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,	§	**INDEX NO. 451625/2020**
v.	§	Hon. Joel M. Cohen
THE NATIONAL RIFLE ASSOCIATION et al.,	§	
Defendants.	§	

CONSOLIDATED REPLY MEMORANDUM OF LAW BY DEFENDANTS THE NATIONAL RIFLE ASSOCIATION, WAYNE LAPIERRE, AND JOHN FRAZER IN SUPPORT OF THEIR MOTIONS TO DISMISS, TRANSFER OR STAY

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PRELIMINARY STATEMENT

Notwithstanding its 17 additional causes of action, this action is fundamentally one for dissolution of the largest civil rights organization in the country, whose very mission is abhorrent to the New York State Office of the Attorney General ("the NYAG"). In fact, this action is a mere reflection of the NYAG's vendetta against the National Rifle Association of America (the "NRA") and raises factual and legal questions that are already being adjudicated in lawsuits previously filed by the NRA (which are also the subject of a federal multidistrict litigation proceeding).[1] This action raises constitutional concerns so significant that both the ACLU[2] and 16 state attorneys general[3] have expressed alarm about the NYAG's actions. Moreover, like everything else about this lawsuit, the NYAG's choice of venue is contrived and political: New York's Not-for-Profit Corporation Law (the "N-PCL") mandates that the NYAG's dissolution claim be brought in Albany, not Manhattan.[4]

Where, as here, venue is improperly placed, the court need not and should not reach any other issue.[5] Instead, "orderly procedure and comity mandate" that all substantive matters,

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[1] *See In re National Rifle Association Business Expenditures Litig.*, MDL No. 2979 (J.P.M.L. 2020).

[2] *See* David Cole, *The NRA Has a Right to Exist*, WALL ST. J. (Aug. 26, 2020), https://www.wsj.com/ articles/the-nra-has-a-right-to-exist-11598457143 ("The American Civil Liberties Union rarely finds itself on the same side as the National Rifle Association . . . [s]till, we are disturbed by New York Attorney General Letitia James's recent effort to dissolve the NRA. . . . You may have your own opinions about the NRA, but all Americans should be concerned about this sort of overreach.")

[3] *See NRA v. James*, Civ. No. 1:20-cv-00889-MAD-TWD (Dkt. No. 25) (Brief of States of Arkansas, Alaska, Georgia, Idaho, Mississippi, Oklahoma, Kansas, Kentucky, Louisiana, Missouri, Ohio, South Carolina, South Dakota, Texas, Utah and West Virginia as *Amici Curiae* in Support of Plaintiff and in Opposition to Dismissal) ("The New York AG's actions threaten the civil rights of five million members, including citizens of the *Amici* states.)

[4] N-PCL § 1110; *see* discussion *infra* at 4-7 (Section I).

[5] Indeed, at least one decision suggests that the purported placement of venue in a district that runs afoul of a statutory mandatory venue provision not only robs the court of venue, but of

including the NRA's dismissal and *forum non conveniens* arguments, be deferred to the transferee court.[6] Venue is particularly salient in this case. When it enacted N-PCL § 1110, the legislature conferred an important substantive right on entities, like the NRA, that face attacks on their very existence. Notwithstanding ordinary venue considerations (such as the convenience of the plaintiff) which would impact an ordinary lawsuit, a judicial dissolution action ***must*** be brought in the target entity's own backyard—namely, the county of its ***designated*** principal office. Because the NRA lacks an office in the State of New York, the venue analysis properly focuses on other addresses designated by the NRA in documents filed with the Secretary of State. Those addresses lie in Albany.

