Mot. Seq. No. 12

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK, Plaintiff, v. THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL, Defendants.	Index No. 451625/2020 Hon. Joel M. Cohen

THE ATTORNEY GENERAL'S MEMORANDUM OF LAW IN SUPPORT OF HER MOTION TO DISMISS DEFENDANT NRA'S COUNTERCLAIMS

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Plaintiff New York Attorney General Letitia James ("Attorney General" or "OAG") respectfully submits this memorandum in support of her motion, brought pursuant to Rule 3211(a)(2) and (7) of the New York Civil Practice Law and Rules ("CPLR"), to dismiss Defendant the National Rifle Association of America, Inc.'s ("NRA") counterclaims with prejudice.

PRELIMINARY STATEMENT

The Attorney General's 163-page Complaint asserts 18 causes of action supported by detailed factual allegations of pervasive illegal conduct at the NRA—diversion of millions of dollars from the NRA's charitable mission for private benefit, lack of internal controls enabling this abuse, false regulatory filings, lucrative no-show contracts, and retaliation against those who tried to seek reform. The Complaint seeks multiple forms of relief, including restitution, an accounting, removal of those wrongdoers who are still leading the NRA, and judicial dissolution.

In February 2021, the NRA filed seven counterclaims challenging the constitutionality of the Attorney General's decision to investigate the NRA and bring judicial dissolution claims in this action ("Counterclaims").[1] The NRA argues that both actions constitute unconstitutional retaliation and selective enforcement of New York law against the political speech of the NRA and its members. The Counterclaims fail as a matter of law for the following principal reasons:

First, the NRA has failed to plausibly plead constitutional claims under the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 8, 9, and 11 of the New York State Constitution. *See infra* Part I.A. Illegal conduct is not subject to First Amendment protection and the Counterclaims do not adequately allege that viewpoint discrimination was the "but-for" cause of the Attorney General's investigation or commencement

[1] The parties agreed to stay the deadline for the Attorney General's response to the counterclaims pending the decision in *NRA v. James*, 1:20-cv-00889 (N.D.N.Y.) (the "Federal Countersuit"), the federal action that the NRA filed in August 2020 asserting virtually identical claims. The NRA withdrew its complaint in the Federal Countersuit in June 2021.

of this Action. The counterclaims based on the Attorney General's allegedly selective enforcement of New York law likewise fail because the NRA has not alleged dissimilar treatment of similarly situated entities. Nor has it adequately alleged that the perceived differential treatment was based on impermissible considerations. *See infra* Part I.B.

Second, the NRA lacks standing to bring constitutional claims on behalf of its members because (1) organizations like the NRA do not have standing to bring civil rights claims on behalf of their members and (2) the NRA has not alleged specific facts establishing that it or its members have (or imminently will have) their associational rights violated. *See infra* Part II.

Third, the NRA has failed to plead a plausible claim that the judicial dissolution statutes in Not-for-Profit Corporation Law §§ 1101 and 1102 are unconstitutional as applied to the NRA because the statutes are facially neutral and unrelated to the suppression of free expression. *See infra* Part III.

And finally, the NRA is barred from the relief it seeks for several additional and independent reasons. The NRA's direct claims under the New York Constitution fail because relief is not available under the State Constitution, where, as here, adequate alternative remedies exist. *See infra* Part IV. Additionally, the Attorney General is entitled to absolute and qualified immunity under Federal and New York State law. *See infra* Part V.

STATEMENT OF PROCEDURAL HISTORY AND RELEVANT FACTS

The Attorney General is statutorily vested with expansive authority to oversee not-for-profit entities, like the NRA, which are organized under New York law. *See Schneiderman v. Tierney*, 2015 WL 2378983, at *2–3 (Sup. Ct. N.Y. Cnty. 2015); *Matter of Cuomo v. Dreamland Amusements Inc.*, 2008 WL 4369270, at *4 (S.D.N.Y. Sept. 22, 2008); *In re McDonell*, 195 Misc.2d 277, 278-79 (Sup. Ct. N.Y. Cnty. 2002); *In re Schlussel*, 89 N.Y.S.2d 47, 56 (Sup. Ct. N.Y. Cnty. 1949) (OAG has broad discretion as the "officer charged with the duty of protecting

charitable beneficiaries"); s*ee also Citizens United v. Schneiderman*, 882 F.3d 374, 379 (2d Cir. 2018).

The Attorney General is responsible for ensuring that not-for-profit charitable corporations and their assets are not abused or misused, and for protecting "the public interest in charitable property." *Tierney*, 2015 WL 2378983, at *3. As the State's chief law enforcement officer, the Attorney General safeguards the public interest through investigations and enforcement actions to prevent, among other things, fraud and misconduct. S*ee Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600 (2003) (recognizing the states' strong interest in promoting compliance and preventing fraud in charities).

In fulfilling her responsibilities, the Attorney General has broad authority and discretion to pursue various types of relief against charitable entities and their officers and directors for violations of the law. Potential remedies include restitution, unwinding transactions, accountings, removal of officers and directors, and judicial dissolution and distribution of the charity's remaining assets for uses consistent with its charitable mission. *See, e.g.,* N-PCL §§ 706, 714, 715, 717, 720, 1008(a)(15), 1101, 1102, 1109(b), and 1115(a); *see also* N-PCL, Art. 5. Although the Attorney General has discretion to seek various forms of relief, the ultimate decision on each of these remedies is the responsibility of this Court. In the case of dissolution, the Court has equitable responsibility and discretion to decide the remedy based on consideration of the public and the NRA members' interest.

A. The OAG initiates an investigation of the NRA culminating in the commencement of this enforcement action.

The OAG Charities Bureau conducted a 15-month investigation of the NRA that began in

late April 2019 and culminated in the filing of this action in August 2020. *See* Connell Ex. A ¶ 21.[2]

The OAG's investigation was commenced after information in regulatory filings, publicly-available documents, litigation filings and press reports indicated serious dysfunction, governance, and financial problems within the NRA.[3] The NRA's 2018 regulatory filings noted substantial inaccuracies in earlier mandated filings. *See* Connell Ex. B (*People v. Ackerman McQueen*, 67 Misc. 3d 1206(A), at *1 (Sup. Ct. N.Y. Cnty. 2020)). Whistleblowers within the NRA raised concerns. *See* NYSCEF 11 ¶¶ 7, 10, 220, 226, 263, 266, 279, 452, 453, 472-73 484-497. Longtime members of the NRA's Board of Directors—including its then-President, Lt. Col. Oliver North—raised credible concerns about alleged financial misconduct within the organization. After North attempted to investigate these concerns, he was not re-nominated for his leadership position at a deeply divided and highly publicized annual convention in April 2019.[4] Similarly, when other dissident board members called for an independent investigation, they were reportedly "stonewalled, accused of disloyalty, stripped of committee assignments and denied effective counsel," and ultimately resigned from the board.[5] A group of longtime NRA members was also

[2] References to "Connell Ex." refers to the exhibits to the Affirmation of Monica A. Connell in Support of the Attorney General's Motion to Dismiss the NRA's Counterclaims, dated June 24, 2021, NYSCEF 266.

