknowledges the Third Circuit's recent decision affirming the district court in *Fraternal Order of Police Pennsylvania Lodge v. Township of Springfield*, 702 F. Supp. 3d 273 (E.D. Pa. November 13, 2023), *aff'd*, 2025 WL 314108, at *1 (3d Cir. 2025), which held that Springfield Township's resolution prohibiting its employees from displaying the Blue Line Flag violated the First Amendment.

[14] Camp Constitution "asked for an immediate order requiring Boston to allow the flag raising, but the [d]istrict [c]ourt denied the request." *Shurtleff*, 596 U.S. at 251. After discovery, both parties cross moved for summary judgment; the district court granted summary judgment for Boston and held "that flying private groups' flags from City Hall's [flag] pole amounted to government speech." *Id.* The First Circuit affirmed. *Id.* The Supreme Court reversed and remanded. *Id.* at 259.

Speech Clause prevents Boston from refusing a flag based on its viewpoint." *Id.* The Court held the latter—"Boston did not make the raising and flying of private groups' flags a form of government speech[,]" thus, "Boston's refusal to let Shurtleff and Camp Constitution raise their flag based on its religious viewpoint "abridg[ed]" their "freedom of speech." *Id.*

The Court first addressed the question of "whether Boston's flag-raising program constitutes government speech." *Id.* at 251. The Court answered in the negative. *Id.* at 258. In so doing, the Court "conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression" and informed by prior precedent, outlined three factors to determine if Boston's action amounted to government speech: (1) "the history of the expression at issue"; (2) the public's likely perception as to who (the government or a private person) is speaking"; and (3) "the extent to which the government has actively shaped or controlled the expression." *Id.* at 252 (citation omitted). The Court determined the first factor—the history of flag flying, particularly at the seat of government supported Boston and that the second factor—public perception did not "tip the scale" in either parties' favor. *Id.* at 253-55. It was the third factor—the extent to which Boston actively controlled these flag raisings and shaped the messages the flags sent—that the Court deemed "the most salient feature of th[e] case." *Id.* at 256. While "Boston maintained control over an event's date and time to avoid conflicts[,] . . . maintained control over the plaza's physical premises, . . . [a]nd [] provided a hand crank so that groups could rig and raise their chosen flags[]" Boston did not control the content of the various flags sought to be raised. *Id.* at 256-57. The Court noted that "The application form asked only for contact information and a brief description of the event, with proposed dates and times." *Id.* at 256-57. In fact, Boston "had nothing—no written policies or clear internal guidance—about what flags groups

could fly and what those flags would communicate." *Id.*[15] Consequently, "[Boston's] lack of meaningful involvement in the selection of flags or the crafting of their messages leads us to classify the flag raisings as private, not government, speech." *Id.* at 258.

Given the Court's determination that Boston's flag-raising program did not express government speech, Boston's refusal of allowing Camp Constitution to raise their flag "amounted to impermissible viewpoint discrimination." *Id.* at 258.

(1) The History of the City's Flag Raising Program

Here, Jersey City argues "there is no dispute that City Hall is owned by the City . . . no dispute the City expresses and disseminates information, opinions and messages at City Hall[]" and that "[t]he City controls the messages its conveys by determining which flags to raise, . . . that emanate from City Hall." (Defs.' Br. at 6); *id.* ("The City exercised its control over whether to display the Blue Flag, as the display of the Blue Flag also conveys a message from City Hall to the City's residents."). However, the same was true in *Shurtleff*. *Shurtleff*, 596 U.S. at 256 ("Boston says that all (or at least most) of the 50 unique flags it approved reflect particular city-approved values or views.").

It is readily apparent that *Shurtleff's* first factor—the history of flag flying, particularly at the seat of government, favors Jersey City like Boston for all the reasons the *Shurtleff* Court noted. *Shurtleff*, 596 U.S. at 253-55 (considering "the history of flag flying, particularly at the seat of government."); *see also Scaer v. City of Nashua*, No. 24-00277, 2024 WL 5205155, at *10 (D.N.H.

