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THOMAS A. DEGISE, individually and in his official capacity as County Executive for the County of Hudson, ANTHONY VAINIERI, individually and in his official capacity as County Freeholder for the County of Hudson, ANTHONY ROMANO, individually and in his official capacity as County Freeholder for the County of Hudson, KENNETH KOPACZ, individually and in his official capacity as County Freeholder for the County of Hudson, ALBERT CIFELLI, individually and in his official capacity as County Freeholder for the County of Hudson, CARIDAD RODRIGUES, individually and in her official capacity as County Freeholder for the County of Hudson,
Plaintiffs,

vs.

AMY TORRES, STACEY GREGG, KASON LITTLE, MARISA BUDNICK, ANAND SARWATE, and JOHN DOES AND JANE ROES 1-20 (fictitious persons whose true identities are presently unknown),
Defendants.

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION: HUDSON COUNTY

DOCKET NO. HUD-C-179-20

CIVIL ACTION

BRIEF IN RESPONSE TO THE ORDER TO SHOW CAUSE, IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, AND IN SUPPORT OF DISSOLVING TEMPORARY RESTRAINTS

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PRELIMINARY STATEMENT

More than eighty years ago, in striking a law that restricted the distribution of leaflets on the streets of Jersey City, the Supreme Court found that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). This case is about whether and how the government can restrict Defendants' rights to speak and protest the decisionmaker of a policy, by restricting their right to assemble, speak, and demonstrate on a traditionally protected and public gathering place—public streets. More specifically, Defendants oppose the attempt by Hudson County ("County") elected officials to dramatically restrict their ability to protest the County Executive's refusal to terminate a contract with Immigration and Customs Enforcement ("ICE") to incarcerate people in ICE custody at the Hudson County jail to raise revenue for the County. Six of the County's elected officials have sued New Jersey residents—including their own constituents—who have protested in a small group on the street outside *one* of their homes, simply because they do not agree with the protesters' political viewpoints.

The constitutional question before the Court is whether the imposed temporary restraining order ("TRO") and requested injunction are prior restraints on speech and presumptively unconstitutional, a determination that includes an analysis of whether the injunction was issued because of the content of the expression. In

light of the undisputed facts gathered during discovery, and as detailed below, it is clear that the injunction was sought based on the content of expression, unconstitutionally singles out a particular subject matter for differential treatment, and provides unbridled discretion that allows for discriminatory enforcement.

However, even if the Court finds that the injunction is a content-neutral restriction of speech, the TRO unconstitutionally burdens far more speech than necessary to serve a significant governmental interest and should be invalidated. Defendants do not dispute that Plaintiffs have a right to residential privacy, but that interest looks different here than it did in *Murray v. Lawson*, the case upon which Plaintiffs' complaint is based. Here, the Court is contending with speech that occurred on a busy city street, expressing views toward an elected public official. Plaintiffs do not require the TRO to protect their residential privacy; Jersey City's existing ordinances are the least restrictive manner of meeting the government's interest, and Defendants conformed to them. Judicial intervention is not an appropriate substitute for the enforcement of local ordinances, and the TRO here provides unbridled discretion to criminalize lawful speech activities.

Finally, even if the Court were to find that the governmental interest is identical to that in *Murray*, the TRO is not appropriately tailored. For a content-neutral injunction, the court must examine whether the challenged provisions of the injunction burden more speech than necessary to serve the government interest.

There is no evidence of any protest near the residences of the commissioner-plaintiffs. Even with respect to the DeGise residence, the TRO appears to curtail *all* protest against the Executive in the entirety of Jersey City, with the exception of a specific corner, for one hour every two weeks, and to require that Defendants provide prior notice to law enforcement. Moreover, this TRO and the proposed injunction creates criminal liability without notice for Jane and John Does—a broad swath of people, as determined by Plaintiffs and law enforcement officials. According to its text, this Order criminalizes all anti-ICE protesting in the entire city. Furthermore, it is vague and leaves to the discretion of government officials the definition of protest.

Defendants ask the Court to dissolve the Temporary Restraining Order; to decline to issue an injunction; and to dismiss the complaint as it fails as a matter of law.

STATEMENT OF PROCEDURAL HISTORY

On December 8, 2020, the six Plaintiffs filed a Verified Complaint and an Order to Show Cause with temporary restraints, seeking restrictions on protests outside each of their homes. The Court granted an ex parte TRO that same day that, as described in detail below, enjoins protests and picketing by Defendants and purportedly others. (*See* Dec. 8, 2020 Temporary Restraining Order ("TRO"), at 3–4 ¶¶ A–H.) During a conference on December 22, 2020, the Court granted limited expedited discovery and set a return date that was later extended to May 14, 2021.

In the course of discovery, this Court resolved a few disputes in a telephonic hearing on March 3, 2021. Defendants served subpoenas dated March 17, 2021 to the Hudson County Sheriff's Office ("HCSO") and Jersey City Police Department ("JCPD") seeking relevant documents including some referenced during depositions. On March 26 – the date discovery closed – Plaintiffs moved to quash those subpoenas. On April 20, the Court denied their motion. On April 21, Plaintiffs emailed JCPD's attorneys to instruct JCPD not to produce documents under the Court's order even though Plaintiffs had not sought a stay, filed a motion for reconsideration, nor sought appellate review. (Apr. 21 Ltr., Ex. 41.)

On April 12, Plaintiffs moved for leave to file a Second Amended Complaint[1] for the purpose of naming three people arrested on December 8 as Defendants in this case and a return date is scheduled for May 7, 2021.

STATEMENT OF FACTS[2]

A. The Public Debate Surrounding Hudson County's Contract with ICE

On November 24, 2020, the Hudson County Board of Commissioners[3] presided over a marathon public meeting that lasted over nine hours. (Jersey Journal

[1] Plaintiffs filed a First Amended Complaint on January 29, 2021.
[2] As explained above, Plaintiffs instructed JCPD (and presumably HCSO) not to comply with subpoenas directed at them. Thus, Defendants have not received the subpoenaed materials prior to the filing of this brief, and reserve their right to supplement these facts upon receipt of those materials.
[3] Then referred to as the Hudson County Board of Chosen Freeholders.

Article, Ex. 1, at DEFTORRES0042; NJ.com Article, Ex. 2, at DEFTORRES0223.) At issue was Resolution No. 718-11-2020 – a resolution to extend the intergovernmental service agreement between the County and ICE to continue incarcerating people on behalf of ICE at the county jail. (Plaintiffs' Brief in Support of the TRO ("Pls.' TRO Br."), at 2.) The meeting drew more than one hundred people, fifty-three of whom expressed opposition to the resolution, with no speakers expressing support. (Jersey Journal Article, Ex. 1, at DEFTORRES0042.)

Defendants Little, Gregg, and Torres were among the speakers at the November 24 meeting. (Nov. 24 Comm'r Meeting Tr., Ex. 3, at Pls0130–31, Pls0175–76, Pls0210–12.) Defendant Sarwate contacted a commissioner ahead of the vote to express his opposition. (Sarwate Nov. 24, 2020 Email, Ex. 4, at DEFSARWATE0002.)

Despite public opposition, the Board voted six to three to extend the contract. (Jersey Journal Article, Ex. 1, at DEFTORRES0042; Nov. 24 Comm'r Meeting Tr., Ex. 3, at Pls0241.) The Plaintiff-commissioners voted in favor of the extension. (*Id.* at Pls0239–Pls0241.)

After November 24, Defendants continued to express opposition to Resolution No. 718-11-2020 through traditional mechanisms for engaging with elected officials. (*See*, *e.g.*, Torres Tr., Ex. 5, 59:10–15; Screenshots of Facebook Posts, Ex. 6, at DEFGREGG0024–25; Screenshots of Tweets, Ex. 7, at

DEFTORRES0080–DEFTORRES0157.) At least three Plaintiffs have confirmed they dismissed or ignored comments from members of the public who opposed their position on the ICE contract, and some Commissioners did not even have working County email addresses.[4] Defendants therefore elected to demonstrate in Jersey City, in front of the residence of Plaintiff DeGise. Defendants chose to direct their message to Plaintiff DeGise, "[t]he sole person responsible for ending [the ICE contract]" following the Commissioners' vote. (Torres Tr., Ex. 5, 95:1–11.) They have not protested outside the homes of any other Plaintiffs. (Romano Tr., Ex. 10, 41:7–10; Cifelli Tr., Ex. 11, 71:11–13; Vainieri Tr., Ex. 12, 66:22–25; Kopacz

[4] Plaintiff DeGise received "a lot of phone calls, a lot of emails" from members of the public expressing opposition to the ICE contract. (DeGise Tr., Ex. 14, 119:17–24.) He conceded that he would "get tired of reading them." (*Id.* at 119: 25–120:1.) Even before the November 24 vote, Plaintiff Vainieri would dismiss emails sent in opposition to the ICE contract, telling members of the public to "get over it" and "get a life." (Vainieri Tr., Ex. 12, 103:21–25.) Plaintiff Vainieri also told individuals emailing him about the ICE contract that there is "[n]o need to contact [him] anymore." (*Id.* at 112:4–9.) Although he would receive "a hundred emails" expressing opposition to the ICE contract, Plaintiff Vainieri would not read them, instead finding them "meaningless" because his "mind's made up" to vote in favor of the ICE contract. (*Id.* at 114:4–19.) Plaintiff Cifelli "rarely" checked his Hudson County email account, (Cifelli Tr., Ex. 11, 46:4–6), relying instead on his personal and business email address which he is not sure is available to the public (Cifelli Tr., Ex. 11, 45:9–46:2). In fact, some of the Commissioners' county email addresses were not even "up and running." (Romano Tr., Ex. 10, 106:4–9.)

Response to Request for Admissions ("Kopacz RFA"), Ex. 38, at ¶ 2; Rodrigues Response to Request for Admission ("Rodrigues RFA"), Ex. 39, at ¶ 2.)[5]

County Executive DeGise and Commissioner Vainieri both released public statements criticizing the protesters, emphasizing protesters' political views and opposition to Hudson County's ICE contract. (DeGise Op-ed, Ex. 31; Hudson TV Article, Ex. 13, at DEFTORRES0117–19.)

B. The Events of December 3–7, 2020

1. The DeGise Residence

Plaintiff DeGise lives with his spouse at 402 New York Avenue in the Jersey Heights neighborhood of Jersey City. His house is a two-story, two-family house with a one-car garage and sits on a "regular city lot" measuring 25 by 100 feet with a small backyard. (DeGise Tr., Ex. 14, 23:15–23.) Plaintiff DeGise refers to living on his street as "life in the big city." (*See*, *e.g.*, *id.* at 70:9–21.) In the summertime, people hang out on stoops and listen to music. (*Id.* at 29:3–4.) This past winter, at the same time Defendants gathered near the DeGise residence, a neighborhood Christmas decorations competition attracted spectators to the neighborhood, by foot and by car. (*See* DeGennaro Tr., Ex. 15, 37:8–21, 56:22–23, 61:12–25.)

[5] Although some organizers considered gathering in front of the homes of other Commissioners who had voted in favor of the ICE contract, they quickly decided to gather only in front of Plaintiff DeGise's home for the reason stated above.