[3] Reports of abuses within the NRA were detailed in lawsuits and press coverage, including by The Wall Street Journal, The Washington Post, The New York Times, The New Yorker and The Trace.

[4] *See, e.g.,* Brian Freskos, *The NRA Ousts Oliver North and Stifles Debate on Financial* Wrongdoing, THE NEW YORKER (April 28, 2019), https://www.newyorker.com/news/news-desk/the-nra-ousts-oliver-north-and-stifles-debate-on-financial-wrongdoing. *See also NRA v. North*, 69 Misc. 3d 1201(A) (Sup. Ct. Albany Cnty. 2020) (discussing North's whistleblowing status).

[5] Beth Reinhard, *Three NRA Board Members Resign in Latest Sign of Upheaval at Gun Rights* Group, WASHINGTON POST (August 1, 2019), https://www.washingtonpost.com/politics/three-nra-board-members-resign-in-latest-sign-of-upheaval-at-gun-rights-group/2019/08/01/aad49bc0-

vocalizing its concerns about the organization's management and launched a "Save the Second" campaign aimed at reforming the NRA's board.[6]

During the pendency of the Attorney General's investigation, the NRA did not attempt to block the investigation as improper selective prosecution or retaliation.[7] Indeed, in its own pleading, the NRA implicitly acknowledges internal problems by discussing its efforts to bring the Association into compliance and the resistance it met from some quarters. Counterclaims ¶¶ 7, 15.

Based upon the evidence uncovered in the investigation, the OAG determined that an enforcement action was warranted.

B. The OAG commences this action.

On August 6, 2020, the Attorney General commenced this Action against the NRA and four of its current and former leaders. NYSCEF 1.

The Complaint sets forth detailed allegations of pervasive and persistent illegal conduct at the NRA. NYSCEF 11. The facts alleged demonstrate that the wrongdoing was not isolated bad

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b49d-11e9-8f6c-7828e68cb15f_story.html; *see also* F. Riehl, *NRA Board Members' Maloney, Knight, Schneider Resign from NRA-BOD*, AMMO LAND (August 1, 2019), https://www.ammoland.com/2019/08/nra-board-members-maloney-knight-schneider-resign-from-nra-bod/#axzz6dKJIw0xd.

[6] Alex Yablon, *New Gun Rights Campaign Seeks to Reform the Scandal-Plagued NRA*, THE TRACE (Jul. 1, 2019), https://www.thetrace.org/2019/07/save-the-second-nra-gun-rights-campaign/.

[7] The NRA did commence litigation in August 2019 during the Attorney General's investigation. The NRA demanded to be present during the subpoenaed testimony of its former president, Lt. Col. North. *See NRA v. James*, Index No. 158019/2019 (Sup. Ct. N.Y. Cnty.) ("North Subpoena Action"). The NRA asserted that the Attorney General was biased against the NRA, using language identical to allegations in its Counterclaims. *Compare* Connell Ex. C, NYSCEF 269 (North Subpoena Action NRA Reply Br.) at 4-5 with Counterclaims ¶ 4. The Supreme Court rejected the NRA's arguments and denied its request for relief. *Id.* Ex. D, NYSCEF 270. The First Department denied the NRA's stay application and the NRA declined to pursue further appeal. *Id*. Ex. E, NYSCEF 270. Having raised its claims of bias in the North Subpoena Action, the NRA is precluded from re-litigating them here. *See O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981).

acts, but rather the institutionalized misuse of assets for private benefit, in a financial system with inadequate controls and pervasive corruption, which was overseen by an entrenched leadership. The Complaints alleges facts establishing that the NRA and its Board permitted the diversion of tens of millions of dollars, perhaps much more, away from the NRA's charitable mission, imposing substantial reductions in its expenditures for core program services, including gun safety, education, training, and member services. *Id.* ¶ 2. The Complaint also alleges that the NRA ignored, and in some cases retaliated against, those who raised concerns about its operation and finances. These whistleblowers included multiple board members and a former NRA President. Many of these whistleblowers resigned or were ousted. *Id*. ¶¶ 444-475.

The Attorney General has asserted 18 causes of action and requested multiple forms of relief, including:

- restitution from the individual defendants and the imposition of penalties;
- removal of current officers;
- an injunction barring the individual defendants from fiduciary roles in any New York not-for-profit organization;
- rescission of certain transactions and classes of transactions;
- an accounting with respect to management of the NRA's institutional funds; and
- repayment of illegal compensation, reimbursements, benefits or amounts unjustly paid.

Id. ¶¶ 560-666. The OAG also asks this Court to find that the NRA is liable to be dissolved pursuant to N-PCL §§ 1101 and 1102. The N-PCL requires, as the Complaint acknowledges, that this Court determine, in the exercise of its discretion under N-PCL § 1109(b), that the interest of the public and the members of the NRA supports a decision to dissolve the NRA.

C. The NRA undertakes multiple procedural maneuvers to stay, dismiss, or transfer this Action to federal court.

The NRA's Counterclaims are the most recent in a series of attempts – all unsuccessful – to evade litigating the merits of the Attorney General's claims in this Court.

A few hours after the commencement of this Action, the NRA filed the Federal Countersuit,

which asserted claims that are identical to its Counterclaims here. Connell Ex. F, NYSCEF 272. The OAG moved to dismiss the Federal Countersuit on several dispositive grounds.[8] That motion was fully briefed and submitted on January 4, 2021, but before the motion was decided, on June 4, 2021, the NRA withdrew its complaint in the Federal Countersuit. Connell Ex. G, NYSCEF 273.

The NRA also moved to transfer, dismiss, or stay this Action on the basis that federal court would be a more convenient forum to litigate the OAG's claims. *See* NYSCEF 70-99, 133-141. In January 2021, the NRA's motions were denied by this Court. NYSCEF 211-215, 220.