[15] The *Shurtleff* Court compared the "extent of Boston's control over flag raisings with the degree of government involvement in our most relevant precedents" and observed that in *Pleasant Grove City* the Court "emphasized that Pleasant Grove City always selected which monuments it would place in its park (whether or not the government funded those monuments), and it typically took ownership over them[;]" likewise in *Walker*, "a state board 'maintain[ed] direct control" over license plate designs by 'actively' reviewing every proposal and rejecting at least a dozen." *Shurtleff*, 596 U.S. at 257. The Court's reasoning went on to analogize *Matal v. Tam*—where the Court held "that trademarks were not government speech because the Patent and Trademark Office registered all manner of marks and normally did not consider their viewpoint, except occasionally to turn away marks it deemed 'offensive'" to "Boston's come-one-come-all attitude except, [] for Camp Constitution's religious flag . . . ." *Id.* at 257. .

Dec. 16, 2024), *report and recommendation adopted*, 2025 WL 951678 (D.N.H. March 28, 2025) ("[T]he general history of flag flying on government property favors Nashua . . . ."). *Accord Feldman v. Denver Pub. Schools*, No. 23-02986, 2024 WL 4308189, at *3 (D. Colo. Sept. 26, 2024) (evidence showing that school officials retained authority over which flags could hang on public school walls supported a determination that historical use of the forum weighed in favor of government speech).

(2) The Public's Perception as to Who is Speaking

The next factor the Court considers is "whether the public would tend to view the speech at issue as the government's." *Shurtleff*, 596 U.S. at 255. The flag raising within City Hall may reasonably be perceived as helping to "defin[e] the identity that [the] city projects to its own residents and to the outside world." *Shurtleff*, 596 U.S. at 255 (second alteration in original) (quoting *Pleasant Grove City*, 555 U.S. at 472)). Consequently, "the public seems likely to see the flags as 'conveying some message' on the government's 'behalf.'" *Id.* (quoting *Walker*, 576 U.S. at 212 (additional quotations and citation omitted); *see also Gundy v. City of Jacksonville*, 50 F.4th 60, 79 (11th Cir. 2022) (finding that the public perception factor weighed in favor of government speech even where the speech at issue, a legislative prayer, was made by a private party, and finding it relevant that the prayer was delivered along with the pledge of allegiance during the opening of a government occasion). However, in the correspondence between the parties, the City referred to Plaintiffs' event as "your flag raising." (Compl. ¶ 28). Additionally, private citizens often attend these flag raisings, which the *Shurtleff* Court also considered. *Shurtleff*, 596 U.S. at 255 ("[A] pedestrian glimpsing a flag other than Boston's" on the flagpole in question "might simply look down onto the [City Hall] plaza, see a group of private citizens conducting a ceremony without the city's presence, and associate the new flag with them, not Boston."). As in *Shurtleff*, citizens

that pass by or visit City Hall might not associate flags raised at City Hall with the City. *Id.* ("[E]ven if the public would ordinarily associate a flag's message with Boston, that is not necessarily true for the flags at issue here.").

Similarly to *Shurtleff*, the second factor—public perception of who is speaking—particularly at this early stage, does not tip the scale towards either party. *Id.* 596 U.S. at 255-56; *see also Scaer*, 2024 WL 5205155, at *13 ("This court concludes that at this early stage in the litigation, the public perception factor favors neither party").