There are several non-residential establishments at the intersection of Plaintiff DeGise's block, including a childcare facility, a liquor store, and a firehouse. (DeGise Tr., Ex. 14, 27:2–7.) Nearby, there are several businesses, including a deli, a coffee shop, and restaurants. (*Id.* at 27:18–28:5.) There is also a park up the street, where people often play loud music. (*Id.* at 67:20–68:3.) Cars drive by at night. (DeGise Tr., Ex. 14, 66:8–14.) When the garbage trucks arrive at night, they can be especially noisy and "wake up the neighborhood," but according to Plaintiff DeGise, "you learn to live with it." (*Id.* at 70:9–21.)

2. The Events of December 3

The first protests took place on the evening of December 3. Ms. Gregg and Mr. Little attended.[6] (Gregg Am. Ans. to Interrogs., Ex. 16, No. 4; Little Ans. to Interrogs., Ex. 17, No. 4.) The demonstrators participated in chants, testified about their experiences, wrote in chalk on the sidewalk, fielded questions from neighbors about the reasons for their demonstration, and held a silent vigil with flashlights. (Gregg Tr., Ex. 20, at 32:3–10; Little Ans. to Interrogs., Ex. 17, No. 4; Gregg Am. Ans. to Interrogs., Ex. 16, No. 4.)

The first night of the protests on December 3 was different from the rest. The demonstrations on December 3 started later than those on subsequent nights. (Little

[6] Ms. Torres, Ms. Budnick, and Dr. Sarwate did not attend on the first night. Torres Am. Interrog., Ex. 30, No. 4; Budnick Ans. to Interrogs., Ex. 18, No. 4; Sarwate Ans. to Interrogs., Ex. 19, No. 4.)

Tr., Ex. 21, 24:12–15.) Some individuals, like Mr. Little, arrived around 10 p.m. (*id.* at 24:20), and did not leave the area until after midnight (Gregg Tr., Ex. 20, 27:23–25). Again, in contrast to subsequent nights, some protesters may have also briefly pointed their flashlights in the direction of Plaintiff DeGise's house for a short period of time in an effort to identify his location. (Gregg Am. Ans. to Interrogs., Ex. 16, No. 24 ; Gregg Tr., Ex. 20, 49:2–14.)

Plaintiff DeGise called the police "[w]ithin five, ten minutes of when [the noise] started" on the first night of the protests (DeGise Tr., Ex. 14, 51:12–13), and his chief of staff also contacted the Hudson County Sheriff's Office (*id.* at 52:17–53:3). Upon their arrival, officers informed protesters of guidelines with respect to the level of permissible noise in the neighborhood. (Gregg Tr., Ex. 20, 29:3–6, 29:12–14, 31:7–8.) The protesters immediately complied (*id.* at 31:7–8), and no tickets or citations were issued.

3. The Events of December 4–7, 2020

The protests on the evenings of December 4–7 were different from the protests on the first night. Unlike the protests on December 3, the first portion of the protests began around or a little after 9 p.m. and lasted less than an hour, ending by 10 p.m. to comply with the noise ordinance. (DeGise Tr., Ex. 14, 60:11–15; Gregg Tr., Ex. 20, 47:11–12; Krywinski Tr., Ex. 22, 79:10–14, 80:5–7; DeGennaro Tr., Ex. 15,

116:14–15.) Protesters intentionally avoided shining flashlights into Plaintiff DeGise's home. (Gregg Am. Ans. to Interrogs., Ex. 16, No. 24.)

The protesters returned to the vicinity of Plaintiff DeGise's residence each evening from December 4 through December 7. On each of those evenings, they gathered at the nearby Washington Park before walking to the County Executive's home. (*See*, *e.g.*, Torres Tr., Ex. 5, at 17:19, 27:16–19.) Once they arrived on Plaintiff DeGise's block, protesters would collectively chant and give testimony one at a time, sometimes using a handheld amplifying device or karaoke equipment that regulated decibel level. (*Id.* at 18:13–16, 21:15–22:2; Little Tr., Ex. 21, 32:15–16.) Protesters also intermittently used acoustic instruments such as a tambourine, jingle bells, a bucket drum, and a wood block, to keep chanters in rhythm. (Torres Tr., Ex. 5, 22:3–7, 22:21–24, 24:7–8.)

People in the group distributed fliers to people driving through and walking by, and to neighbors on the block. (*Id.* at 18:7–10.) The flyers included statements in English and Spanish, the public office phone number for Mr. DeGise, a website for people to learn more about ways to get involved, and quotes from Senators Menendez and Booker denouncing the ICE contracts. (Ex. 1 to Pls.' Am. Compl.)

Some protesters, including Ms. Gregg, Ms. Torres, and Ms. Budnick, wrote messages in washable chalk on the public sidewalk. These messages included phrases such as "DINO" (an acronym for "Democrat in Name Only" (*see*, *e.g.*,

Budnick Tr., Ex. 23, 29:13)) and "Free them all" (Photo, Ex. 24, at DEFGREGG0050). None of the messages in the flyers or on the sidewalk contained threats. (Romano Tr., Ex. 10, 70:8-25; Flannelly Tr., Ex. 25, 130:23–131:1.) One message was written in a permanent material on the sidewalk (DeGise Tr., Ex. 14, 76:2–6), and Plaintiff DeGise found chalk writing on his porch (*id.* at 75:7–10), but Defendants were not responsible for either of those messages (Budnick Tr., Ex. 23, 29:9–10; Gregg Am. Ans. to Interrogs., Ex. 16, No. 25; Little Ans. to Interrogs., Ex. 17, No. 25; Sarwate Ans. to Interrogs., Ex. 19, No. 25; Torres Ans. to Interrogs., Ex. 26, No. 25). There is no evidence to the contrary, nor any evidence as even to when they were written.

After the police instructed those gathered on the first night of demonstrations about Jersey City noise limits, participants took care to stop all chanting and other noise by 10 p.m. sharp, recognizing that they "had to keep it very quiet." (Gregg Tr., Ex. 20, 47:2–6; *see also* Flannelly Tr., Ex. 25, 45:1–3.) The protesters then held a silent vigil that lasted from a few minutes to around thirty minutes. (Gregg Tr., Ex. 20, 47:21–48:2.) On December 6, for instance, a Sheriff's officer reported that after 10 p.m. the group remained together on the street for the vigil for about 15 minutes, during which time people were either completely silent or "quietly speaking amongst themselves." (Flannelly Tr., Ex. 25, 45:7–46:16.)

Despite some negative reactions,[7] Ms. Gregg testified that the group "had a lot of support from the neighborhood." (Gregg Tr., Ex. 20, 33:22–23.) Some neighbors joined the protests because they also opposed the ICE contract (Torres Tr., Ex. 5, 18:16–18), with a few even "taking the microphone and telling their stories of being immigrants" (Gregg Tr., Ex. 20, 34:3–7). Some neighbors brought drinks and cookies to the protesters. (*Id.* at 35:8–11; Torres Tweet, Ex. 7, at DEFTORRES0138.)

Police presence was constant on each night of the protests. In addition to the JCPD and HCSO presence on December 3, Plaintiff DeGise called officers to the house on December 4 (DeGise Tr., Ex. 14, 55:10–18), and Sheriff's officers were subsequently detailed to the residence at Plaintiff DeGise's request (*id.* at 57:5–10).

On December 7, the Hudson Regional Health Commission ("HRHC") received a noise complaint from Plaintiff DeGise about "approximately 10 people" protesting outside his house. (HRHC Investigation, Ex. 27, at Pls0029.) The noise emanating from the protests outside of the DeGise residence was "not covered" by the state code – the only source of authority under which HRHC can enforce noise limits and issue consequences for violations (Rivelli Tr., Ex. 33, 64:14–15, 65:18–20) – because the complaint did not allege noise from "a commercial or industrial

[7] For example, two of Plaintiff DeGise's neighbors submitted brief and nearly identical certifications in support of Plaintiffs' application for the TRO.

source, and not a stationary source." (Rivelli Messages, Ex. 28.) Nevertheless, HRHC was deployed to 402 New York Avenue on December 7 to conduct noise measurements. (HRHC Investigation, Ex. 27, at Pls0029.)

C. December 8 Enforcement of the TRO

Earlier in the day on December 8, after the issuance of the TRO, Plaintiff DeGise "signed off" on the decision to arrest protesters outside of his home alongside Hudson County Sheriff Frank Schillari and possibly Mr. DeGise's chief of staff. (DeGise Tr., Ex. 14, 102:7–17.) Mr. DeGise cannot recall any other situation in which he has been consulted before law enforcement has effectuated an arrest. (*Id.* at 102:22–25.)

That evening, HCSO Sergeant Kevin Flannelly, accompanied by two officers, was detailed to the protests with instructions to serve the TRO on protesters. (Flannelly Tr., Ex. 25, 60:12–16.) At least three HCSO prisoner transport vans were on site before the protesters arrived, presumably in anticipation of multiple arrests. (Krywinski Tr., Ex. 22, 132:12–21.) Sergeant Flannelly was given a brown cardboard box containing seventeen copies of the TRO by Steven Krywinski from the Hudson County Law Department. (Flannelly Tr., Ex. 25, 83:1–5.) The HCSO officers arrived at the scene around 6 p.m. and waited in their vehicles until the protesters began to arrive, at which point they got out of their cars and stood on the

sidewalk at the property line of Plaintiff DeGise's home. (Flannelly Tr., Ex. 25, 82:7–11.)

A group of protesters arrived on the block and gathered between one and two houses down from Plaintiff DeGise's property line (Krywinski Tr., Ex. 22, 121:24–25; Ephros Video, Ex. 9 at 00:00–00:15), a short distance from where the HCSO officers were waiting. Sergeant Flannelly informed the group that a TRO had been issued and offered to hand out copies to "everyone involved." (Flannelly Tr., Ex. 25, 83:14–15; Ephros Video, Ex. 9, at 00:00–00:03.) Sergeant Flannelly placed the cardboard box on the ground and told individuals they could take a copy if they wanted. (Flannelly Tr., Ex. 25, 82:16–19; Ephros Video, Ex. 9, at 00:30–00:48.) Individuals appeared reluctant to take copies after the Sergeant referred to having COVID-19 and ostensibly joked that the papers were "infested." (Ephros Video, Ex. 9, at 01:34–02:04.) The protesters and the Sergeant indicated that he had not consistently worn a mask on the previous night he was present on the block. (Ephros Video, Ex. 9, at 00:29–00:36; Flannelly Tr., Ex. 25, at 97:24–98:3.)

When most protesters did not to take copies of the TRO, the sergeant read aloud some – though not all – portions of the TRO and incorrectly summarized others. (Ephros Video, Ex. 9, at 2:13–2:50.) His summary of the applicable provisions included a statement that the protesters must be "200 feet away from the residence which they allocated the area down on Congress Street." (*Id.*) Sergeant

Flannelly is not certain who, if anyone, received a copy of the TRO that evening. (Flannelly Tr., Ex. 25, 110:16–23.)