Moreover, even if venue were proper in this Court, this case would be properly stayed or dismissed pursuant to CPLR 327 and CPLR 2201. In its Opposition ("Opp."), the NYAG does not dispute that its claims overlap with those being litigated in federal court. Rather, it insists that "vital" state interests in the "uniform development and interpretation" of state not-for-profit law mandate a state forum.[7] In truth, if the NYAG favored a uniform, coherent enforcement approach, it would never have brought this lawsuit, which diverges wildly from how state courts have

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jurisdiction. *See People v. Venornum*, 34 Misc.3d 1221(A) (Sup. Ct. Essex Cnty. 2012) ("The Supreme Court of Essex County being a superior court and not a 'district court' or 'local criminal court' in which a misdemeanor complaint may be filed to commence a criminal action, and the charges asserted in the accusatory instrument . . . having allegedly occurred in Franklin County, the misdemeanor complaint . . . ***must be and hereby is dismissed sua sponte for lack of jurisdiction and improper venue***. Because courts should abide by 'the cardinal principle of judicial restraint—if it is not necessary to decide more—it is necessary not to decide more' [and] "this Court will not address any defects in the accusatory instrument." (emphasis added) (citing *PDK Laboratories, Inc. v. U.S. Drug Enforcement Administration*, 362 F.3d 786, 799 (D.D.C. 2004) (Roberts, J., concurring) and *People v. Carvajal*, 6 N.Y.3d 305, 316 (2005) ("We are bound, of course, by principles of judicial restraint not to decide questions unnecessary to the disposition of the appeal.").

[6] *See, e.g.*, *Romero v. City of New York*, 59 Misc. 3d 903, 905 (Sup. Ct. Bronx Cnty. 2018).

[7] Opp. at 13.

interpreted the N-PCL, and how the NYAG has enforced it, for over two decades.[8] Moreover, the NRA is not seeking an alternate forum outside New York, but rather a federal one within New York.[9] Contrary to the NYAG's contention, federal courts are perfectly capable of adjudicating

[8] As illustrated extensively in the NRA's amended federal complaint against James in support of its Equal Protection claim, *see NRA v. James*, Civ. 1:20-cv-00889 (MAD)(TWD) (Dkt. No. 13 ¶¶ 31-44), since at least 1999, NYAG has not sought dissolution of any non-profit on the basis of executive looting, negligence by boards that allowed executive looting to occur, or even where a board was aware of and allowed the looting to occur. Instead, actions were maintained against the executives and reforms were implemented via settlements with the non-profits. *Compare, e.g.*, Press Release, *New York Attorney General Sues Former NARAL President for Siphoning Over $250,000 from Charity for Personal Use* (Jun 29, 2012), https://ag.ny.gov/press-release/2012/office-attorney-general-sues-former-naral-president-siphoning-over-250000-charity; Press Release, *A.G. Schneiderman Obtains $950k Settlement from Former National Arts Club Leaders for Years of Self-Dealing* (Jul. 10, 2013), https://ag.ny.gov/press-release/2013/ag-schneiderman-obtains-950k-settlement-former-national-arts-club-leaders-years; Press Release, *A.G. Schneiderman Sues to Remove Board of Thoroughbred Retirement Foundation That Put Horses in Danger and Finances in Ruin* (May 3, 2012), https://ag.ny.gov/press-release/2012/ag-schneiderman-sues-remove-board-thoroughbred-retirement-foundation-put-horses; Press Release, *A.G. Schneiderman Announces $1.025 Million Settlement with Trustees of Nonprofit that Squandered Assets Intended for Underprivileged Children* (Apr. 29, 2015), https://ag.ny.gov/press-release/2015/ag-schneiderman-announces-1025-million-settlement-trustees-nonprofit-squandered. NYAG has only sought dissolution of non-profits that were themselves frauds or fronts for criminal activity. *See, e.g.*, *New York Attorney General Schneiderman Announces $1 Million Settlement with Officials of So-Called Children's Leukemia Foundation and Their Auditor, National Association of Charity Officials,* NASCO (Dec. 17, 2015), https://www.nasconet.org/2015/12/new-york-attorney-general-schneiderman-announces-1-million-settlement-with-officials-of-so-called-childrens-leukemia-foundation-and-their-auditor/ (Leukemia Foundation spent less than one percent of revenue on charitable purpose); Bill McAllister, *N.Y. Judge Places Tobacco Institute Under Control of Receiver*, WASH. POST (May 3, 1998), https://www.washingtonpost.com/archive/politics/1998/05/03/ny-judge-places-tobacco-institute-under-control-of-receiver/fd082867-5a96-4f8b-9d7c-202d4eb88701/ (tobacco industry non-profit was used to peddle disinformation about the health effects of smoking); *People v. Zymurgy, Inc.*, 233 A.D.2d 178 (1 Dept. 1996) (non-profit was a front for the child pornography outfit NAMBLA). New York's highest court has ruled that dissolution under the analogous Business Corporation Law section is only available in cases of "egregious" conduct, which "go far beyond charges of waste, misappropriation and illegal accumulations of surplus, which might be cured by a derivative action for injunctive relief and an accounting." *Liebert v. Clapp*, 13 N.Y. 2d 313, 316 (1963).