The NRA also unsuccessfully applied to the Judicial Panel on Multidistrict Litigation (JPML) to transfer and consolidate four cases in the United States District Court for the Northern District of Texas. Connell Ex. H (JPML Order), NYSCEF 274. In February 2021, the JPML denied the NRA's application. *Id.*

On January 15, 2021, the NRA filed for bankruptcy in the United States Bankruptcy Court for the Northern District of Texas.[9] Following an eleven-day trial, on May 11, 2021, the court concluded: "there is cause to dismiss this bankruptcy case as not having been filed in good faith both because it was filed to gain an unfair litigation advantage and because it was filed to avoid a state regulatory scheme." Connell Ex. I at 2. The court found that "the primary purpose of the bankruptcy filing was to avoid potential dissolution" in this Action, *id.* at 26, which gave the court

[8] *See* OAG 12(b) motion papers, *NRA v. James*, 1:20-cv-00889 (N.D.N.Y.), ECF Nos. 19-20. A copy of the OAG's 12(b) motion papers is attached as Exhibit C to the Affirmation of Jonathan Conley in Support of the Attorney General's Opposition to the Defendants' Motions to Transfer, Stay, or Dismiss this Action. *See* NYSCEF 187.

[9] *In re National Rifle Association of America and Sea Girt LLC*, Jointly Administered, Case No. 21-30085-hdh11 (Bankr. S.D. Tex.) ("NRA Bankruptcy Proceeding"); Connell Ex. I (May 11, 2021 Order Granting Motions to Dismiss in NRA Bankruptcy Proceeding) at 8-9.

"great concern . . . because [the NRA's] purpose is to avoid dissolution that is being sought as a remedy in a state regulatory action," *id.* at 27. The Court further held that the NRA's purpose "was to deprive the [OAG] of the remedy of dissolution, which is a distinct litigation advantage" and not a good faith basis for seeking bankruptcy protection. *Id.* at 29.[10] The NRA did not appeal the court's order dismissing the bankruptcy. Connell Aff. ¶ 11.

D. The NRA's Answer and Counterclaims in this Action.

On February 23, 2021, the NRA answered the Complaint and filed seven Counterclaims against the Attorney General in her official and individual capacities under 42 U.S.C. § 1983, the New York State Constitution, and CPLR 3001. *See* NYSCEF 230.[11]

The First, Second, Third, and Fourth Counterclaims (collectively, the "Retaliation Counterclaims") allege that the Attorney General's investigation of the NRA and commencement of this Action constitute unconstitutional retaliation against the NRA and its members for engaging in political speech. *Id.* ¶¶ 44-89. The Fifth and Six Counterclaims (collectively, the "Selective-Enforcement Counterclaims") allege that the Attorney General's decision to bring the judicial dissolution claims in this action ("Dissolution Claims") constitutes selective enforcement of New York law in violation of the NRA's constitutional right to equal protection. *Id.* ¶¶ 90-110. The Seventh Counterclaim seeks a declaratory judgment that N-PCL §§ 1101 and 1102 ("Dissolution Statutes") would be unconstitutional as-applied to the NRA in this Action. *Id.* ¶¶ 111-116. The

[10] As discussed in Part I.A.2, *infra,* the bankruptcy court made several factual findings that support the OAG's claims in this Action and undermine the NRA's counterclaims that "but for" the alleged retaliatory motive of the Attorney General, this action would not have been filed.

[11] On June 4, 2021, the NRA withdrew its complaint in the Federal Countersuit, triggering the Attorney General's response to the NRA's counterclaims by June 24, 2021. See NYSCEF 230, 241.

NRA seeks damages, declaratory relief, and an injunction barring the Attorney General from bringing claims for judicial dissolution in this Action. *Id.* at 167-68.

The Counterclaims are contradicted by factual admissions in the NRA's Answer, *see* NYSCEF 230, which acknowledge much of the misconduct that gave rise to the investigation and commencement of this Action, including that:

- it funneled NRA executive travel and entertainment expenses through its former vendor, Ackerman McQueen, in violation of applicable accounting controls. *Id.* ¶ 5.
- it entered into a poison pill employment agreement with Mr. LaPierre. ¶ 419.
- its Executive Vice President and codefendant Wayne LaPierre had to reimburse the NRA for excess benefits related to Mr. LaPierre's private travel. ¶¶ 8, 145, 152, 159.
- it has made numerous payments to vendors outside of the existing contracts (in violation of the NRA Bylaws)—including vendors whose owner allowed Mr. LaPierre to use his yacht every summer for years. ¶ 166.
- whistleblowers raised concerns about its codefendants Wilson Phillips (former NRA CFO) and Joshua Powell (former Chief of Staff to Mr. LaPierre). ¶ 220.
- Mr. Phillips also took a trip on a yacht owned by the same person whose yacht Mr. LaPierre used, and that Mr. Phillips's trip had to be submitted for purported retroactive ratification by the NRA's Audit Committee. ¶¶ 221, 228.
- the Audit Committee did not review Mr. Phillips' extremely lucrative no-show consulting agreement before his retirement. ¶ 233.
- Mr. Powell's employment was terminated for reasons including the misappropriation of NRA funds, and that Mr. Powell negotiated an agreement with a vendor that had employed his wife. ¶¶ 247, 257, 259.
- a senior advisor to Mr. LaPierre caused the NRA to pay approximately $18,000 for her son's wedding expenses. ¶ 288.

Mr. LaPierre similarly makes significant admissions in his answer. NYSCEF 226.

The OAG now moves to dismiss the Counterclaims in their entirety.

ARGUMENT

I. THE NRA'S ALLEGATIONS OF POLITICAL BIAS DO NOT STATE PLAUSIBLE CONSTITUTIONAL CLAIMS.

A. The NRA has failed to plead the elements of a First Amendment retaliation claim.[12]

To state a First Amendment retaliation claim, the NRA must adequately plead that "(1) [it] has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by [its] exercise of that right; and (3) the defendant's actions caused [it] some injury." *Dorsett v. City of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013). With respect to the third element, "[i]t is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must *cause* the injury. Specifically, it must be a 'but-for' cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019).

The NRA fails to adequately plead all three elements. *First*, the wrongdoing at issue here is not constitutionally protected activity. *Second*, the NRA has not pleaded—nor could it—that illegitimate animus was the but-for cause of the Attorney General's investigation or request for judicial dissolution. The NRA's allegations cannot overcome the "presumption of regularity" afforded the Attorney General's actions. *See Hartman v. Moore*, 547 U.S. 250, 263 (2006). *Third*,

[12] The analysis for a claim of retaliation under Article I, Section 8 of the New York State Constitution is identical to the analysis under the First Amendment to the U.S. Constitution. *See Rotundo v. Village of Yorkville*, 2011 WL 838892, at *4 n.8 (N.D.N.Y. Mar. 4, 2011) ("While the NYS Constitution generally affords greater protection than the United States Constitution with regard to speech . . . claims of free speech retaliation under Article I, section 8 of the New York State Constitution are governed by the same principles that apply under the First Amendment to the United States Constitution.") (citation omitted); *Massaro v. Dep't of Educ.*, 121 A.D.3d 569, 569-70 (1st Dep't 2014) (citing to Second Circuit authority for analysis of Federal and State Constitution retaliation claims). Because the analysis for the two provisions is the same, and for the sake of brevity, discussion of the First Amendment Retaliation Counterclaims applies equally to the NRA's Article I, Section 8 counterclaims.

the NRA has failed to plead that it suffered any injury as a result of the alleged retaliation.