Likely in preparation for arrests, Sergeant Flannelly then requested that an HCSO lieutenant and additional HCSO officers be dispatched to the scene. (Flannelly Tr., Ex. 25, 84:17–18, 85:1–5, 85:14–23.) Meanwhile, rather than chanting or otherwise protesting, the ICE contract opponents gathered on the sidewalk and spoke or sang quietly amongst themselves. (Ephros Video, Ex. 9, at 10:58–16:12.) Some held a quiet vigil. (*Id.*) Eventually, the group turned around and walked away peacefully. (*See* Krywinski Tr., Ex. 22, 119:13–120:11.)

As the group continued to walk away from the house, three individuals were arrested.[8] (Krywinski Video 36, Ex. 8; Krywinski Video 38, Ex. 36.)[9] Video documentation shows that at least one arrest was made twelve houses north of the DeGise residence, at 426 New York Avenue. (*See* Krywinski Video 36, Ex. 8; Krywinski Tr., Ex. 22, 147:10–13.)[10] Given the standard city lot width of 25 feet,

[8] Defendant Gregg was also arrested that night. With respect to her arrest, Ms. Gregg has asserted her rights against self-incrimination, pursuant to the Fifth Amendment and analogue state statutes and rules.

[9] Defendants note that the video cited starts with a few seconds of screaming nearby which is unrelated to the events at issue in this litigation.

[10] While watching one of the videos he filmed, Mr. Krywinski testified that a person in a plaid hoodie and another person appeared to be in custody in the vicinity of a house with an illuminated wreath on the door (Krywinski Tr., Ex. 22, 142:5–22, 144:15—145:18), and heard someone ask, "What am I being arrested for?" (*id.* at 141:23–25).

this arrest occurred approximately 300 feet from the DeGise residence.[11] Four individuals were charged with violations of the TRO and are currently in criminal proceedings.

D. Hardships Arising Out of the Temporary Restraining Order

The protesters have reported threats, hostilities, and embarrassment as a result of the TRO. The five named Defendants have all experienced restrictions on their rights to speech and assembly, as well as a broader chilling effect on these rights, since they have not participated in protests and demonstrations that they would have attended absent the TRO. (Sarwate Amended Interrog., Ex. 29, No. 16; Budnick Ans. to Interrogs., Ex. 18, No. 16; Budnick Tr., Ex. 23, 58:4–7; Torres Ans. to Interrogs., Ex. 26, No. 16; Gregg Am. Ans. to Interrogs., Ex. 16, No. 16; Little Ans. to Interrogs., Ex. 17, No. 16.) Some defendants also reported particularized, personal hardships and emotional distress arising out of the TRO. (*See* Torres Ans. to Interrogs., Ex. 26, No. 16; Torres Tr., Ex. 5, at 103:12–15 (referencing emotional distress and trauma); Sarwate Tr., Ex. 44, 30:2–4, 32:14–21, 64:20–65:11; Sarwate Amended Interrog., Ex. 29, No. 16; Screenshots from Twitter, Ex. 43, at DEFSARWATE0044–45 (referencing a former mayor targeting him on Twitter);

[11] Defendants arrive at this estimate through use of the commonly available mapping software Google Maps. *See* N.J.R.E. 201(b) (Court may take judicial notice of facts not reasonably in dispute). The map also shows that the twelfth house away from the DeGise residence is 426 New York Avenue.

Gregg Tr., Ex. 20, 128:21–129:25; Gregg Am. Ans. to Interrogs., Ex. 16, No. 16 (referencing embarrassment and fear).)

STANDARDS OF REVIEW

Defendants ask this Court to dissolve the TRO, deny Plaintiffs' application for a preliminary injunction, and dismiss the complaint in its entirety. For the former two inquiries, a court should not issue preliminary injunctive relief unless: (1) it is "necessary to prevent irreparable harm," (2) "the legal right underlying plaintiff's claim is unsettled," (3) the plaintiff has made "a preliminary showing of a reasonable probability of ultimate success on the merits," and (4) "[o]n balance, the equities favor the grant of temporary relief to maintain the *status quo* pending the outcome of a final hearing." *Crowe v. De Gioia*, 90 N.J. 126, 132–34 (1982) (citations omitted).

In evaluating Defendants' motion to dismiss under *R.* 4:6-2(e), a court must dismiss a pleading "if it states no basis for relief and discovery would not provide one." *Sashihara v. Nobel Learning Communities, Inc.*, 461 N.J. Super. 195, 201 (App. Div. 2019) (internal quotation marks and citations omitted).[12] "The essential

[12] Defendants acknowledge the unusual procedural posture of this case in which, pursuant to their request, the Court ordered Defendants to contemporaneously file a motion to dismiss with their substantive response to the Court's Order to Show Cause, and as such the Court may treat the motion to dismiss as one for summary judgment pursuant to *R.* 4:6-2.

test is whether a cause of action is suggested by the facts." *Id.* at 200 (internal quotation marks and citation omitted).

ARGUMENT

"New Jersey has been at the historical center of debate over speech and assembly." *Green Party of N.J. v. Hartz Mountain Indus., Inc.*, 164 N.J. 127, 138 (2000). Individuals' rights to free speech and assembly are protected under the First Amendment to the United States Constitution, *id.* at 139, and under Article I, paragraphs 6 and 18 of the New Jersey Constitution, *id.* at 142.

The New Jersey Constitution offers even broader protections for speech compared to the U.S. Constitution; its corollary provisions regarding speech are "more sweeping in scope than the language of the First Amendment." *State v. Schmid*, 84 N.J. 535, 557 (1980), *appeal dismissed sub nom.*, *Princeton Univ. v. Schmid*, 455 U.S. 100, 101 (1982); *accord N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 138 N.J. 326, 353 (1994) (holding that state constitutional speech rights are "affirmative" and "broader than the [federal] right against governmental abridgement of speech"). Unlike the U.S. Constitution, the New Jersey Constitution contains an affirmative right to free speech, and one that is "broader than practically all others in the nation." *Green Party of N.J.*, 164 N.J. at 145; *Dublirer v. 2000 Linwood Ave. Owners, Inc.*, 220 N.J. 71, 78–79 (2014) ("The New Jersey Constitution guarantees a broad affirmative right to free speech . . . That

guarantee is one of the broadest in the nation, and it affords greater protection than the First Amendment." (internal citations omitted)); *compare N.J. Const.* art. I, ¶ 6 ("Every person may freely speak, write and publish his sentiments on all subjects") *with U.S. Const.* amend. I ("Congress shall make no law . . . abridging the freedom of speech").

Both the U.S. and New Jersey Constitutions protect the speech and activities of Defendants in this matter.

I. The injunctive relief sought is based on the viewpoints of the protesters, is not content-neutral, and is a prior restraint and presumptively unconstitutional.

"Above all else, the First Amendment[13] means that government generally has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Barr v. Am. Assoc. of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346 (internal quotation marks and citation omitted). The government is prohibited from discriminating on the basis of the content of expression, *see id.*, and yet, this complaint was brought, and the TRO issued, based on the viewpoints of protesters.

[13] "Because our State Constitution's free speech clause is generally interpreted as co-extensive with the First Amendment, federal constitutional principles guide" the analysis. *E&J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin*, 226 N.J. 549, 568 (2016) (citation omitted). There are however, a "few exceptions where the State Constitution provides greater protection[s]." *See id.* For the reasons contained herein, Defendants seek additional protections under the state constitution, should this Court find federal remedies are insufficient to preserve Defendants' rights. *Horizon Health Ctr. v. Felicissimo*, 135 N.J. 126, 154 (1994).

The relief sought, and temporarily granted, therefore is not content-neutral, and is presumptively unconstitutional.

When curtailing otherwise protected speech under the First Amendment, a court's initial inquiry must assess the appropriate level of scrutiny, which depends in part on whether the injunction is based on the content of the expression or is content neutral. *E&J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin*, 226 N.J. 549, 570 (2016) ("The threshold inquiry is whether the regulation of expressive activity is content neutral."); *see also Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 166 (2015) (explaining that the first inquiry by the Court must be "whether a law is content neutral on its face *before* turning to the law's justification or purpose" (emphasis in original) (collecting cases)). If the "injunction was issued because of the content of the expression," it would be a "prior restraint" on speech and presumptively unconstitutional. *See Murray v. Lawson*, 138 N.J. 206, 221, 224 (1994); *cf. Barr*, 140 S. Ct. at 2346 (finding that while the government is constitutionally permitted to impose reasonable restrictions on speech, it is prohibited from discriminating based on the content of expression, or instituting a rule that "singles out specific subject matter for differential treatment" (internal citations omitted)).

"The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech *because of* disagreement with the

message it conveys." *E&J Equities, LLC*, 226 N.J. at 571 (emphasis added) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). When an injunction is content- or viewpoint-based it "demand[s] the level of heightened scrutiny," described in *Perry Educational Association*. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763–64 (1994) (referring to *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). "To enforce a content-based exclusion the State must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* at 761 (citing *Perry Educ. Ass'n*, 460 U.S. at 45).

A. The TRO and proposed injunction are not content neutral.

The relief Plaintiffs seek is not content neutral.[14] As an initial matter, the TRO and proposed injunction are so vague and indefinite that they result in providing unbridled discretion to the officials enforcing them that amounts to *per se* viewpoint discrimination. *See Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763–64

[14] By its own text, the TRO is not content neutral because (1) it covers areas around the homes of elected officials who supported the decision to continue the ICE contract but who have had no protests at their homes, illuminating that it was intended to target people who demonstrated in opposition to the ICE contract; (2) TRO provisions (D)–(G) show an intent to prevent those named in the TRO to protest anywhere, as opposed to an interest tethered to Plaintiff DeGise's residential privacy; and (3) requiring Defendants to notify the HCSO and local police in advance of any protest suggests a particular intent to target and monitor the activities of Defendants, presumably for expressing their views on the contract, because notice is not required for other similar activities in Jersey City.

(1988). As discussed *infra* Part III.C.3, the record is clear that the terms of the TRO are so vague and confusing that someone wearing a scarf with a "confrontational message" near Plaintiffs' residences could be subject to its enforcement. (DeGise Tr., Ex. 14, 137:21–24, 138:17–22, 139:2–5.) The U.S. Supreme Court has uniformly found such policies unconstitutional because "without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." *Lakewood*, 486 U.S. at 763–64; *see also Forsyth Cnty v. Nationalist Movement*, 505 U.S. 123, 130–31, 133 (1992) (striking down an ordinance for providing "unbridled discretion" because its standards were not narrowly drawn, reasonable, and definite).

Even if this Court does not consider the relief sought to amount to *per se* viewpoint discrimination, the record demonstrates that the injunction amounts to viewpoint discrimination in fact. "When courts assess content neutrality, the government's purpose is the controlling consideration." *E&J Equities*, *LLC*, 226 N.J. at 571 (internal quotation marks and alteration omitted). As the First Circuit has helpfully summarized, the Supreme Court has found that

> [t]here are various situations which will lead a court to conclude that, despite the seemingly neutral justifications offered by the government, nonetheless the decision to exclude speech is a form of impermissible discrimination. Three are relevant here. First, statements by government officials on the reasons for an action can indicate an improper motive. Second, where the government states that it rejects

> something because of a certain characteristic, but other things possessing the same characteristic are accepted, this sort of underinclusiveness raises a suspicion that the stated neutral ground for action is meant to shield an impermissible motive. . . . Third, suspicion arises where the viewpoint-neutral ground is not actually served very well by the specific governmental action at issue; where, in other words, the fit between means and ends is loose or nonexistent.

Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 87 (1st Cir. 2004) (citing, *inter alia*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 812 (1985); *Purkett v. Elem*, 514 U.S. 765, 768 (1995); *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 259 (1981)).

As further described herein, all three scenarios are present in this matter. First, Plaintiff DeGise tolerates certain forms of protest and not others. Second, the statements by Plaintiff DeGise indicate an improper motive rooted in animus. And finally, the proposed relief is over-inclusive. For instance, the Order Plaintiffs proposed to this Court covers areas around the homes of other officials who are connected to the decision to renew the contract, but who have had no actual or planned protests around their homes, signifying that the Plaintiffs intended specifically to target people who opposed the ICE contract. The extraordinarily broad TRO provisions at (D) through (G) display an intent to prevent Defendants—and unidentified protesters—from protesting anywhere, as opposed to only an intent

to protect the County Executive's residential privacy. Accordingly, the injunctive relief is not facially content neutral.

B. Plaintiff DeGise treated Defendants differently than other picketers based on the content of their message and Plaintiffs' demonstrated animus towards protesters motivated them to seek court intervention.

Even if the injunctive relief requested was deemed content neutral on its face, Plaintiffs' statements and actions make clear they did not intend for the proposed restraints to apply equally regardless of viewpoint. The record demonstrates that Plaintiff DeGise's reaction to Defendants in this matter was not because he was generally concerned about protests or picketing directed at his home, but because he opposed their message. (DeGise Tr., Ex. 14, 92:21–95:3, 184:12–185:8.) When Plaintiff DeGise was President of Jersey City Council, firefighters protested about a contract dispute outside of his home by "holding signs and walking back and forth across [his] sidewalk." (*Id.* at 92:23–93:1.) Plaintiff DeGise did not express concerns about his residential privacy nor otherwise object to that protest; in fact, he and his family embraced it. His wife made the protesters a "big thing of lemonade," and Plaintiff DeGise "sent [his] two daughters out with the lemonade to the firemen who accepted it." (*Id.* at 93:1–4.) He then went outside to discuss the dispute with the protesters. (*Id.* at 93:9–18.) Plaintiff DeGise explained that he "pride[s] [him]self in getting along with people and [he] get[s] along fine with people with the

firefighters." (*Id.* at 94:5–7; *see also id.* at 185:2–3 ("They are friends of mine doing their thing. And I had absolutely no objection.").)[15]

In stark contrast with his response to firefighters protesting outside of his home, the County Executive explained that he's

> not sitting down and talking to [the protesters in this matter], I'm not – this isn't negotiable. This is my house, this is my block, this is my neighborhood and for people coming from Rockaway and Montclair and all the different towns they come to march on my block to tell me what I should do in the city that they got to drive 50 miles to get to, that ain't going to work.

(DeGise Tr., Ex. 14, 160:7–14.) Plaintiff DeGise directly referenced the protesters' political positions in explaining how he decided how to respond to the protests. The County Executive continued to explain that

> I'm a good negotiator. I talk, I make deals for a living. And that would have been the way to try to go but if, you know, you come out and you're throwing punches, you know, I'm throwing them back.
>
> So I have no interest in talking to them. They should find the leader of their group that could represent them and can bargain for them. They choose not to do it. I mean, there are Black Lives Matter people, there are blood money people, there are – and it's a conglomeration of different protest[] groups there and I'm not talking to them.

[15] In the March 3 discovery ruling, the Court relied on representations by Plaintiffs' counsel, prior to depositions, that his clients were not looking to stop any of the protests (Mar. 3 Conf. Tr., Ex. 32, 49:11–15), and that there was "no history . . . of anybody demonstrating in front of the Commissioners' or the County Executive's home on any other issues" (*id.* at 20:11–14). As discussed herein, the record now contains undisputed testimony from Plaintiff DeGise that he experienced a prior protest at his home, and that he did distinguish between groups of protesters based on their viewpoints.

(*Id.* at 161:4–14.) The County Executive thus conceded that he has discriminated against those protesters whom he views as supporting movements that he associates with left-wing political views.[16] Moreover, Plaintiff DeGise only called for law enforcement on the first night of the protests *after* he realized that the people gathered outside of his home were anti-ICE protesters. (*Id.* at 47:1–9.)[17]

Government action is content-based under the First Amendment when it is premised on actions rooted in animus towards a particular group. *See*, *e.g.*, *Reed*, 576 U.S. at 165; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993); *Simon & Schuster, Inc. v. Members of N.Y.S. Crime Victims Bd.*, 502 U.S. 105, 117 (1991). Here, Plaintiff DeGise's testimony demonstrates that the relief he

[16] Plaintiff DeGise has expressed irritation at people opposing the ICE contract because he views them as outsiders, (DeGise Tr., Ex. 14, 170:21–25 ("But when people [come here] from out of town, when people from other, you know, points of interest come here and tell us everything that we're doing wrong, [it] kind of ticks us off a little bit.")), even though the public record is replete with examples of Hudson County residents, politicians, and county commissioners who have opposed the contract.

[17] Although he later equivocated, the County Executive also compared the phrase "blood money contract" used by Defendants in this matter with "symbols like swastikas and stuff like that[.]" (DeGise Tr., Ex. 14, 137:21–24, 138:17–25.) Plaintiff DeGise further explained, "you have a First Amendment right to, you know, wear a swastika or any of the other hate things there. Yeah, you do, you have that right but that don't make it less offensive there. And if I was targeted, you know, somebody is going to go there with a T-shirt and say something that would be contrary and confrontational to me with it, no, he shouldn't be." (*Id.* at 138:22—139:5.) There are few sentiments more evident of animus than comparing something to a swastika.

seeks is content-based by revealing his hostility to Defendants because of who they are and what they believe, not their actions.

In addition to the differential treatment described above, Plaintiffs have displayed clear and directed animus toward the speech and viewpoints of the people gathered to protest, hold vigils, and leaflet in the vicinity of Plaintiff DeGise's home. Plaintiff DeGise's animus was evident from the opinions he shared publicly and his sworn testimony.[18] *Cf. Ridley*, 390 F.3d at 86 (collecting Supreme Court cases for the proposition that the "[s]uspicion that viewpoint discrimination is afoot is at a zenith when the speech restricted is speech critical of the government, because there is a strong risk that the government will act to censor ideas that oppose its own").

Plaintiff DeGise showed his animus when maligning Defendants and other protesters in public statements that emphasized their political viewpoint. In an opinion piece published on December 9, 2020, Plaintiff DeGise contrasted the "reasonable, moderate leadership" by Democrats in the 2020 presidential election with the "zealots" and "Democratic Socialists who stand for an agenda that is frankly offensive to many of us" – groups with which he aligned the protesters "in my

[18] Plaintiff DeGise's animus is also evident in the differential treatment between those protesting his policy position on the ICE contract and the firefighters: he characterized Defendants as "outsiders" who are telling him and other people in Hudson County what to do as opposed to firefighters who he perceives as part of his community; he used markedly different language to describe the two groups of protesters; and he was only willing to speak with and listen to the viewpoints he deemed acceptable.

neighborhood in the Jersey City Heights." (DeGise Op-ed, Exhibit 31, at 1.) He described the protesters as "a group of left-wing extremists," noting that "Joe Biden's victory wasn't just a triumph over Trumpism," but

> was a win for moderate Democrats who don't want to see our party taken over by radicals. Here in Hudson County, our county elected officials won overwhelmingly against left-wing opposition candidates in the primary election, some of whom are leading these current protests. They claim that they speak for the residents, but in fact, they only speak for themselves—isolated, radical extremists who don't understand Hudson County and never will.

(*Id.* at 2–3.) Plaintiff DeGise expanded on these sentiments during his deposition. In response to a question about what he meant when calling Defendants and other anti-ICE protesters "a group of left-wing extremists," he explained:

> I called them – because they are, you know, for most of the country and for our party, the Democratic Party, you know, I remember one time I said something along the lines that I wanted to see what happened when we had a new president, that Joe Biden, you know, would be a game changer and I'd like to sit down. And I was criticized by them saying that nobody threw more people out of the country than Barack Obama and Joe Biden. That they didn't like Biden, they didn't like that at all. You know, that is a left wing extremist.

(DeGise Tr., Ex. 14, 167:9–21.)

Moreover, the County Executive is not the only plaintiff to exhibit animosity toward the viewpoints of people opposing the ICE contract. Plaintiff Vainieri, who walked out of a commissioners' meeting during public testimony against the ICE contract, stated that he and his colleagues "should 'leave every time,'" as "[n]obody wants to listen to the same garbage anymore." (NJ.com Article, Exhibit 2, at

DEFTORRES0223; *see also id.* ("Vainieri said he has 'no respect for these people at all anymore.'"); *id.* at DEFTORRES0224 ("'They have taken it to another level of a lowlife dirtbag type of people,' Vainieri said. 'That I don't respect or tolerate.'").) Like Plaintiff DeGise, Plaintiff Vainieri has publicly referred to advocates opposed to the ICE contract, including the protesters, as "extremists" with "radical positions." (Hudson TV Article, Ex. 13, at DEFTORRES0218.)[19]

The type of speech the County Executive and other Plaintiffs publicly criticized and seek to restrict—political speech—"lies 'at the core' of our constitutional free speech protections." *Mazdabrook Commons Homeowners' Ass'n v. Khan*, 210 N.J. 482, 499 (2012) (citation omitted). "There is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of . . . all matters relating to political processes." *Id.* (internal quotation marks, citation, and

[19] As government officials, Plaintiffs have been able to use vast government resources to act on their animus. This triggers strict scrutiny and fundamentally differentiates their case from *Murray v. Lawson*. Plaintiffs brought this case to create limitations that they did not believe they could achieve by legislative or other means. The testimony of both Plaintiff DeGise and Captain DeGennaro reflect that the people outside of his home could not be arrested absent the County Executive's decision to bring litigation. (*See* DeGise Tr., Exhibit 14, 103:14–23; DeGennaro Tr., Ex. 15, 88:13–18.) Additionally, County resources were used to investigate the matter (*id.* at 48:24–49:7), including tasking county employees with litigation-related assignments (Krywinski Tr., Ex. 22, 46:13–20; DeGennaro Tr., Ex. 15, 94:5–97:6, 15:18–17:8); Plaintiff DeGise also used his position to deploy a regional agency responsible for commercial and industrial noise pollution to measure the noise outside of his home (DeGise Tr., Ex. 14, 71:15–25).

alteration omitted) (alterations added). Strict scrutiny is the standard used for content-based restrictions on speech because content-based actions "have the constant potential to be a repressive force in the lives and thoughts of a free people." *Free Speech Coal., Inc. v. Att'y Gen. U.S.*, 974 F.3d 408, 420 (3d Cir. 2020) (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004)). Such actions are "presumptively unconstitutional" and may only be justified if they serve a compelling governmental interest, are narrowly tailored to achieve that interest, and are the least restrictive means of advancing that interest. *Id.* (internal quotation marks and citations omitted). For all of these reasons, strict scrutiny is the appropriate level of review here.