[9] Although it is possible that the multidistrict litigation panel would consolidate the NRA's federal lawsuit for discovery purposes in another district, the matter would revert to Albany for trial. *See* 28 U.S.C § 1407(a) ("Each action so transferred shall be remanded by the panel at or

state-law dissolution claims, and there are compelling reasons for an Article III court to intercede where a partisan state attorney general seeks to dissolve a political enemy. Additionally, even if the NRA's federal lawsuit were not the first-filed case (it is), the federal forum proposed by the NRA would be the better place to adjudicate both sets of claims. There is no question that the merits of the NYAG's N-PCL claims and the NRA's constitutional claims are inextricably intertwined. Given the prominence of the constitutional issues raised and the dispersion of witnesses and documents throughout the country, an Article III court is best suited to resolve both matters. This is particularly true in light of the efficiencies that would arise from multidistrict consolidation with other, already-pending federal lawsuits that raise the same issues.

Accordingly, the Court should grant Defendants' motions to dismiss or, in the alternative, to transfer or stay.

ARGUMENT

I. The Only Permissible State-Court Venue for This Action Is Albany County.

Attempting to evade the mandatory venue provision of N-PCL § 1110, the NYAG rehashes futile red herrings raised in its original objection[10] and dispatched in the NRA's opening brief. In sum, the NYAG insists that the NRA's principal office should be deemed to be in New York County because the NRA filed documents there in 1871, and because the Secretary of State's website says so.[11] As the NRA demonstrated in its opening brief—and the NYAG does not, and

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before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.")

[10] Dkt. No. 108.

[11] Opp. at 19-20. The NYAG emphasizes the words "Initial DOS Filing Date: November 20, 1871" and "County: New York" on the Secretary of State's website while ignoring that, just below that, the website states "Selected Entity Address Information" and twice lists "80 State St., Albany, New York."

cannot, dispute—the law at the time of the NRA's incorporation contained no provision for designating the location of a principal office. No subsequent law required the NRA to designate a principal office, and the NYAG identifies no law that would allow the Court to constructively designate one based on the location where paperwork was submitted more than 100 years ago. The NYAG insists that the Secretary of State's records should be dispositive, yet relies disingenuously on clerically generated text in an online database[12]—not official documents *filed with* the Secretary of State *by the NRA* as New York law requires.[13] Indeed, the NRA has produced an exhaustive record of relevant documents it submitted to the Secretary of State over its 149-year existence, and not a single one designates a principal office in New York County.[14]

As a factual matter, the NRA does not maintain an office in New York State other than the one it maintains, through its registered agent, at 80 State Street in Albany. In similar situations in which foreign corporations doing business within the state are sued, the location of their registered

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[12] Opp. at 26.