1. Fraud and illegal conduct are not protected by the First Amendment.

The NRA fails to support its Retaliation Counterclaims with allegations of any protected conduct at issue. The NRA does not contend, and could not, that the conduct at issue in this Action—misrepresentations, fraud, self-dealing, looting of charitable assets, waste, false filings—is protected. There is no constitutionally protected right to use charitable funds on no-show consulting contracts, for lavish expenditures for insiders, and other violations of applicable law. *See Illinois ex rel. Madigan*, 538 U.S. 600, 612 (2003) ("[T]he First Amendment does not shield fraud."); *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 710 (S.D.N.Y. 2018) ("Ensuring that 'accurate information' reaches the market and the public is consistent with a *bona fide* investigation—not retaliation."); *see also St. German of Alaska E. Orthodox Cath. Church v. United States*, 840 F.2d 1087, 1093 (2d Cir. 1988) (holding that First Amendment did not shield donors who participated in tax fraud scheme from having their names disclosed to the IRS during investigation). The NRA's conduct at issue here is thus not protected by the First Amendment.

2. The NRA has not pleaded "but for" causation, as it must, because no First Amendment claim can arise from an objectively justified investigation.

The Retaliation Counterclaims also fail because the NRA has not pleaded—nor could it—that the Attorney General's investigation and subsequent request for judicial dissolution were unjustified. The Supreme Court has held that to state a prima facie First Amendment retaliation claim, a plaintiff must plead and prove that the action was independently unjustified and, "but for" the retaliatory motive, the action would not have been taken. *Nieves*, 139 S. Ct. at 1722 (citing *Hartman*, 547 U.S. at 259-260).

The requirement of "but for" causation is consistent with the "presumption that a prosecutor has legitimate grounds for the action he takes." *Hartman*, 547 U.S. at 263 (citing *Wayte*

v. United States, 470 U.S. 598, 607-608 (1985)). As a matter of law, allegations of an improper motive cannot raise a plausible claim of bad faith when the complaint also alleges an "obvious alternative explanation" for the conduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009) (internal quotation marks and citation omitted).

Here, even on a motion to dismiss, the pleadings are replete with evidence of pervasive and persistent illegal conduct by and within the NRA. The NRA's pleadings admit that the NYAG's investigation and complaint were not baseless. The NRA's own internal inquiry led it to terminate relationships with certain executives and vendors "who did not welcome the NRA Board's push for additional documentation and transparency"—two of whom are defendants in this Action, and one of whom the NRA admits "was fired by the NRA for many of the same issues alleged in the Complaint." Counterclaims ¶¶ 7, 15, 43. And instead of moving to dismiss the Complaint on substantive grounds, the NRA filed Counterclaims challenging only the Dissolution Claims. The NRA has not challenged the propriety of the other 16 causes of action in the Complaint. By admitting that many allegations in the Complaint are, in fact, true, and not contesting that the Complaint states causes of action against it, the NRA cannot establish but-for causation.

It bears noting that the NRA's admissions dovetail with the court's findings in the NRA Bankruptcy Proceeding that the governance failures, abuse of authority by NRA leadership, and misconduct—which are the subject of this Action—were established at trial. For example, the bankruptcy court noted "the surreptitious manner in which [NRA Executive Vice President, Wayne] LaPierre obtained and exercised authority to file bankruptcy for the NRA," finding the decision to "[e]xclude[] so many people from the process of deciding to file for bankruptcy, including the vast majority of the board of directors, the chief financial officer, and the general counsel, … nothing less than shocking …." Connell Ex. I at 34. In addition to finding that the

NRA petition was filed to gain an unfair litigation advantage in this Action, the Court found that the petition would inure to the benefit of Mr. LaPierre, the ultimate decisionmaker on the bankruptcy and a defendant in this Action. *Id.* at 29. Citing the "cringeworthy" evidence of the NRA's past and ongoing misconduct, the court dismissed the bankruptcy proceeding, holding that:

> should the NRA file a new bankruptcy case, this Court would immediately take up some of its concerns about disclosure, transparency, secrecy, conflicts of interest of officers and litigation counsel, and the unusual involvement of litigation counsel in the affairs of the NRA, which could cause the appointment of a trustee out of a concern that the NRA could not fulfill the fiduciary duty required by the Bankruptcy Code for a debtor in possession.

Id. at 37.

In sum, the NRA cannot use the First Amendment to enjoin or receive damages because of an objectively appropriate investigation that led to a well-supported enforcement action by claiming that the Attorney General was acting with political motivations.

3. The NRA fails to plead that illicit animus caused it injury.

The NRA has also failed to set forth facts to establish an actionable injury due to the Attorney General's investigation and request for judicial dissolution. *Dorsett*, 732 F.3d at 160. The NRA's only allegation of injury is the conclusory assertion that the investigation and request for judicial dissolution "threaten[] to destroy the NRA and chill the speech of the NRA, its members, and other constituents, including like-minded groups and their members." Counterclaims ¶ 42. These allegations of an abstract threat are not sufficient to make out a prima facie case. Given the NRA's assertions that it is continuing activities, it has not suffered an actionable injury. *Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001).

To adequately plead a First Amendment injury, the NRA must show that it "has sustained or is immediately in danger of sustaining a direct injury as the result of [the] action." *Laird v. Tatum*, 408 U.S. 1, 13 (1972). No such immediate danger has been, nor can be, alleged here.

Dissolution depends on the outcome of the litigation in this Court, where the NRA will have due process to defend against the Attorney General's claims. *See* N-PCL §§ 1101, 1102 and 1109(b).

The NRA's reference to a "reputational harm" is also inadequate. Counterclaims ¶¶ 54, 67. Allegations of defamation are insufficient to establish an injury for a First Amendment retaliation claim. *See Zherka v. Amicone*, 634 F.3d 642, 646 (2d Cir. 2011). For these reasons, the NRA's Retaliation Counterclaims fail.