Strict scrutiny is also required here because this matter concerns political speech in a forum quintessentially reserved for free expression.

> A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or park is a quintessential forum for the exercise of First Amendment rights. Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.

Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).

The County Executive's decision to seek injunctive relief only for protesters who hold a particular political viewpoint, and to take no action with respect to other protests, is also inconsistent with the First Amendment and Equal Protection clauses. Under both those clauses

> 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. And it may not select which issues are worth discussing or debating in public [facilities]. There is an equality of status in the field of ideas, and government must afford all points of view an equal opportunity to be heard.

Police Dep't of City of Chi. v. Mosley, 408 U.S. 92, 96 (1972) (internal quotation marks and footnote omitted).

For these reasons, the TRO and proposed injunction are *per se* discrimination and borne of animus, and are not content-neutral. They should be reviewed using the strictest of scrutiny, and for all the reasons described *infra* in Part III, they must fail.

II. Even if the TRO or injunction sought is found to be content neutral, it is not narrowly tailored because it burdens far more speech than necessary to serve the government's interest.

Even if this Court finds the TRO to be content neutral and that alternative means of communications exist, Defendants' right to engage in speech directed at elected officials outweighs Plaintiffs' interest in residential privacy, and the proposed relief likewise is not sufficiently tailored under the applicable standard. Because generally applicable ordinances "represent a legislative choice regarding the promotion of particular societal interests" and injunctions "carry greater risks of censorship and discriminatory application," an injunction—even a content neutral one—is held to "a somewhat more stringent application of general First Amendment principles[.]" *Madsen*, 512 U.S. at 764–65. In *Madsen*, the U.S. Supreme Court determined that the standard time, place, and manner analysis was "not sufficiently

rigorous" for evaluating a content neutral injunction: "[w]e must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.* at 765–66 (collecting United States Supreme Court cases). Similarly, the New Jersey Supreme Court in *Murray v. Lawson* did not use the "time, place, and manner" formulation as the relevant inquiry but considered whether the "restrictions burden[ed] [] more speech than necessary to protect plaintiffs' residential-privacy interest." *Murray*, 138 N.J. at 234. Injunctive relief "must be crafted on a fact-specific basis." *Id.* at 232; *see also Horizon Health Ctr.*, 135 N.J. at 148 ("Injunctions necessarily require an individualized balancing of rights."). The facts in this case, including Defendants' limited protests and the lack of arrests or citations for violations of any local ordinances, require this Court to find that there is no genuine dispute that the burden on Defendants' speech is far greater than required to protect Plaintiffs' residential privacy.

First, with respect to the governmental interest in residential privacy, Plaintiffs' interest is at its nadir here. The context of the protests – on a busy city street – is a far cry from the quiet, suburban neighborhood described in *Murray*. Defendants, after being advised of the local noise ordinance, made efforts to comply with it, and otherwise limited their demonstrations in manner, scope, and duration each day.

Second, the TRO's restrictions on Defendants' speech far exceed any government interest that may exist. As a threshold matter, Plaintiffs are elected officials, and New Jersey's broad, affirmative interpretations of the public's rights of speech and assembly in the state constitution, *N.J. Const.* art. I, ¶¶ 6, 18, should afford greater deference to individuals' rights to express themselves to their elected representatives. Regardless, the TRO is not properly tailored to fit the government's limited interest: it is excessive on its face, it burdens speech far beyond what was directed at Plaintiff DeGise, and it is vague and overbroad, giving police undue discretion regarding enforcement. Adequate alternative channels of communication with Plaintiff DeGise do not exist. For these reasons and the reasons that follow, the TRO violates First Amendment principles.

A. Plaintiffs' residential privacy interests do not justify an injunction in this case.

While Defendants do not dispute that the government has an interest in safeguarding residential privacy, *see*, *e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 484 (1988); *Carey v. Brown*, 447 U.S. 455, 470–71 (1980), undisputed facts on the record establish that Defendants' conduct did not meaningfully intrude on that privacy.[20] In *Frisby*, the U.S. Supreme Court acknowledged the government's

[20] If the Court finds that that the TRO is content-based, however, the government's interest in residential privacy is "not such a transcendent objective" to outweigh speech in a public forum, making this analysis moot. *See Boffard v. Barnes*, 264 N.J. Super. 11, 16 (App. Div. 1993) (citing *Carey*, 447 U.S. at 465).

interest in residential privacy in the context of a town that had enacted an ordinance placing limits on residential picketing, and construed the ordinance narrowly to find it facially constitutional. 487 U.S. at 484. This Court, in contrast, is not evaluating alleged violations of applicable ordinances. Jersey City has made legislative determinations about how to protect its residents' residential privacy: Plaintiff DeGise is not entitled to extra protections in the form of this injunction.

As Plaintiff DeGise himself acknowledges, there are sacrifices that come with living in a bustling neighborhood in Jersey City. Plaintiff DeGise describes his neighborhood as a city street frequented by cars and passers-by who hang out on stoops in the summertime and idle outside of homes with competition-winning Christmas lights in the winter. There are several commercial businesses in the immediate vicinity. He refers to living on his street as "life in the big city." (DeGise Tr., Ex. 14, 70:9–21.) This neighborhood is very different from Westfield, New Jersey, where the protests at issue in *Murray* took place. In *Murray*, the plaintiff's house was set back about twenty-five feet from the sidewalk of a "completely residential" street. 138 N.J. at 231, 232.

It is in this bustling context that Defendants and others protested the ICE contract. On the first night of the protests, police officers arrived and explained the guidelines for lawful noise levels to Defendants, who immediately complied with the officers' directions. (Gregg Tr., Ex. 20, 29:3–6, 31:7–8.) Defendants concede

that protesters may have shone flashlights or lanterns into the DeGise residence on the first night of the protests (*see*, *e.g.*, Gregg Am. Ans. to Interrogs., Ex. 16, No. 24), but Defendants took pains to educate participants and control the actions of the group on subsequent nights (*see id.*), and any lights shining into the DeGise residence were fleeting and accidental (Sarwate Tr., Ex. 44, 26:14–27:9).

After the first night of protests, Defendants regularly arrived on New York Avenue between 9 and 10 p.m., and stopped their chanting to hold a silent vigil starting at 10 p.m.; as a result, their chanting was never longer than one hour in length. (Gregg Tr., Ex. 20, 47:8–12; Torres Tr., Ex. 5, 21:4–9.) To comply with the Jersey City noise ordinance, the protesters took care to promptly end their chants and other noise-making at 10 p.m., when the maximum permissible decibel level decreased, and even provided one- and three-minute warnings before the deadline to cease making noise. (Gregg Tr., Ex. 20, 47:6-8, 83:15-25; Signal Chat Screenshots, Ex. 34, DEFTORRES0012; Ex. 35, DEFTORRES0017.) Defendants researched the maximum decibel levels permissible before 10 p.m., and adjusted the volume levels on voice amplification devices accordingly. (*See*, *e.g.*, Torres Ans. to Interrogs., Ex. 30, No. 6; Torres Tr., Ex. 5, 37:16–38:25.) At no point did Plaintiff DeGise see the protesters block the sidewalk or prevent people or cars from passing. (DeGise Tr., Ex. 14, 85:6–9.)

Defendants' actions during the protests were noticeably less intrusive than the activity at issue in *Murray*, and even less so after December 3. Unlike the picketers in *Murray*, Defendants did not ring the doorbell, nor did they speak with DeGise or his family members. *Compare Murray*, 138 N.J. at 212 (defendant told plaintiff's 14-year-old son to tell his father to stop doing abortions), *with* (DeGise Tr., Ex. 14, 78:18–19, 80:3–5). There is no evidence that protesters trespassed on DeGise's property, except accidentally onto the driveway, to let someone pass by.[21] *Compare Murray*, 138 N.J. at 212, *with* (DeGise Tr., Ex. 14, 78:14–17; DeGennaro Tr., Ex. 15, 63:4–6; Flannelly Tr., Ex. 25, 40:24–41:24). There was never any physical altercation with protesters outside the DeGise residence. *Compare Murray*, 138 N.J. at 214 *with* (DeGise Tr., Ex. 14, 98:19–24). Protesters' dialogue with passersby was described as polite by a county official (Krywinski Tr., Ex. 22, 100:12–15), and resulted in some neighbors joining the protests, occasionally testifying about their experiences as immigrants (Torres Tr., Ex. 5, 18:13–18; Gregg Tr., Ex. 20, 33:24–34:7). One neighbor gave Defendants a bag of homemade chocolate chip cookies. (Sarwate Tweet, Ex. 44, at DEFSARWATE0021; Torres Tweet, Ex. 42, at DEFTORRES0006.) Thus, Defendants' speech did not significantly intrude upon

[21] Notwithstanding Plaintiff DeGise's and Captain DeGennaro's belief that a sidewalk abutting a home belongs to that homeowner (*see* DeGise Tr., Ex. 14, 79:22–25; DeGennaro Tr., Ex. 15, 43:13–15), the sidewalks are public property, *see Roman v. City of Plainfield*, 388 N.J. Super. 527, 534–35 (App. Div. 2006) (finding a public sidewalk to be public property under N.J.S.A. 59:4-2).

Plaintiff DeGise's residential privacy. (The residential privacy of the other Plaintiffs was similarly not compromised since no action took place near their residences.)[22]

Courts have recognized the need to protect the "unwilling listener" from unwanted speech when inside the home because, unlike how an individual can seek to avoid unwelcome speech when in public by walking another way or averting one's eyes, a person is a "captive audience" at home. *See*, *e.g.*, *Frisby*, 487 U.S. at 484 ("Although in many locations, we expect individuals simply to avoid speech they do not want to hear . . . the home is different." (internal citations omitted)). But captive audience jurisprudence cannot be so broad as to apply to the facts in this case. Defendants not only conformed with applicable ordinances, but their actions were similar to that of prior protesters that Plaintiff DeGise welcomed.[23] An injunction in this case would result in a blanket rule with no limiting principle. Under this interpretation of *Murray*, anyone could get an injunction to stop people from free speech activities in front of their home. It would not matter whether residential

[22] Plaintiffs characterize protesters' behavior as "threatening," but the only ostensibly threatening behavior they have alleged happened after the TRO was issued and has no connection with Defendants. (*See*, *e.g.*, DeGise Tr., Ex. 14, 126:11–15, 127:5–10 (conceding that he "do[esn't] have anything to prove" that a package of glitter sent to his home was related to the ICE Contract or that Defendants sent the package); *id.* at 122:18–24 (stating there was no reason to believe that Defendants made threatening phone calls).)

[23] To the extent that these protests differed from the firefighters' protest because they happened at night, Jersey City has already decided what noise levels are permissible at night. Defendants complied with those restrictions.

privacy was actually being intruded upon. It would not matter that there were no concerns for harm or safety. It would not matter what the municipality's governing body had determined regarding appropriate noise restrictions for its residents.

B. The TRO burdens more protected speech than required to serve the government's limited interest.

Plaintiffs' testimony during discovery evinces an erroneous belief that the interest in residential privacy shields them from exposure to expressive activity in which they are uninterested. This position distorts *Murray*. Whatever residential privacy interest does exist does not permit the government to completely shut out speech with which it disagrees – and especially not speech directed at elected representatives.