[13] See *Rosen v. Uptown General Contracting*, 72 A.D.3d 619, 620 (1 Dep't 2010) (venue is "based upon defendant's designation of that county as its corporate residence on the certificate of incorporation it filed with the Secretary of State.") (emphasis added and internal citation omitted). The cases relied upon by NYAG nowhere state that the Secretary of State's electronic records are more reliable or more determinative than the filed documents themselves. *Astarita v. Acme Bus Corp.*, 55 Misc.3d 767, 773 (Sup. Ct. Nassau Cnty. 2017) only references legislation noting that a registration statement is more "streamlined" than consulting articles of incorporation. In *Kearney v. Cappelli Enterprises, Inc.*, 2012 WL 692036, at *1 (Sup. Ct. N.Y. Cnty. Feb. 24, 2012), the defendant presented a printout from the secretary of state in lieu of original incorporation documents. The court merely found that sufficient in place of the certificate of incorporation, not as superior evidence to the certificate itself, which is presented here.

[14] Nor is it relevant to this inquiry whether the NRA has previously "availed" itself of the county for purposes of other litigation, as the NYAG insinuates. The NYAG cites no support for the premise that the NRA's previous litigation in this forum makes venue proper in a distinct, subsequent lawsuit (one subject to a mandatory venue provision). *See* Opp. at 26. As set forth in both of the lawsuits the NRA filed against Oliver North, venue was premised on plaintiff's designation with the statement that the NRA was incorporated in New York State. No admission is made regarding the county in which the NRA maintained any principal office.

agent has functioned as a *de facto* principal office for venue purposes.[15] The NRA, which maintains its headquarters outside of New York and conducts no brick-and-mortar operations in New York, should be treated the same. Accordingly, venue is proper in Albany County for purposes of N-PCL § 1110.

The NYAG also argues that the Court should ignore the mandatory dissolution venue provision of the N-PCL because venue in New York County is allegedly alternately proper under CPLR 503 or because dissolution is "merely one of several forms of relief sought,"[16] and alternate venues are available for the remaining causes of action. But CPLR 503 provides a basis for venue only "[e]xcept where otherwise prescribed by law." In this case, venue is prescribed by N-PCL § 1110. The Legislature also in enacting the N-PCL notably *removed* provisions from the old General Corporation Law allowing the attorney general to commence dissolution proceedings in any county designated by it.[17] Nor is it appropriate for the NYAG to attempt to contrive venue in New York County for its dissolution claims by appending other causes of action that could independently have been brought here. Dissolution comprises the NYAG's first two causes of action,[18] dominates the NYAG's attendant partisan publicity campaign,[19] and represents the most severe relief sought. Under the theory the NYAG urges, a party seeking dissolution, or any other

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[15] *E.g.*, *Gilinsky v. Ashforth Properties Const., Inc.*, 2019 WL 4575685 (Sup. Ct. N.Y. Cnty. Sept. 17, 2019).

[16] Opp. at 27.

[17] *See* Comment to N.Y. Business Corporation Law § 1112.

[18] *See* Am. Compl. (Dkt. No. 11) at 138-142 (Causes of Action 1 and 2).

[19] *See, e.g.*, Transcript of Letitia James' Aug. 6, 2020 press conference at 9:07, https://www.rev.com/blog/transcripts/ny-attorney-general-letitia-james-sues-nra-press-conference-august-6 (after describing alleged misconduct, stating that "[f]or these years of fraud and misconduct, we are seeking an order to dissolve the NRA in its entirety. . . ." James went on to outline remedies against the individual defendants but mentioned no other relief allegedly sought from the NRA.

specialized remedy, could thwart any mandatory venue provision imposed by the Legislature simply by appending ancillary claims. As the NRA has already noted (and the NYAG fails to refute), this is not a situation where multiple claims possess conflicting venue provisions.[20] The NYAG concedes that it is resident in every county in New York State, including Albany County.[21] The venue provisions of CPLR 503 applicable to the remaining causes of action therefore also properly lay venue in that county. This entire action can, and should, be transferred there.