B. The NRA fails to state a plausible selective prosecution claim.[13]

The Fifth and Sixth Counterclaims allege selective prosecution, but only for the Dissolution Claims. The NRA does not argue that any of the other claims in the Action violate its rights, implicitly conceding that they are pled in good faith. *See* NYSCEF 230 ¶¶ 626-645.

The crux of the NRA's argument is that the OAG has never before sought dissolution of an organization "based solely on alleged self-dealing or related-party transactions engaged in by corporate executives." Counterclaims ¶ 27. The premise of this argument is false. The Complaint goes far beyond isolated instances of misconduct by rogue officers. The Complaint details decades of wrongdoing by entrenched leadership who corrupted the organization to protect their power and privilege, to the detriment of the organization's finances, mission and reputation. As described above, the Complaint alleges the diversion of millions of dollars away from the NRA's charitable mission for private benefit, absent or overridden internal financial controls, false filings to state

[13] The analysis for the NRA's claim of selective enforcement under Article I, Section 11 of the New York State Constitution is identical to the analysis under the Fourteenth Amendment to the U.S. Constitution. *See Masi Mgmt*., *Inc*. *v. Town of Ogden*, 180 Misc. 2d 881, 897 (Sup. Ct. Monroe Cnty. 1999), *aff'd*, 273 A.D.2d 837, 709 N.Y.S.2d 734 (2000) (applying same standard to plaintiff's State and Federal selective enforcement claims). Because the analysis for the two provisions is the same, and for the sake of brevity, discussion of the Fourteen Amendment selective enforcement Counterclaim applies equally to the NRA's Article I, Section 11 counterclaim.

and federal regulators to obscure the abuse, lucrative and wasteful no-show contracts awarded to ensure loyalty, and repeated retaliation against reformers.

A selective enforcement claim requires a plaintiff to establish "(1) that it was treated differently from other similarly situated businesses and (2) that such differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 40 (2d Cir. 2018) (internal quotation marks, citation, and edit omitted). Given the Attorney General's authority and discretion to seek dissolution and the absence of true comparators, the NRA's allegations fail on both prongs.

1. The Attorney General is authorized to seek dissolution in appropriate cases and her decisions are entitled to a presumption of good faith.

The Dissolution Claims are based on the findings of an extensive investigation and are brought under the OAG's well-established statutory authority. The Complaint speaks for itself and the OAG is entitled to a presumption that it is acting in good faith. *United States v. Bassford*, 812 F.2d 16, 19 (1st Cir. 1987). The OAG, in a wholly appropriate use of its discretion, determines which remedies to seek. It is beyond dispute that the Attorney General has broad discretion and may seek the statutory remedy of dissolution from this Court where an entity meets the statutory standards for dissolution as determined by the Legislature. *People v. Oliver Schs., Inc*., 206 A.D.2d 143, 148 (4th Dep't 1994) (noting the Attorney General's discretion).

Further, whether dissolution is warranted is ultimately a decision for this Court: while the OAG may commence the action, it is ultimately this Court's statutory duty to determine whether dissolution is in the "interest of the public," N-PCL 1109(b)(1), and in the interest of the members. N-PCL 1109(b)(2). *See Matter of Inzer v. W. Brighton Fire Dep't, Inc.*, 173 A.D.3d 1826, 1828

(4th Dept. 2019) (upholding a determination to dissolve the entity where the court properly considered the "paramount" issue of the benefit of dissolution to the members).

2. The NRA has failed to allege that it was treated differently than similarly situated charities.

To survive a motion to dismiss, the NRA must set forth well-pled facts showing that it has been treated differently from others who were similarly situated. *Lanning v. City of Glens Falls*, 2017 WL 922058, at *8 (N.D.N.Y. Mar. 8, 2017), *aff'd*, 908 F.3d 19 (2d Cir. 2018). Similarly situated means "comparators whom a prudent person would think were roughly equivalent". *Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills*, 815 F. Supp. 2d 679, 696 (S.D.N.Y. 2011) (internal quotation marks omitted). The NRA's counterclaims fail because they do not, and cannot, cite to any true comparators.

First, the NRA incorrectly contends that an entity must be a "sham" to be subject to a claim for dissolution. The term "sham," or its equivalent, does not appear in the N-PCL statutes, nor in the relevant caselaw. The Attorney General's authority to seek dissolution of a corporation is a well-established statutory power, with the applicable standards [14] and the analogous article of the Business Corporation Law. *See* BCL § 1101 (mirroring N-PCL § 1101). Under N-PCL § 1101(a)(2), the Attorney General may bring an action seeking dissolution when "the corporation has … carried on, conducted or transacted its business in a persistently fraudulent or illegal manner, or by the abuse of its powers contrary to public policy of the state has become liable to be dissolved." *See People v. N. Leasing Sys., Inc*., 70 Misc. 3d 256, 278-79 (Sup. Ct. N.Y. Cnty. May 29, 2020). Under N-PCL § 1102(a)(2)(D), dissolution is appropriate where the "directors or

[14] Section 112 of the N-PCL, which enumerates the Attorney General's enforcement powers, provides that the Attorney General is authorized to maintain an action or special proceeding to dissolve a corporation that has acted beyond its capacity or power or to restrain it from carrying on unauthorized activities. N-PCL § 112(a)(1). Article 11 elaborates on the bases for dissolution.

members in control of the corporation have looted or wasted the corporate assets, have perpetuated the corporation solely for their personal benefit, or have otherwise acted in an illegal, oppressive or fraudulent manner." "Sham" is not the relevant legal standard.

The OAG's actions are consistent with past enforcement cases based on findings of grave breaches of fiduciary duty. For example, most recently, the OAG sought and obtained dissolution of the Trump Foundation, despite the fact that it conducted some legitimate charitable grant making. *People v. Trump*, 62 Misc. 3d 500, 516-18 (Sup. Ct. N.Y. Cnty. 2018). The OAG has filed additional complaints for dissolution based on pervasive mismanagement and repeated self-dealing. *See, e.g., People v. Fed'n of Multicultural Programs*, Index No. 0005671/2015 (Sup. Ct. Albany Cnty.) (obtaining dissolution of a provider of services to people with disabilities because of extensive financial mismanagement)[15]; *N. Leasing Sys., Inc*., 70 Misc. 3d 256 (in the for-profit context, granting the Attorney General's action for dissolution despite the defendant's claims that the allegedly abusive leases at the heart of the complaint were only a small fraction of defendant's total business).