New Jersey case law examining restraints on the public's freedom to picket outside their elected officials' residences is sparse. But in other contexts, New Jersey courts have consistently found that New Jerseyans' interests outweigh public officials' individual privacy interests. Courts' decisions in these other contexts strongly suggest that the New Jersey Constitution's robust and explicit protection of New Jerseyans' rights to assemble and "make known their opinions to their representatives, and to petition for redress of grievances," *N.J. Const*., art. I, ¶ 18, affords greater weight to speech directed at elected representatives.

For example, New Jersey upheld a local ordinance requiring public employees to file financial disclosures detailing personal assets, despite public officials' claim

that these disclosures constituted an invasion of personal privacy. *See Lehrhaupt v. Flynn,* 140 N.J. Super. 250, 261–62 (App. Div. 1976) ("The public official, on the other hand, should be ready to subordinate his right of privacy to the extent that it may be appropriate to effectuate the common weal."). Additionally,

> [b]y accepting public employment an individual steps from the category of a purely private citizen to that of a public citizen. And in that transition he must of necessity subordinate his private rights to the extent that they may compete or conflict with the superior right of the public to achieve honest and efficient government.

Id. at 262.

Here, unlike in *Murray*, where the defendants' speech was aimed at a private resident, all Plaintiffs are public representatives, who have brought this action in their official capacities. Implicit in those positions as elected officials are the responsibility to hear grievances from constituents. *Murray* did not have occasion to consider the importance of a public official's availability to the public, nor weigh the essential freedoms of speech, assembly, and expression toward elected representatives against residential privacy interests. To effectuate the affirmative protections in New Jersey's Constitution, it is necessary to evaluate the public interest in speech directed towards publicly-elected representatives, who have accepted the unique responsibilities and attention that accompany their positions.

C. The TRO is not narrowly tailored to achieve any governmental interest in residential privacy.

1. The TRO on its face is not narrowly tailored.

Even if content neutral, "laws may not transgress the boundaries fixed by the Constitution for freedom of expression," and "[a]ccordingly, the scrutiny to be accorded [government action] that trenches upon first amendment liberties must be especially scrupulous." *State v. Burkert*, 231 N.J. 257, 275–76 (2017) (internal quotation marks and citations omitted). The activities prohibited by the TRO and proposed injunction in this matter burden a substantial amount of First Amendment speech and are not narrowly tailored.

The limitations here are more restrictive than even those imposed in *Murray v. Lawson*, in which the New Jersey Supreme Court modified an injunction on remand from the U.S. Supreme Court for further deliberation after the U.S. Supreme Court's decision in *Madsen*. As modified, the injunction affirmed by the New Jersey Supreme Court in *Murray* provided that Defendants and all those in active concert or participation with them:

> (1) are prohibited at all times and on all days from picketing in any form within 100 feet of the property line of the Murray residence, located at 917 Carlton Road, Westfield, New Jersey;
>
> (2) may picket in a group of no more than ten persons outside the 100–foot zone around the Murray residence for one hour every two weeks; [and]

> (3) must notify the Westfield police department at least twenty-four hours prior to any intended instance of picketing pursuant to this injunction of the number of picketers and of the time and duration of the intended picketing.

138 N.J. at 234.

In modifying the injunction, the *Murray* Court attempted to ensure that "defendants w[ould] be able to get their message across." *Id.* Because the TRO in this case does not strike this balance, it cannot withstand scrutiny even if this Court finds that the restrictions on Defendants' speech are content neutral.

The most obvious issue with the TRO is its restrictions as to Plaintiff DeGise. The TRO states: "As to Plaintiff DeGise, compelling the Defendants to protest/picket, if at all, in the area limited to the corner of New York Avenue and Congress Street in the City of Jersey City, New Jersey[.]" (TRO, at ¶ B.) This language precludes Defendants from protesting or picketing *anywhere except* "in the area limited to the corner of New York Avenue and Congress Street." *Id.* From various Plaintiffs' and witnesses' testimony, it is apparent that they assume that the 200-foot buffer requirement imposed on "the other Plaintiffs" in Paragraph C of the TRO also applies to Plaintiff DeGise. (*See*, *e.g.*, Flannelly Tr., Ex. 25, 90:19–22.) But that is not what the TRO says. A TRO that confines *all* expressive activity directed toward Plaintiff DeGise to a single street corner in the entirety of Jersey City – also precluding, presumably, speech outside of Plaintiff DeGise's county office – is clearly not narrowly tailored.

Aside from this initial matter, a 200-foot buffer would nonetheless be extreme. In *Murray*, the injunction was modified to a 100-foot buffer zone that took into account the lot size in Westfield, narrowing the buffer zone between picketers and the intended recipient to a mere one-and-a-half lots. 138 N.J. at 223. The buffer zone also still permitted the picketers to picket on the plaintiff's block, which was 1800 feet long. *Id.* (noting that under the original *Murray* injunction, "Defendants c[ould] picket on the remainder of the Murrays' block" because "the injunction ban[ned] picketing within 300 feet of the Murray residence and the block on which they live is 1800 feet long"). Taking these facts into account, the *Murray* Court specifically tailored its injunction to prevent only the activity that "inherently and offensively" interfered with the plaintiff's residential privacy, *id.* at 224, including entering the property to ring the doorbell and initiating direct contact with the occupants of the home. *See id.* at 212.

Importantly, however, the modified *Murray* injunction was limited enough to permit the plaintiff to hear the picketers' message. The injunction was specifically tailored to permit "the Murrays [to] enjoy their domestic tranquility inside their house, but if they choose to go out into their yard, they will see the picketers a mere lot-and-a-half away." *Murray*, 138 N.J. at 234. This was in contrast to the original 300-foot injunction, which the Court concluded was "too broad" because "if plaintiffs stayed within their residence or even walked out into their yard, the

picketers and their placards would not likely be visible 300 feet away." *Murray*, 138 N.J. at 232–33.

The lots on Plaintiff DeGise's block are significantly smaller, about 25 feet in length. (DeGise Tr., Ex. 14, 23:15–23.) The TRO's 200-foot buffer zone forces protesters more than eight houses away – well out of earshot or eyesight of their intended audience, particularly in the context of a noisy city street. Even if Plaintiff DeGise were to choose to go out into his yard, the protesters could not make themselves seen or heard. (*Id.* at 188:6–14.) Defendants' ability to convey their message would be severely impeded if the County Executive was not even able to see them.

Plaintiffs have repeatedly emphasized that the protesters' political views are minority views that are not held by most of the voting public, ostensibly to justify dismissing them. (*See*, *e.g.*, DeGise Op-ed, Ex. 31 ("They claim that they speak for the residents, but in fact, they only speak for themselves – isolated, radical extremists who don't understand Hudson County and never will."); Hudson TV Article, Ex. 13, at DEFTORRES0117–19 ("Advocates who oppose the ICE contract claim they represent the majority of public opinion. They are completely wrong . . . People who do support these radical positions are extremists and the vast majority of Americans know this.").) Indeed, Plaintiff DeGise complained about "the actions of a handful of protesters." (DeGise Tr., Ex. 14, 115:1–12.) That Plaintiffs perceive the advocates

to hold a minority view makes it *more* important that their speech not be curtailed, not less.

As to the Plaintiffs other than the County Executive, any restrictions near their residences, let alone a 200-foot restriction, are excessive and not narrowly tailored because there have never been any protests in the vicinity of any of the other Plaintiffs' residences, nor any evidence that Defendants intended to locate protests there. (Cifelli Tr., Ex. 11, 71:11–13; Romano Tr., Ex. 10, 41:7–10, 42:11–15; Vainieri Tr., Ex. 12, at 66:22–67:3; Kopacz RFA, Ex. 38, at ¶ 2; Rodrigues RFA, Ex. 39, at ¶ 2.) The other Plaintiffs' only explanation as to why they were concerned about protests in front of their homes was the fact that there were protests in front of Plaintiff DeGise's house, and some phone calls which were never tied to Defendants. (Cifelli Tr., Ex. 11, 64:17–22, 72:11–24 (acknowledging that he has no evidence to suggest a nexus between the threatening call he reported and the protests, and relying on the fact that "if [the protesters] came to DeGise's house they can come to Cifelli's house" to explain why he anticipated protesters outside his residence); Vainieri Tr., Ex. 12, 72:14–25, 79:11–24 (acknowledging that two threatening calls he has reported as reason to fear protesters did not reference ICE or immigration detention, "ha[ve] nothing to do with the case," and pointing only to a "hunch" to explain why the calls are linked to protests about the ICE contract); Kopacz RFA, Ex. 38, at ¶ 4; Rodrigues RFA, Ex. 39, at ¶ 4.) There is no evidence that any expressive activity –

let alone intrusive expressive activity – would take place in front of those other residences.

The TRO also limits the number of protesters to no "more than 10 people present during any protest or picket." (TRO, ¶ F.) Though this number is the same limit as in *Murray*, *Murray* involved 57 individuals who gathered in the suburban neighborhood. 138 N.J. at 212. By contrast, placing a limit on a group that the parties agree was typically comprised of only around ten to fifteen people each night, (*see*, *e.g.*, Little Ans. to Interrogs., Ex. 17, No. 21; Torres Ans. to Interrogs., Ex. 26, No. 21; Pls.' Am. Compl., ¶ 18), does little to further any residential privacy interest. There is nothing in the record that justifies limiting the number of protesters, who have made a conscious effort to comply with local ordinances. Importantly, limiting the number of people who can protest when, according to Plaintiffs, the protesters represent a minority viewpoint further pushes an already marginalized viewpoint into the shadows. Furthermore, limiting the number of protesters raises questions of enforcement. If police officers are tasked with enforcing the limit on protesters, it is unclear how law enforcement authorities will identify protesters when, as described *infra* Part III.C.3, the TRO does not define "protest," inappropriately leaving this determination to the officers' discretion.

The TRO completely restricts protests to between the hours of 7 and 8 p.m., "no more often than one night every two weeks." (TRO, ¶¶ C–D.) Given that

Defendants' protests were limited in duration, that they did not engage in threatening or harassing activity, and that Defendants carefully coordinated their timing so as not to run afoul of existing noise ordinances, such a severe curtailment of protest is not narrowly tailored.

Finally, the TRO requires protesters to notify JCPD and HCSO "at least 24 hours prior to the start of any protest." (*Id.* ¶ G.) This requirement to invite police presence chills speech, especially after individuals were arrested pursuant to the TRO. (*See*, *e.g.*, Torres Tr., Ex. 5, 102:23–103:20 (expressing that she and others fear being arrested by police for protesting).) Like the other components of the TRO, there is no tailoring between this requirement and the conduct of Defendants, who strove to comply with applicable laws.

2. The TRO is not narrowly tailored because it burdens speech beyond what is directed at the County Executive.

The TRO's restrictions also prevent engagement with other residents on Plaintiff DeGise's block. As explained *supra* Part II(a)(i), upon observing the small gathering on various nights between December 3 and December 7, protesters engaged with several of Plaintiff DeGise's neighbors and some neighbors who found the protesters' message compelling joined the group. (Torres Tr., Ex. 5, 18:13–18; Gregg Tr., Ex. 20, 33:24–34:7.) Under the TRO, Defendants are not only prohibited from expressing opposition near the DeGise residence, but they are wholly prevented from speaking with others in the vicinity who may be interested in their message.