II. This Action Should Be Dismissed or Stayed Pending Resolution of Overlapping, Already-Pending Federal Lawsuits.

The NYAG argues that its chosen forum should not be disturbed principally because: (i) the NRA allegedly concedes a strong New York nexus; (ii) federal courts purportedly cannot adjudicate claims under the N-PCL; and (iii) the State of New York has an ostensible "vital interest" in prosecuting this action here.[22] But even to the extent that the subject matter of this action bears a geographical nexus to New York, the NRA's chosen federal forum is ***also*** in New York. Federal courts are perfectly capable of litigating state-law corporate dissolution claims. And, other federal litigation has been pending for nearly a year that centrally concerns the same

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[20] *Cf. Grumet v. Pataki*, 675 N.Y.S.2d 662, 665 (3 Dep't 1998), see Opp. at 27. The NYAG's reliance on *Tashenberg v. Breslin*, 89 A.D.2d 812 (4 Dep't 1982) is misplaced for these reasons, and additionally because *Tashenberg* is contrary to the Court of Appeals' controlling decision in *Lazarow, Rettig, & Sundel v. Castle Capital Corp.*, 49 N.Y.2d 508 (1980), in which the court, construing the language of a federal statute containing similar language to N-PCL § 1110, held that the venue provision of a statute requiring actions against national banks be brought only in courts of the county in which the banks were located, mandated dismissal of a third-party action against a bank brought in a county other than that required by the statute. The Court of Appeals explained: "The rule that a national bank may only be sued in the district or county in which it established was 'prescribed for the convenience of those institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process from state courts' . . . '[T]he mandatory character of the statute may not be blunted by judicially created exceptions.'"

[21] Opp. at 21.

[22] Opp. at 8-14.

transactions between the NRA and its erstwhile primary vendor, Ackerman McQueen, which figure prominently in the NYAG's lawsuit.

A. The NYAG's Choice of Forum Does Not Serve the Interest of Substantial Justice.

CPLR 327(a) gives a court discretion to dismiss a case "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum," and such action "shall not [be] preclude[d]" because of the "domicile or residence in this state of any party to the action." Thus, objections lodged under this provision need not be predicated on geography alone. *Forum non conveniens*, while most frequently litigated in connection with foreign parties, is broader than the question of where activities occurred or witnesses are located. As the NYAG concedes, a defendant's burden when raising a *forum non conveniens* argument requires "demonstrat[ing] relevant private or public interest factors which militate against accepting the litigation."[23] Significant relevant factors exist here.

This case is notable because it appears to be the first in which a state has sought to dissolve a legitimate civil rights organization. It is remarkable because the object of the attempted dissolution has not committed substantial alleged misconduct in the prosecuting state. Scholars and commentators across the ideological spectrum, along with more than a dozen states, have joined the NRA in pointing out significant constitutional rights violations by the NYAG in connection with its unprecedented and unconscionable effort to destroy a legitimate non-profit on grounds of purported "negligent"[24] conduct. This is something no New York court has ever

[23] *Id*. (citing *Bank Hapoalim (Switzerland) Ltd. v. Banca Intesa S.p.A.*, 2006 N.Y. Slip Op. 01379 (1 Dep't 2006)).

[24] *See* Transcript of Letitia James' Aug. 6, 2020 press conference at 00:36 and 13:49, https://www.rev.com/blog/transcripts/ny-attorney-general-letitia-james-sues-nra-press-conference-august-6 ("The NRA's boards [sic] audit committee was *negligent* in its duty to ensure appropriate competent and judicious stewardship of assets by NRA leadership. Specifically the audit committee failed to ensure standard fiscal controls. They failed to respond adequately to

countenanced, and no New York attorney general has ever sought. This case has garnered nationwide public interest and provoked significant outcry because of the chilling implications it has for freedom of speech, freedom of association and democratic norms. Where there are allegations that a wrong was committed under color of state law, there is "an inherent potential for bias" in the state court.[25] Moreover, judicial review of allegations involving activities that are unpopular locally (like the NRA's Second Amendment stance is in New York) is best conducted by life-tenure federal judges whose jobs are not subject to parochial pressures.[26]