(3) Jersey City Did Not Exercise Control Over the Flag Raising Program

Lastly, the court must evaluate "the extent to which the government . . . actively shaped or controlled the expression." *Shurtleff*, 596 U.S. at 252. It is this third factor—as in *Shurtleff*—that compels the Court's determination here. *Id.* 596 U.S. at 256. Jersey City's "application form asked only for contact information and a brief description of the event, with proposed dates and times." *Id.* at 256-57; (Catrambone Cert., Ex. 2); *cf. Scaer*, 2024 WL 5205155, at *14 ("Nashua required anyone wishing to fly a flag on the Citizen Flag Pole to submit an application that included a photograph of the proposed flag "and an explanation of the message intended to be conveyed . . . Pursuant to that Policy, the City expressly disclaimed the use of the Citizen Flag Pole "as a forum for free expression by the public."); *Feldman*, 2024 WL 4308189, at *4 (holding Denver public schools flag displaying program, which permitted display of Pride Flag near school classroom doors constituted government speech because "[h]ere, unlike in *Shurtleff*, [p]laintiffs' allegations indicate that [Denver public schools] exerted complete control over the flags' content and meaning."). Moreover, at this juncture although discovery has not occurred, Defendants have not presented any relevant record demonstrating it has denied other flag raising event requests besides Plaintiffs, nor represented that the City has any "written policies or clear internal guidance about

what flags groups could fly and what those flags would communicate." *Shurtleff*, 596 U.S. at 257; *cf. Walker*, 576 U.S. at 213 (concluding that state "effectively controlled" the messages conveyed by specialty license plates "by exercising final approval authority over their selection." (quotations and citations omitted)). Indeed, to the contrary, the City's 2023 flag raising list attached to Plaintiffs' Complaint, like Boston's, has "flags associated with other countries celebrated [Jersey City's] many different national origins" but also others that are "more difficult to discern a connection to the city." *Shurtleff*, 596 U.S. at 256. (*See* Compl., Ex. A). As such, the Court does not discern any basis at the pleading stage, to conclude Jersey City "actively controlled these flag raisings." *Id.* at 256.[16] Accordingly, Jersey City's "lack of meaningful involvement in the selection of flags or the crafting of their messages leads [this Court] to classify the flag raisings as private, not government, speech . . . ." at this juncture. *Id.* at 258.[17]

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[16] "Importantly, the Supreme Court noted that Boston 'could easily have done more to make clear it wished to speak for itself by raising flags[,]' and it referred to the written policy of [another city in] California, as an example of a flagpole policy that would support government speech." *Scaer*, 2024 WL 5205155, at *15 (quoting *Shurtleff*, 596 U.S. at 257-58); *see also id.* at *16 (finding Nashua exercised sufficient control of the expression of flags because "Nashua maintained a written flagpole policy with identifiable guidelines of what it wished to communicate through the flags displayed on the Citizen Flag Pole. Like [city's] policy, but in contrast to Boston's policy, the 2022 Flag[]pole Policy stated that the 'potential use of a City flag pole is not intended to serve as a forum for free expression by the public.'" The *Scaer* Court further noted "Nashua maintained the right to exert ultimate control over the Citizen Flag Pole by reserving for itself "the right to deny permission or remove any flag it consider[ed] contrary to the City's best interest" and that Nashua's application required "an explanation of the message intended to be conveyed."); *Metroplex Atheists v. City of Forth Worth*, No. 23-00736, 2023 WL 5025020, at *3 (N.D. Tex. Aug. 6, 2023) (concluding that history of city banner policy supported a finding that challenged banners were government speech where city retained sole authority to approve banner applications, city maintained exclusive control over the areas where banners were hung, and city had exclusive oversight of the municipal banner program); *Smith v. City of Battle Creek*, 24-00853, 2024 WL 5361180, at *3 (W.D. Mich. Aug. 26, 2024) (dismissing plaintiff's complaint based on finding that city's flag display policy "actively shapes or controls sentiments that may be expressed on its flagpoles."); *see also Little v. Los Angeles County Fire Dept.*, No. 24-04353, 2025 WL 409427, at *8 (C.D. Cal. Jan. 25, 2025) (holding county directive requiring Progress Pride Flag to be flown at county facilities was government speech and dismissing with prejudice lifeguard captain's First Amendment claim), *but see N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1565-66 (11th Cir. 1990) (holding flying confederate flag above Alabama's state capitol was not government speech).