The Court of Appeals decision cited by the NRA, *Leibert v. Clapp*, 13 N.Y.2d 313 (1963), Counterclaims ¶ 24, squarely supports the Attorney General's actions here. In *Leibert*, minority shareholders of a corporation brought a derivative suit to seek dissolution. The Court of Appeals held that the allegations of looting and coercion were sufficient to state a claim for dissolution, and, notably, that it *is not* a bar to the grant of dissolution that an entity is conducting legitimate activity. *Leibert*, 13 N.Y.2d at 316; *see also N. Leasing Sys., Inc.,* 70 Misc. 3d 256, at 278-79.

Second, the NRA has not identified a single comparable case involving the scope and range of wrongdoing at issue here, which spans years and was orchestrated by leadership that remains in

[15] Connell Ex. J, NYSCEF 276 (Order of Dissolution).

power. In fact, in all of its summaries of past OAG actions, the NRA does not cite a single instance of *nonenforcement* of a similarly-situated entity. *303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 695 (1979). Rather, the NRA's summaries demonstrate a robust enforcement regime, with each resolution achieved based on the unique facts of the case with consideration to a wide variety of factors, including the severity of the wrongdoing, available resources, and willingness of the organization to take meaningful remedial steps.

In other instances, including the matters cited by the NRA (all of which were settlements that followed the departure of the chief wrongdoers), the OAG has obtained other remedies, including permanent bars on fiduciary service and monitorships, as well as criminal convictions. *See e.g.,* OAG–Metropolitan Council on Jewish Poverty Settlement Agreement[16] (following felony convictions of Executive Director, mandating staff changes, adoption of new policies, and a multiyear monitorship of the organization); *In the Matter of the Investigation of the Richenthal Foundation*, Assurance of Discontinuance No. 18-034[17] (imposing permanent bars on fiduciary service, board reforms, training, and disclosure requirements).

The NRA mischaracterizes this Action as solely based on "executive misconduct." Counterclaims ¶ 34. To the contrary, the Complaint describes in great detail the OAG's findings of pervasive and persistent illegality. Additionally, unlike many of the executives involved in wrongdoing in past OAG actions, the chief wrongdoers at the NRA remain at the helm. Mr. LaPierre has been NRA Executive Vice President for more than 30 years, and as alleged in the Complaint, is not checked by the Board. As such, the NRA's citations to other OAG actions, which

[16] Connell Ex. K, NYSCEF 277.
[17] Connell Ex. L, NYSCEF 278.

the NRA characterizes as instances of executive misconduct where the Attorney General did not seek dissolution, are inapposite.

3. The Attorney General is not treating the NRA differently than similarly situated entities based upon impermissible considerations.

The NRA also fails to adequately plead that the Action is based on impermissible considerations. *See Exxon Mobile Corp.*, 316 F. Supp. 3d at 704 (finding that Exxon failed to establish a plausible inference that the Attorneys General of New York and Massachusetts did not act on a good-faith belief that Exxon may have violated state laws); *Trump*, 62 Misc. 3d at 509. Allegations of political disagreement cannot insulate the subject of an ongoing investigation from law enforcement activity. *In re FDIC*, 58 F.3d 1055, 1062 (5th Cir. 1995) (taking political considerations into account could not establish "bad faith or improper behavior" by agency officials). A rule that prosecutors and enforcement agencies cannot investigate any subject with whom they are alleged to disagree politically would allow subjects to avoid investigation for wrongdoing wholly unrelated to their protected activity.

The Attorney General's exercise of her prosecutorial discretion, including what discretionary relief to seek from this Court, is within her authority. Courts acknowledge that some deference to prosecutorial discretion is appropriate in State law enforcement decisions. *People v. Goodman*, 31 N.Y.2d 262, 268 (1972); *see also, 303 West 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 693 (1979) ("[L]atitude must be accorded authorities charged with making decisions related to legitimate law enforcement interests."); *People v. Utica Daw's Drug Co*., 16 A.D.2d 12, 21 (4th Dept. 1962) ("Selective enforcement may also be justified when a striking example or a few examples are sought in order to deter other violators, as part of a bona fide rational pattern of general enforcement, in the expectation that general compliance will follow and that further prosecutions will be unnecessary."). The extensive and serious allegations against the NRA in the

Complaint undermine the notion that bias was the sole motivating factor for the investigation and the proceeding.

The NRA's Selective Enforcement Counterclaims fail because they require this Court to ignore the detailed allegations of extensive and longstanding illegal conduct within the NRA and by current and former officers, the statutory standards for dissolution and the Attorney General's legal discretion to seek an appropriate remedy.

II. THE NRA LACKS STANDING TO ASSERT A CLAIM ON BEHALF OF MEMBERS FOR VIOLATION OF THEIR ASSOCIATIONAL RIGHTS.

A. The NRA cannot bring a Section 1983 claim on behalf of its members.

The NRA's constitutional claims "based upon its members' exercise of association rights" afforded by the First Amendment, Counterclaim Three, fails under established precedent. The Second Circuit clearly held in *Nnebe v. Daus,* 644 F.3d 147, 156 (2d Cir. 2011): "[I]t is the law of this Circuit that an organization does not have standing to assert the rights of its members in a case brought under 42 U.S.C. § 1983." *See also N.Y. State Citizens' Coal. for Children v. Velez*, 629 F. App'x 92, 93 (2d Cir. 2015).

The narrow exception for claims of abridgment of members' right of association is inapplicable here. The exception requires an organization to show that the challenged action threatens the very ability of both the organization and its members to assemble and carry out First Amendment protected activities. *See Aguayo v. Richardson*, 473 F.2d 1090, 1100 (2d Cir. 1973) (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459–460 (1958)).

Accordingly, standing hinges on the right of organizations to oppose conduct which has "adverse effects" on the right of the collective exercise of protected First Amendment activity. *Aguayo*, 473 F.2d at 1100; *Capital Associated Indus., Inc. v. Stein*, 283 F. Supp. 3d 374, 387–88 (M.D.N.C. 2017), *aff'd*, 922 F.3d 198 (4th Cir. 2019); *Nassau & Suffolk Cty. Taxi Owners Ass'n,*

Inc. v. State, 336 F. Supp. 3d 50, 71 (E.D.N.Y. 2018); *Am. Charities for Reasonable Fundraising Regulation, Inc. v. Shiffrin*, 46 F. Supp. 2d 143, 153 (D. Conn. 1999), *aff'd*, 205 F.3d 1321 (2d Cir. 2000). Where an organization cannot establish an injury to its own and its members' right of association impacting its ability to engage in First Amendment protected activities, it lacks standing under this exception. *See Capital Associated Indus., Inc.*, 283 F. Supp.3d at 387–88; *Stauber v. City of New York*, 2004 WL 1593870, at *14 (S.D.N.Y. Jul. 16, 2004); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

The NRA has not alleged specific facts (as distinct from conclusory assertions) showing that it and its members have or imminently will have their associational rights violated. *Shiffrin*, 46 F. Supp. 2d at 152-53. Rather, the Counterclaims cite the NRA's continuing successful association and advocacy activities, claiming it is "America's leading provider of gun-safety and marksmanship education" and "the foremost defender of the Second Amendment…. The NRA has over five million members, and its programs reach millions more." Counterclaims ¶ 1. This is not enough to establish organizational standing under § 1983. Accordingly, the Third Counterclaim must be dismissed.