Despite Plaintiff DeGise's complaints of noise, not a single protester was arrested, ticketed, or fined before the arrests on December 8 arising out of the Temporary Restraining Order. This is true in spite of the constant police presence at the protests. (DeGise Tr., Ex. 14, 51:12–13, 52:17–53:3, 55:10–18, 57:5–10.) Critically, the noise ordinance reflects Jersey City's determination of the noise level above which its residents should not be subjected. Plaintiffs may address noise issues through enforcement of local noise and sidewalk ordinances, but instead are using injunctive relief to seek extra quiet and privacy beyond the city's determination.

It is certainly easier for Plaintiffs to prohibit all protesting, rather than enforce a local ordinance. But "[t]o meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier. . . . [T]he prime objective of the First Amendment is not efficiency." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014).

3. The TRO is not narrowly tailored because it is overbroad, chills speech, and constitutes a vague order that unconstitutionally leaves too much up to the discretion of government officials.

The TRO currently enjoins, *inter alia*, the times and places in which Defendants may protest or picket (*see* TRO, at 3), without any definition of the word "protest," or explanation of what conduct is specifically prohibited. "It is self-evident that an indeterminate prohibition carries with it the opportunity for abuse,

especially where it has received a virtually open-ended interpretation." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018) (internal quotation marks and alterations omitted) (collecting cases). Moreover, because a restraining order functions by creating criminal liability for those who allegedly transgress it, the TRO's vagueness raises concerns about fair notice and chilling lawful speech. Although not legislation, the principal that "[c]riminal laws touching on speech must give fair notice of where the line is set between what is permissible and proscribed and must be drawn with appropriate definitiveness," *Burkert*, 231 N.J. at 276 (internal quotation marks omitted) (collecting cases), applies here. "Vague and overly broad laws criminalizing speech have the potential to chill permissible speech, causing speakers to silence themselves rather than utter words that may be subject to penal sanctions." *Id.* (collecting cases). That is exactly what happened in this instance. Additionally, "[s]uch laws give government authorities undue prosecutorial discretion, thus increasing 'the risk of discriminatory enforcement.'" *Id.* at 277 (quoting *Reno v. ACLU*, 521 U.S. 844, 872 (1997)). The discretion afforded to government officials by the TRO already issued in this case is ripe for abuse.[24]

[24] Defendants are concerned about discriminatory enforcement of an injunction aimed at curbing protesting of a county's policies as they relate to immigration enforcement, as suggested by the evidence in the record. For instance, Plaintiff DeGise noted in his opinion piece, and testified at his deposition that the protesters were "mostly young [and] mostly white." (DeGise Tr., Ex. 14, 168:20–23; *see also*

Most significant is this TRO's failure to define what constitutes a "protest" or describe the actual behavior that is enjoined. This failure has led to a wide range of understandings regarding what behavior is prohibited, and therefore criminalized.[25] For example, Captain DeGennaro could not independently determine whether Defendants would be in violation of the TRO if they gathered to sing Christmas carols outside the DeGise residence, noting that he would have to consult with legal advisors. (DeGennaro Tr., Ex. 15, 153:18–154:1.) Sergeant Flannelly, who was assigned to be a supervisor at the security detail outside of the DeGise residence and was present on December 6 and December 8 (Flannelly Tr., Ex. 25, 21:25–22:11), also expressed uncertainty over the parameters of the TRO and did not know whether Christmas carolers would be subject to this restraint. (*Id.* at 105:5–15.) According to Sergeant Flannelly, Christmas carolers would be subject to it if they were wearing

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id. at 169:7–9 ("So, mostly young, mostly white and the left wing extremists. And I stand by that."); *id.* at 171:7–16 ("It was just they're mostly white and they're mostly young and that's what I said. There is no pejorative in there. They're mostly white and they're mostly young. You know, have we reached that point in political correctness we can't call things for what they are? You know, is that – are you inferring that that's racially insulting or something like that? You know, I don't know where you're going with that one. They're young and they're white mostly.").) And yet, two out of three of the people who were not initially named in the Complaint but were arrested on December 8, 2020, are Latinx. (*See* Excerpt from Incident Report Form, Exhibit 37.)

[25] Notably, Plaintiff Vainieri incorrectly believes that the TRO prohibits protest outside of his place of business. (Vainieri Tr., Ex. 12, 53:22–54:3 (explaining that he joined the present case because he "did not want to see [protests] happening to [the] front of [his] business").)

anti-ICE sweatshirts while singing because that would qualify as "a form of protest." (Flannelly Tr., Ex. 25, 105:18–22.) Captain DeGennaro was not sure who is subject to the TRO's restrictions; he could not answer whether a member of a coalition seeking to abolish ICE who was not present at the protests from December 3 through December 7 would be bound by the TRO, and stated that he would need to consult with legal advisors prior to an arrest. (DeGennaro Tr., Ex. 15, at 158:8–17.) Sergeant Flannelly explained that to determine whether someone qualified as a protester subject to the TRO would depend on a number of factors, including "what they're writing" in chalk and "what they're wearing." (Flannelly Tr., Ex. 25, 106:7–12.) Regardless of the TRO's prohibitions, there does not seem to be a consensus whether *any* protest occurred on December 8, the night that arrests were made.[26]

The County Executive—who, as previously discussed, signed off on the arrest of protesters on December 8—also demonstrated an inconsistent understanding of the kinds of activities prohibited by the Order. According to Plaintiff DeGise, it

[26] (*See*, *e.g.*, Krywinski Tr., Ex. 22, 118:1–12 ("Q. What did you understand that gathering on the evening of December 8th to be? A. I really had no idea because it wasn't like the previous nights where the people just started chanting. It was different that night. Q. Did you think it was a protest? A. I couldn't say it was a protest. Q. Why couldn't you say that it was a protest? A. Because I didn't observe—well, maybe it was a protest, a [quiet] protest. I have really no recollection of what it could be other than a group of people that came and I know they were [quiet]."); Flannelly Tr., Ex. 25, 103:9–104:2 (Sergeant Flannelly stating that "there was to be no form of demonstration in front of the house," including a silent gathering and on "[t]hat particular night nothing was allowed").)

would be impermissible under the TRO for a person wearing a scarf that reads "blood money" to stand outside his house because he would be targeting Mr. DeGise with a "confrontational" message. (DeGise Tr., Ex. 14, 137:21–24, 138:17–22, 139:2–5.) In fact, Plaintiff DeGise went so far as to say that someone cannot use chalk to draw a hopscotch board outside of the DeGise residence if he is "wearing a blood money scarf or something." (*Id.* at 137:9–20.) When asked whether it would be a violation for someone "wearing [a] scar[f] that said "blood money" to gather silently, Plaintiff DeGise responded:

> I think it's wrong. I think he has every right to wear whatever he wants there but if he – if he picked out my house to stand in front of to display, you know, what he was wearing, well, that's a little different. Now I'm targeted with that. . . . And if I was targeted, you know, somebody is going to go there with a T-shirt and say something that would be contrary and confrontational to me with it, no, he shouldn't be.

(*Id.* at 138:17–139:5.) As written, at least some people understand the TRO to preclude an individual wearing particular clothing from standing outside of the DeGise residence.

A frequent objection from Plaintiffs' counsel during the depositions was that understanding the TRO called for a legal conclusion, and that the witness would need to consult with counsel. However, neither those immediately bound by the injunction in this matter, nor the current unnamed protesters, are afforded that luxury; they need to understand the TRO's parameters to modify their behavior and avoid criminal liability. The TRO is simply too vague to be understood. As such, it

is not only insufficiently tailored, but also results in per se viewpoint discrimination, as discussed *supra* I.A.

Decided the same year as *Murray v. Lawson*, the New Jersey Supreme Court in *Horizon Health Center*, 135 N.J. 126, significantly modified a permanent injunction restricting the activities of antiabortion protesters outside of medical clinics.[27] With respect to the "manner" restrictions of the TRO, the Court took issue with "[p]aragraph one of the trial court's injunction [that] forbids defendants from 'gathering, parading, patrolling and picketing to disrupt, intimidate or harass and specifically from using obscene or abusive language or insults or epithets, making loud accusations, and shouting statements that are abusive.'" *Id.* at 148 (alterations omitted). The Court explained that this language was not sufficiently tailored and that the restrictions should instead "focus more sharply on the actual problem caused by the noise of the protest: the volume of the noise was so great that it produced a deleterious effect on patients and staff inside the clinic." *Id.* at 149. Accordingly, the Court modified the injunction to enjoin the defendants "from screaming, chanting, singing, speaking, yelling, or producing noise in any other manner, in a volume that interfered with the provision of medical services within the Center." *Id.* The Court

[27] Defendants note that this case was decided prior to *Murray v. Lawson* and *Madsen*, and thus erroneously uses a time, place, and manner analysis to evaluate whether an injunction is constitutional. Nevertheless, even under the erroneous and more forgiving standard, the Court found the discussed injunction to be insufficiently tailored.

chose the more specific language in part because it "closely tracks the Jersey City ordinance, which prohibits 'the creation of any excessive noises on any street adjacent to any hospital that disturbs or unduly annoys patients in the hospital.'" *Id.* (alterations omitted) (quoting Jersey City, N.J. Municipal Code § 16–3(a)(7) (1988)). Should this Court find that restrictions on protesters outside of the DeGise residence are constitutional, the most appropriately tailored restrictions should closely track the already existing Jersey City noise ordinances. Those ordinances already reflect content neutral and equally applicable legislative decisions aimed at restricting the time and noise level of public protest, and are the least restrictive means of protecting residential interests.

The New Jersey Supreme Court also modified the portion of the *Felicissimo* injunction that "effectively create[d] a speech-free or buffer zone around the Center" by prohibiting expressive activity in front of the Center and requiring the defendants to remain across the street. *Id.* at 151. The Court determined:

> The facts of our case lend themselves to a more permissive restriction than the one the trial court imposed. The trial court did not find that the sidewalk counselors and protesters had assaulted any patients, nor did the Center, its staff, or its patients report any violence or threats. No one filed a complaint with the police. The primary difficulties that defendants caused related to their large numbers and solid mass directly in front of the Center and to the volume of their expressive activities. Thus, we determine that rather than prohibiting all expressional activities on the sidewalk directly in front of the Center, the injunction should have allowed a limited, controlled form of expression near the entrance while restraining the troublesome mass of protesters to a location across the street.

Id. at 152. "Because the crafting of an injunctive order imposing 'place' restrictions . . . is peculiarly fact sensitive," the Court "remand[ed] to the trial court to fashion an injunction that permits some form of expression by defendants near the Center." *Id.* For the reasons already discussed, the 200-foot buffer zone in this case is similarly broader than necessary in that it restricts activity in multiple places where Defendants have not been present and does not allow for speech to reach the elected official. Most importantly here, the geographical restrictions in the TRO are also unclear. The TRO currently restricts Defendants "to protest/picket, if at all, in the area limited to the corner of New York Avenue and Congress Street in the City of Jersey City, New Jersey." (TRO, at 3.) This may be understood to restrict *all* protesting in the *entirety* of Jersey City to a single corner, prohibiting protest even in front of the Brennan Courthouse. Not only does this preclude alternative methods of communication, it is vague and overbroad, and not sensitive to the peculiar facts of this case.