[17] Various decisions from sister circuits and districts—unrelated to flag raising—are also instructive in demonstrating the importance of the extent of control exercised by the governmental entity in determining circumstances constitute government speech. *Compare McGriff v. City of Miami Beach*, 84 F.4th 1330, 1336 (11th Cir. 2023) (finding city's selection of only some pieces of artwork, and rejection of others, including depiction of individual who was shot and killed by city police, to display at city-organized festival which included art installations was government speech and thus exempt from First Amendment; city contracted for and funded the art installations, government had long historical use of artistic expression to convey messages, and city advertised and promoted the art produced for the event); *Mech v. Sch. Bd. of Palm Beach Cnty.*, 806 F.3d 1070, 1074–76 (11th Cir. 2015) (finding that banners advertising a private

Additionally, the Complaint alleges that the City not only prevented Plaintiffs from raising the Blue Line Flag at City Hall, but also changed the venue from City Hall to the police memorial, despite the City's form that indicates three separate locations within City Hall that can be utilized for flag raisings. Moreover, Plaintiffs allege the City did so without explanation, which further supports Plaintiffs allegation of impermissible viewpoint discrimination for several reasons. First, the City's concern about controlling the messages conveyed to Jersey City residents from City Hall—"one of the central buildings from which the local government runs" (Defs.' Br. at 6), is no longer at issue given the change in location; thus, the City's reliance on the government speech doctrine is open to question in this context. Second, all the other flag raisings that occurred the prior year took place at City Hall. (Compl., Ex. A). Third, even assuming the government speech doctrine is applicable, preventing Plaintiffs from raising the Blue Line Flag *at the police memorial* rather than City Hall could undermine the notion that the public would perceive that the government supported and endorsed such a message.[18]

Given the facts presented on the limited record before the Court, Plaintiffs sufficiently plead that the City's flag raising program does not constitute government speech. *See, e.g.*, *Shurtleff*, 596 U.S. at 258.

Accordingly, Counts One and Two survive.[19]

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business on school grounds are government speech in part because the "banners are hung on school fences, and government property is 'often closely identified in the public mind with the government unit that owns the land.'" (quoting *Pleasant Grove City*, 555 U.S. at 472)), *with Cajune v. Indep. Sch. Dist.*, 194, 105 F.4th 1070, 1081 (8th Cir. 2024) (holding that Black Lives Matter posters placed in public schools were not government speech because the school district relinquished control by allowing "private persons, including 'staff and families' in the District" to place posters on school walls); *Cambridge Christian Sch. v. Fla. High Sch. Athletic Ass'n, Inc.*, 115 F. 4th 1266, 1292-94 (11th Cir. 2024) (finding that a school athletic association's denial of a school's request to present a prayer over the announcement system fell outside of the First Amendment because announcements over the public announcement system, including those by private parties, are perceived to be government speech, all announcements were drafted by athletic association and association had rules governing the content of announcements and in-game commentary).

[18] The City did not address the government speech doctrine in the context of the police memorial. (*See generally* Defs.' Br.).

[19] Neither party substantively addressed Plaintiffs' First Amendment association claim. In analyzing an expressive association claim, Supreme Court jurisprudence has delineated three factors: (1) "whether the group making the claim

B. Qualified Immunity

Defendants argue Ms. Goodman is entitled to qualified immunity. (Defs.' Br. at 8-10). Plaintiffs argue she is not. (Pls.' Br. at 16). The Court agrees with Plaintiffs.