B. The NRA cannot bring a claim on behalf of its members under the New York State Constitution.

For similar reasons, the NRA also lacks standing to assert an associational-rights claim under the New York State Constitution. *See* Counterclaim Four. To establish standing, the NRA "must show that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members." *Uhlfedler v. Weinshall*, 47 A.D.3d 169, 181 (1st Dep't 2007) (internal quotation marks omitted). Thus, the NRA must establish that one of its members could show

"'injury in fact,' meaning that [the member] will actually be harmed by the challenged [governmental] action." *Id*. (internal quotation marks omitted).

The NRA previously argued to this Court when its own members tried to intervene in this Action that they lacked standing. *See* NYSCEF 177 (NRA letter objecting to member's request to intervene pursuant to N-PCL § 1104). Moreover, the NRA has not pleaded any facts showing that its members have or will suffer any harm to their associational rights by the fact of the Attorney General's lawsuit. At best, the NRA's claim is that the Dissolution Claims will harm its members' associational rights, but this is merely duplicative of the NRA's flawed as-applied constitutional challenge to the Dissolution Statutes. *See supra* Part III.

For these reasons, the NRA lacks standing to bring Counterclaims Three and Four.[18]

III. THE NRA'S AS-APPLIED CHALLENGE TO NOT FOR PROFIT CORPORATION LAW §§ 1101 AND 1102 FAILS TO STATE A CLAIM.

In its Seventh Counterclaim, the NRA seeks an order declaring that the "allegations of [NRA] executive misconduct do not constitute corporate fraud or criminality and that [N-PCL] Sections 1101 and 1102 are unconstitutional as-applied to the NRA absent such a showing." Counterclaims ¶ 116. This claim fails because the Dissolution Statutes as applied to the NRA are facially neutral and unrelated to the suppression of free expression.

The NRA wrongly argues that strict scrutiny applies here because it engages in unspecified "constitutionally protected activity." Counterclaims ¶ 37. At most, the Dissolution Statutes are subject to the intermediate scrutiny test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). The *O'Brien* test applies where, as here, the challenged action concerns a regulation that is "unrelated to the suppression of expression." *Texas v. Johnson*, 491 U.S. 397, 407 (1989). There

[18] Even if the NRA had standing to bring associational claims on behalf of its members, which it does not, those claims nevertheless fail for the same reasons its other First Amendment retaliation claims fail. *See infra* Part I.A.

is no question that the Dissolution Statutes are facially neutral and do not regulate expression protected by the First Amendment.

The four-part test in *O'Brien* provides: "[A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial government interest; [3] if the government interest is unrelated to the suppression of free expression; [4] and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. The Dissolution Statutes, as applied to the NRA, satisfy all four requirements.

The first, second, and third prongs cannot seriously be disputed. It is settled law that the Attorney General is empowered to regulate not-for-profits to advance the important interest in "preventing fraud and self-dealing in charities." *Citizens United,* 882 F.3d at 384. The Dissolution Statutes further that interest by authorizing the Attorney General to seek dissolution of a charity that is systematically and persistently violating charities laws. There can be no serious assertion that "the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The Dissolution Statutes are content neutral, and the NRA has not alleged that they were enacted to suppress constitutionally protected activity.

Regarding the fourth prong, the State's interest in preventing fraud and abuse of the charitable form would be materially compromised without the ability to petition courts to dissolve persistent and systematic offenders like the NRA. The Attorney General is not required, as the NRA erroneously contends, to demonstrate that dissolution is "the least restrictive means of achieving a compelling state interest," Counterclaims ¶ 37 (internal quotation marks and citation

omitted). Discussing the fourth *O'Brien* factor, the Supreme Court explained, the challenged statutory application:

> must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least-restrictive or least-intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the regulation . . . promotes a substantial government interest that would be achieved less effectively absent the regulation.

Ward, 491 U.S. at 798-99 (discussing the fourth *O'Brien* factor) (internal quotation marks and citations omitted).

The Attorney General is not summarily dissolving the NRA, but rather is seeking judicial action, in the discretion of this Court, to dissolve the organization under the neutral standards of the Dissolution Statutes, each of which takes into account the broader interests of the public and the NRA members. The Attorney General's direct claim under N-PCL § 1101 must show that the NRA's misconduct "has produced, or tends to produce, injury to the public. The transgression must not be merely formal or incidental, but material and serious, and such as to harm or menace the public welfare." *People v. Oliver Schools, Inc.*, 206 A.D.2d 143, 145 (4th Dep't 1994) (interpreting BCL § 1101, from which N-PCL § 1101 is derived) (quoting *People v. North River Sugar Refining Co.*, 121 N.Y. 582, 609 (1890)). The Attorney General's derivative claim under N-PCL § 1102 must prove that the "directors or members in control of [the NRA] have looted or wasted the corporate assets, have perpetuated the corporation solely for their personal benefit, or have otherwise acted in an illegal, oppressive or fraudulent manner." N-PCL § 1102(a)(2)(D); 112(a)(7). In addition, the Court must ultimately decide whether dissolution of the NRA under N-PCL § 1101 is in the best interest of the public, or under N-PCL § 1102 is in the best interest of its members. *See* N-PCL § 1109(b)(1) & (b)(2).

The Attorney General is confident that the allegations in the Complaint of persistent and systemic waste, lack of oversight, false filings, conflicts of interest, related party transactions,

financial mismanagement, and whistleblower retaliation that the NRA perpetuated over the course of years warrant dissolution of the organization. *See* NYSCEF 11 ¶¶ 560-579. But it will be for this Court to decide after a trial whether the Attorney General has met her burden, and whether dissolution of the NRA is in the public's and its members' interests. *See* N-PCL § 1109(b). Therefore, the Dissolution Statutes are narrowly tailored to serve the State's legitimate interest in preventing systematic abuse of the charitable form. For these reasons, the NRA's as-applied challenge to the Dissolution Statutes fails to state a claim for which relief may be granted and should be dismissed.