It must also be noted that the modified injunction upheld by the New Jersey Supreme Court in *Murray v. Lawson* does not include the undefined word "protest." The injunction there restricted "picketing" only, a word more easily understood, identified, and defined. *Cf. Bruni v. City of Pittsburgh*, 941 F.3d 73, 87 (3d Cir. 2019) ("No doubt due to the easily identifiable nature and visibility of 'congregating, patrolling, picketing, or demonstrating,' the Court has repeatedly considered

regulation of those activities to be based on the manner in which expressive activity occurs, not its content, and held such regulation content neutral." (internal citation and alterations omitted) (quoting *Madsen*, 512 U.S. at 759)) (collecting Supreme Court cases). The word "protest" is inherently vague, and over-inclusive, as previously described.

Most significantly, the word "protest" may be understood to prohibit leafletting, an activity at the core of First Amendment protections. *See Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 377 (1997) ("Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum."); *see also Bruni*, 941 F.3d at 87 (finding that a city may not prohibit, via ordinance, sidewalk counseling as "approaching someone *individually* to engage in a *one-on-one* conversation no more constitutes congregating than walking alongside another person constitutes patrolling" and "[s]imply calling peaceful one-on-one conversations demonstrating or picketing does not make it so when the plain meaning of those terms does not encompass that speech" (internal quotation marks and alterations omitted)). Neither the TRO, nor any injunction this Court might consider, may prohibit core protected First Amendment activities: leafletting and

passing out flyers to cars and passers-by, or individually approaching people on the sidewalk to discuss the policy decisions reached by elected officials.

Moreover, under the New Jersey State Constitution's expanded protections for speech and assembly, *see Borough of Sayreville v. 35 Club L.L.C.*, 208 N.J. 491, 494 (2012), an order that would require government officials to parse the language and viewpoint of protesters to enforce the TRO or proposed injunction is unconstitutional. Unlike the anti-abortion protests at issue in *Murray* and *Horizon Health Center*, where it might be easier to parse out who is present to protest, Defendants and the unnamed protesters are subjected to a TRO for a much wider range of actions. For instance, Plaintiff DeGise understands the TRO and proposed injunction to prohibit anybody who displays something "that would be contrary and confrontational to [him]" from standing outside of his home. (DeGise Tr., Ex. 14, 137:2–5.) It is unclear who decides what is "confrontational" to the County Executive; as previously discussed, Plaintiff DeGise was involved in the decision to arrest protesters. Any decision—made by either an elected representative or a law enforcement officer—will necessarily mandate an inquiry into the individual's political views and their reason for standing on a public sidewalk. Such an inquiry violates the expanded protections under the State Constitution.

III. The TRO does not leave open ample alternative channels for communication of Defendants' protected speech.

Restrictions on protected speech cannot be justified without "leav[ing] open ample alternative channels for communication of the information." *McCullen*, 573 U.S. at 477 (quoting *Ward*, 491 U.S. at 791)); *see also E&J Equities, LLC*, 226 N.J. at 572 ("When speech is restricted, there must be alternative means of communicating the message."). Even if a law does not completely prohibit speech, the mere existence of alternatives, though not without significance, is insufficient to find that alternative channels for communication are open; courts must examine whether, *in practice*, those channels are sufficient. *See Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 93 (1977) (striking down a law preventing homeowners from posting "For Sale" signs in their yards and observing that "[a]lthough in theory sellers remain free to employ a number of different alternatives, in practice" the alternatives were "far from satisfactory"). Alternatives may be insufficient, for example, if they "are less likely to reach persons not deliberately seeking [ ] information" or "may be less effective media for communicating the message." *Id.* And as the New Jersey Supreme Court recognized, the ability to communicate a "message much closer to where the object of their message would likely become aware of it" is important because it "presumably mak[es] that speech more effective." *Murray*, 138 N.J. at 235.

Defendants chose to protest in front of Plaintiff DeGise's house because of his unique position to do something about the ICE contract (Torres Tr., Ex. 5, 95:1–11), making it essential to advocates that they present their message to him specifically. Any alternative means should therefore ensure that advocates can reach Plaintiff DeGise. As discussed above, the TRO's limitation to one corner at the end of the block is an inadequate alternative because it is not within sight or earshot of the DeGise residence. Plaintiffs' assertion that demonstrators may protest the ICE contract elsewhere, such as at the Hudson County Jail or the Brennan Courthouse, is therefore beside the point: those protests will not reach the County Executive. And Defendants cannot ensure that their messages will reach the County Executive because protesters cannot know where the County Executive is working at a given time, especially during a pandemic.[28] The TRO not only leaves insufficient alternative means for Defendants to communicate their message to the County Executive—it leaves no alternatives whatsoever for protest.

IV. Plaintiffs' Complaint Should Be Dismissed For Failure to State a Claim

Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted. *See R.* 6:6-2(e). "The essential test is whether a cause of action is suggested by the facts." *Sashihara*, 461 N.J. Super. at 200–201. The "plaintiff is entitled to a

[28] During the events at issue, all parties were subject to the exacting demands of social distancing, a new work-from-home norm, and the public health imperative to quarantine upon possible exposure to COVID-19.

liberal interpretation and given the benefit of all favorable inferences that reasonably may be drawn." *State ex rel. McCormac v. Qwest Commc'ns Int'l, Inc.*, 387 N.J. Super. 469, 478 (App. Div. 2006).

Even taking Plaintiffs' allegations in the light most favorable to them, their claims fail. Plaintiffs allege that Defendants' conduct was "unlawful," citing allegedly "threatening" and "intimidating," behavior. (*See*, *e.g.*, Am. Compl. ¶¶ 14, 20.) But, as a threshold matter, "[s]peech . . . cannot be transformed into criminal conduct merely because it annoys, disturbs, or arouses contempt." *Burkert*, 231 N.J. at 281. Even if Defendants' behavior was exactly as Plaintiffs characterized it – which it was not – "the First Amendment protects the right to coerce action by 'threats' of vilification or social ostracism." *State v. Carroll*, 456 N.J. Super. 520, 537 (App. Div. 2018) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926 (1982)) (discussing the protected status of threats under the First Amendment).

Furthermore, Plaintiffs are not entitled to injunctive relief that violates the Constitution. Even assuming for the purposes of this motion that Plaintiffs hold no animus towards Defendants' viewpoints and that their Amended Complaint merely sought a content neutral restriction on speech, the correct standard for analyzing the validity of such a restriction is not a time, place, and manner analysis, but an inquiry into whether more speech is burdened than necessary to serve a significant government interest. *Madsen*, 512 U.S. at 765–66 ("Accordingly, when evaluating

a content-neutral injunction . . . our standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.") (collecting cases). Plaintiffs have not and cannot allege facts that support their request for such a broad injunction.

For these reasons, and for all the foregoing reasons set out *supra* Parts I–IV, Plaintiffs' Complaint should be dismissed.

V. Plaintiffs have not demonstrated that temporary restraints or preliminary injunctive relief are necessary.

Plaintiffs bear the burden of showing that the temporary restraints or preliminary injunctive relief they seek is "necessary to prevent irreparable harm," that "the legal right underlying plaintiff's claim is well-settled," that a plaintiff has "a reasonable probability of ultimate success on the merits," and that, "[o]n balance, the equities favor the grant of temporary relief to maintain the status quo pending the outcome of a final hearing." *Crowe*, 90 N.J. at 132–34 (citations omitted). "Each of these factors must be clearly and convincingly demonstrated." *Waste Mgmt. of N.J., Inc. v. Union Cnty. Utils. Auth.*, 399 N.J. Super. 508, 520 (App. Div. 2008). Plaintiffs have not met their burden under any of the factors.

First, Plaintiffs' claim that they face irreparable harm absent the injunctive relief entered in this case boils down to one plaintiff's desire to avoid exposure to unwanted speech on a public street outside his home, where Defendants have

observed local ordinances, have not attempted contact with his family, and have not intruded on his private property. This is not the kind of "severe personal inconvenience" that courts have found may justify injunctive relief. *Cf. Crowe*, 90 N.J. 176 (observing that "the trauma of eviction from one's home" and the loss of one's livelihood "may well justify the intervention of equity"); *see also supra* Part III.C.1 (discussing the more serious intrusions on residential privacy at issue in *Murray*).

Moreover, it is a basic principle from *Murray* that a government may impose content neutral restrictions on speech only so long as those restrictions do not "burden . . . more speech than necessary to protect plaintiffs' residential-privacy interest." *Murray*, 138 N.J. at 234. Contrary to Plaintiffs' argument, *Murray* does not support the contention that they, as elected public officials, are entitled to such a broad injunctive order in this context, where there are no alternative channels available to Defendants to make themselves heard and the TRO is not content neutral or narrowly tailored. *See supra* Parts I-IV.

Plaintiffs' sweeping characterizations[29] of Defendants' conduct were not borne out in discovery, *see supra* Statement of Facts, and do not constitute a clear

[29] (*See, e.g.*, Pls.' TRO Br., at 5 ("Defendants . . . infringe upon the residential privacy rights and threaten, harass, and intimidate [Plaintiff DeGise] using all manner of things, including, but not limited to, verbal threats, noise makers, megaphones and instruments that disturb the peace and DeGise's quiet enjoyment

and convincing showing of likely irreparable harm. Moreover, the record shows that Defendants had no plan to gather outside the homes of any Plaintiff other than Plaintiff DeGise.

For similar reasons, and for the reasons explained *supra* Parts I-IV, Plaintiffs are not likely to succeed on the merits of their claim. "A preliminary injunction should not issue where all material facts are controverted." *Crowe*, 90 N.J. at 133 (citation omitted). Though the material facts in this case are not controverted, they unequivocally support *Defendants*, not Plaintiffs. *See supra* Parts I-IV.

Finally, balancing the equities, which requires a court to consider the "relative hardship[s] to the parties," *Crowe*, 90 N.J. at 134, also overwhelmingly weighs in Defendants' favor. In cases where "the public interest is greatly affected, a court may withhold relief despite a substantial showing of irreparable injury to the applicant." *Waste Mgmt. of N.J., Inc.*, 399 N.J. Super. at 520. Defendants' First Amendment freedoms at issue in this case are exactly the sort of rights that greatly implicate the public interest, and courts weigh them heavily when deciding whether to issue preliminary relief. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). As explained *supra* Part III.A–B, the TRO's burden

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of his property, flashlights and lighting equipment, and threatening written messages located directly in front of DeGise's residence.").)

on Defendants' protected speech imposes a severe hardship that outweighs Plaintiffs' interest in residential privacy.

Because Plaintiffs have failed to make a clear and convincing demonstration that they are entitled to preliminary relief, this Court should dissolve the TRO and decline to enter a preliminary injunction.

CONCLUSION

For the reasons contained herein, Defendants respectfully ask the Court to dissolve the TRO, decline to issue a permanent injunction, and dismiss this case in its entirety.

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**Practicing in New Jersey pursuant to R. 1:21-3(c).*