"The doctrine of qualified immunity 'balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.'" *Stringer v. County of Bucks*, --- F.4th ---, 2025 WL 1701775, at *3 (3d Cir. June 18, 2025) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). "Whether qualified immunity can be invoked to shield an official from personal liability turns on the 'objective legal reasonableness' of the official's action, "assessed in light of the legal rules that were 'clearly established' at the time it was taken[.]" *Stringer*, 2025 WL 1701775, at *3 (first citing *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982), then citing *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quoting *Harlow*, 457 U.S. at 818)).

"An official sued under § 1983 for an alleged constitutional violation is entitled to qualified immunity unless he (1) violated a constitutional right that (2) was clearly established when he acted." *Id.* (citing *George v. Rehiel*, 738 F.3d 562, 571-72 (3d Cir. 2013)). "For a right to be 'clearly

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engaged in expressive association"; (2) "whether the state action at issue significantly affected the group's ability to advocate its viewpoints"; and (3) a court must "weigh[] the state's interest implicated in its action against the burden imposed on the associational expression to determine if the state interest justified the burden." *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 442 (3d Cir. 2000) (citations omitted). Here, the Court assumes the JCPSOA engages in expressive association. *Pi Lambda Phi Fraternity, Inc.*, 229 F.3d at 443 ("[T]here is no requirement that an organization be primarily political (or even primarily expressive) in order to receive constitutional protection for expressive associational activity."). Second, the City's preclusion of allowing Plaintiffs to raise the Blue Line Flag could have "significantly affected" their ability to advocate the JCPSOA's viewpoints. The Complaint gives no express indication that the City's action "significantly affected" the JCPSOA's ability to engage in protected expressive activity; Plaintiffs attended the flag raising ceremony, but without their chosen flag. (Compl. ¶¶ 54, 57). *See, e.g.*, *State Troopers Fraternal Ass'n of New Jersey, Inc. v. New Jersey*, 585 F. App'x 828, 831 (3d Cir. 2014). Yet, the allegations that the City denied Plaintiffs use of City Hall as the venue for Plaintiffs' event and the City's refusal to permit Plaintiffs from raising the Blue Line Flag, could provide a basis for Plaintiffs' expressive association claim, particularly after discovery occurs, which might provide additional relevant facts not before the Court at this early stage. Likewise, a determination of weighing the state's interest implicated in its action against the burden imposed on the associational expression is properly considered after further discovery. Accordingly, Plaintiffs' alleged violation of their right to expressive association survives at this juncture.

established,' the contours of that right 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* (citing *Anderson*, 483 U.S. at 640). "Existing case law, [] must give the official 'fair warning' that his conduct is unconstitutional." *Id.* (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). "Typically, analogous precedent from the Supreme Court or this Court or a consensus of persuasive authority in the Courts of Appeals is required." *Id.* (citing *Clark v. Coupe*, 55 F.4th 167, 182 (3d Cir. 2022) (second citation omitted). "Yet broad principles of law suffice to give fair warning when an official commits a patently 'obvious' constitutional violation." *Id.* (citing *Hope*, 536 U.S. at 741; *Mack v. Yost*, 63 F.4th 211, 233 (3d Cir. 2023) (quoting *Schneyder v. Smith*, 653 F.3d 313, 330 (3d Cir. 2011)).

"As for timing, the Supreme Court has repeatedly stressed the importance of resolving qualified immunity 'at the earliest possible stage in litigation.'" *Id.* at *4 (citing *Pearson*, 555 U.S. at 232 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)). "But even though the defense may be raised either in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) or in a motion for summary judgment under Federal Rule of Civil Procedure Rule 56, Rule 12(b)(6) is often 'a mismatch for immunity and almost always a bad ground for dismissal.'" *Fogle v. Sokol*, 957 F.3d 148, 162 n.14 (3d Cir. 2020) (citation omitted).