IV. THE NRA'S DIRECT CLAIMS UNDER THE NEW YORK STATE CONSTITUTION FAIL.

In addition to the deficiencies discussed in Part I, *supra,* the NRA's direct claims under Article I, Sections 8, 9, and 11 of the New York State Constitution—*see* Counterclaims Two, Four, and Six—fail because they are duplicative of its § 1983 claims.[19] *See Felmine v. N.Y.C.*, 2012 WL 1999863, at *6 (E.D.N.Y. June 4, 2012) (noting that private cause of action under New York Constitution is only available when there are no alternative remedies and collecting cases); *see also Martinez v. City of Schenectady*, 97 N.Y.2d 78, 83 (2001) (holding that damages claim under State Constitution is only available in certain situations where the plaintiff's remedies are "damages or nothing").

The NRA's State Constitutional claims are exact copies of its § 1983 claims. *Compare* Counterclaims One, Three, and Five *with* Counterclaims Two, Four, and Six. Therefore, relief under the State Constitution is not necessary to "ensure full realization of [the NRA's] asserted constitutional rights." *Martinez*, 97 N.Y.2d at 84; *see also Sullivan v. Metro. Transit Auth. Police Dept.*, 2017 WL 4326058, at *10 (S.D.N.Y. Sept. 13, 2017) (dismissing freedom of speech claim

[19] As set forth in Parts I, II, and V, the NRA's § 1983 claims fail for several independent reasons.

under New York State constitution because plaintiff's § 1983 First Amendment retaliation cause of action provided an adequate alternative remedy). Accordingly, Counterclaims Two, Four, and Six should be dismissed.

V. THE ATTORNEY GENERAL IS ENTITLED TO ABSOLUTE AND QUALIFIED IMMUNITY.

A. The NRA's claims for damages against the Attorney General in her official capacity are barred by sovereign immunity.

The doctrine of sovereign immunity bars "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury." *Giaquinto v. Comm'r of N.Y. State Dep't of Health*, 11 N.Y.3d 179, 187 (2008). While the State of New York has consented to suit in its own courts for certain claims, the New York Court of Claims has exclusive jurisdiction over claims for money damages against state officials acting in their official capacities. *See* N.Y. Const. art. VI, § 9; Ct. Cl. Act § 8; *Morell v. Balasubramanian*, 70 N.Y.2d 297, 300 (1987); *Thomas v. Tarpley*, 268 A.D.2d 258, 258 (1st Dep't 2000). For this reason, a damages claim against a state officer in her official capacity "is one of which the Supreme Court does not have jurisdiction; the claim can be prosecuted only in the Court of Claims." *Automated Ticket Sys*., *Ltd*. *v*. *Quinn*, 455 N.Y.S.2d 799, 800 (1982), *aff'd*, 58 N.Y.2d 949 (1983). Further, state officials sued in their official capacities are not "persons" subject to suit under § 1983. *Id.* (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70-71 (1989)).

Therefore, the NRA's claims for damages against the Attorney General in her official capacity must be dismissed under CPLR 3211(a)(2) for lack of subject matter jurisdiction.[20]

[20] To the extent the NRA seeks retroactive relief separate from monetary damages, it is also barred by sovereign immunity. *See Clark v. DiNapoli*, 510 F. App'x 49, 51 (2d Cir. 2013) (noting that only prospective relief falls within the *Ex Parte Young* exception to sovereign immunity).

B. The Attorney General is entitled to absolute immunity for her decision to sue the NRA.

The Attorney General is entitled to absolute immunity from monetary damages for her decision to commence a suit against the NRA. *See, e.g., Spear v. Town of West Hartford*, 954 F.2d 63, 66 (2d Cir. 1992). State executive officers are entitled to absolute immunity from § 1983 damages in suits in connection with the initiation of civil litigation. *Id.*; *see also Butz v. Economou*, 438 U.S. 478, 516–17 (1978); *Cornejo v. Bell*, 592 F.3d 121, 127 (2d Cir. 2010); *NRA v. Cuomo*, No. 1:18-CV-0566, 2021 WL 964119, at *6 (N.D.N.Y. Mar. 15, 2021).

Where absolute immunity applies, an official's motivations for initiating an action are irrelevant. *Bernard v. Cnty of Suffolk*, 356 F.3d 495, 504 (2d Cir. 2004) ("partisan prosecutions, pursued without probable cause, are reprehensible, but such motives do not necessarily remove conduct from the protection of absolute immunity"); *see also Newton v. City of New York*, 738 F. Supp. 2d 397, 404 (S.D.N.Y. 2010).

Here, the Attorney General's decision to commence proceedings against the NRA is protected by absolute immunity regardless of her motivation and any request for damages premised on such commencement fails.

C. The NRA's claims are barred by qualified immunity.

Qualified immunity is protection from suit, not just liability. The question whether the doctrine applies should be decided at the earliest possible opportunity. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) Under the federal qualified immunity doctrine, government officials are protected from liability for civil damages where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson,* 555 U.S. at 231 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

Here, given the Attorney General's obligation to oversee not-for-profit corporations and

the indicators of illegal conduct by and within the NRA, it was objectively reasonable for the Attorney General to commence an investigation and a civil action against the NRA without concern that such action would violate a clearly established right. *See Winfield v. Trottier*, 710 F.3d 49, 57 (2d Cir. 2013). As such, she is entitled to federal qualified immunity.

Official immunity under New York law is "considerably greater" than that offered under federal law, *Hirschfeld v. Spanakos*, 909 F.Supp. 174, 180 (S.D.N.Y. 1995), and provides immunity for state employees in the performance of conduct that involves "the exercise of reasoned judgment which could typically produce different acceptable results." *Tango v. Tulevech,* 61 N.Y.2d 34, 40-41 (1983). The questions of whether to pursue an investigation or commence a civil action are quintessential examples of actions that require "reasoned judgement" on the part of officials and could result in various satisfactory outcomes. *See Nash v. City of New York*, 2003 WL 22455641 at *3 (Civ. Ct. N.Y. Cnty. Oct. 21, 2003). The Attorney General is thus entitled to qualified immunity under state law.

CONCLUSION

For the foregoing reasons, the NRA's Counterclaims should be dismissed in their entirety with prejudice.

Dated: June 24, 2021
New York, New York

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Attorney Certification Pursuant to Commercial Division Rule 17

I, Monica Connell, an attorney duly admitted to practice law before the courts of the State of New York, certify that the Memorandum of Law in Support of the Attorney General's Motion to Dismiss the NRA's Counterclaims complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because the memorandum of law contains 8,971 words, excluding the parts exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law and affirmation.

Dated: June 24, 2021
New York, New York

/s/ Monica Connell
Monica Connell