The *Stringer* Court noted that "the first prong of the qualified immunity analysis—whether the facts alleged make out a violation of a constitutional right—fits like a glove at the motion-to-dismiss stage because it overlaps with a district court's inquiry under Rules 8(a) and 12(b)(6)." *Id.* (citing *Kedra v. Schroeter*, 876 F.3d 424, 435 (3d Cir. 2017)). Thus, "a well-pleaded § 1983 complaint necessarily alleges a constitutional violation for purposes of qualified immunity, while a complaint that fails to plausibly plead the violation of a right does not." *Id.*

As the Third Circuit has repeatedly recognized, however, "the second prong of a qualified immunity analysis—whether the right allegedly violated was "clearly established"—presents unique difficulties at the pleading stage[,]" because "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established," and defining the right with specificity is a "fact-intensive inquiry," that "must be undertaken in light of the specific context of the case," *Id.* (citations omitted).

"[T]he 'burden of pleading a qualified immunity defense' like any other affirmative defense 'rests with the defendant[].'" *Id.* (citing *Thomas v. Indep. Twp.*, 463 F.3d 285, 293 (3d Cir. 2006)).

Here, the first factor is satisfied; the Complaint plausibly pleads a violation of Plaintiffs' First Amendment rights. *See Shurtleff*, 596 U.S. at 258-59. "So under our analytical framework for analyzing qualified immunity at the 12(b)(6) stage, Defendants are entitled to dismissal only if they can show, based on the pleadings alone, that this right was neither clearly established nor obvious." *Stringer*, 2025 WL 1701775, at *6 (citation omitted).

However, here, as is common, a determination as to the second prong of a qualified immunity analysis—whether the right allegedly violated was "clearly established" is premature. *See Stringer*, 2025 WL 1701775, at *7 (affirming district court's determination that [d]efendants' request for qualified immunity was premature because it could not, without further factual development, "determine whether it would have been clear to any of the [defendants] that their conduct was unlawful when interacting with [plaintiff]."); *id.* at *4 ("Thus, it is often the case that, without more than the complaint to go on, a court "cannot fairly tell whether a right is obvious or squarely governed and thus clearly established by precedent, making qualified immunity inappropriate" on a motion to dismiss."); *Sause v. Bauer*, 585 U.S. 957, 959-60 (2018) (per curiam) (reversing the grant of qualified immunity on a 12(b)(6) motion because factual issues precluded

resolution of the question); *Reilly v. City of Atl. City*, 532 F.3d 216, 234 (3d Cir. 2008) (quoting *Wright v. City of Philadelphia*, 409 F.3d 595, 599 (3d Cir. 2005)); *Phillips*, 515 F.3d at 242 n.7; *Curley v. Klem*, 298 F.3d 271, 278 (3d Cir. 2002); *see also Liberty and Prosperity 1776, Inc. v. Corzine*, 720 F. Supp. 2d 622, 636-37 (D.N.J. 2010) (finding defendants were not entitled to qualified immunity at motion to dismiss stage because determination was based on defendants purpose in ordering or permitting speech restriction at state sponsored town hall meeting); *Kovats v. Rutgers*, 822 F.2d 1303, 1313-14 (3d Cir. 1987) (holding that a qualified immunity determination was "premature" when the "legal issues [were] inextricably intertwined with the factual issues" and "there has been no discovery on th[ose] factual issues").

There are relevant factual issues that must be answered before this Court "can define the right with appropriate specificity and reach "the crucial question" at the core of the qualified immunity analysis: "whether the [Defendants] acted reasonably in the particular circumstances that [they] faced." *Stringer*, 2025 WL 1701775, at *7 (citation omitted). For example, whether Jersey City has any written policies or clear internal guidance about what flags groups could fly and what those flags would communicate or if the City denied other flag raising applications. Accordingly, at this juncture, the Court cannot determine without more facts whether Ms. Goodman is entitled to qualified immunity.

IV. CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss (ECF No. 3) is **DENIED**. An appropriate Order accompanies this Opinion.

DATED: June 30, 2025

JULIEN XAVIER NEALS
United States District Judge