Additionally, the NRA concedes no substantial nexus to New York beyond the obvious fact that it is incorporated there.[27] That nexus is far exceeded by this case's connection to other states; indeed, as the NRA has demonstrated, litigating this case will require documents and testimony to be procured from locations far and wide. The NRA's principal place of business is in Virginia, and its officers, directors and members are spread across the country, with relatively few of them living in New York. The NRA's longtime vendor, Ackerman McQueen, and several of its principals—pivotal actors with regard to transactions and conduct that the NYAG will urge the fact-finder to ascribe to the NRA—are located respectively in Oklahoma, Texas, and Washington,

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whistleblowers, affirmatively took steps to conceal the nature and scope of whistleblower concerns from external auditors, and they failed to review potential conflicts of interest for employees. . . . . And as a result of that, we've come to the conclusion that the NRA, unfortunately, was serving as a personal piggy bank to four individual defendants.") (emphasis added).

[25] *See* Chevigny, Section 1983 Jurisdiction: A Reply, 83 HARV. L. REV. 1352, 1358 (1970).

[26] See *England v. Louisiana State Bd. Of Medical Examiners*, 375 U.S. 411 (1964) (Douglas, J., concurring).

[27] Of course, the NRA also has members in New York. Like NRA members in every other state, they are presumptively supportive of the organization and oppose the NYAG's efforts to terminate its existence and redistribute its assets.

D.C. Other witnesses and documents are located overseas.[28] The NYAG has already conducted an 18-month investigation into this matter and is more than aware of the nationwide scope of discovery that will be required to prosecute it.[29] As the NRA laid out in its opening brief, federal courts are more apt to order this discovery and to compel the presence of trial witnesses. The NYAG's other arguments stressing ties to New York are irrelevant. The NRA does not seek to move this action outside of New York. As New York courts have acknowledged, the *forum non conveniens* doctrine simply inquires whether there exists a more convenient forum, and that forum may be a federal court within the same state.[30]

This Department has made clear that New York courts do not have exclusive subject-matter jurisdiction over dissolution of New York corporations.[31] Federal courts are equally able to adjudicate such matters by exercising pendent jurisdiction in non-diverse cases. [32] NYAG is simply

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[28] *See* Exhibit 27 to the Affirmation of Sarah B. Rogers in Support of the National Rifle Association's Motion to Dismiss (Dkt. No. 98).

[29] The NYAG argues that the NRA has conceded that the Commercial Division is just as appropriate as a federal court to adjudicate these claims by virtue of having sought transfer of this action there. *See* Opp. at 15. The NRA made no such concession, but instead merely sought to remedy what it viewed as an administrative misstep at the outset of this case. If the matter were to remain in state court, then the Commercial Division would be best-equipped to adjudicate it given its expected volume and complexity—but a federal court is better-equipped still, due to greater efficiencies associated with the ability to issue interstate subpoenas and effect consolidation with other federal matters.

[30] *See Diagnostic Rehab. Med. Serv. v. Republic W. Ins. Co*., 2003 WL 22888389, at *6 (Civ. Ct. N.Y. Cnty. 2003); *A&S Med., P.C. v. ELRAC, Inc*., 707 N.Y.S.2d 778 (Civ. Ct. Queens Cnty. 2000). Regardless of whether these courts granted the motions before them, none disputed that a federal court within the same state may be considered an appropriate forum. See Opp. at 10 n.12.

[31] See *Matter of the Dissolution of Hospital Diagnostic Equipment Corp. Hde Holdings, Inc. v. Klamm*, 205 A.D.2d 459 (1 Dep't 1994) ("We have considered the litigants' remaining arguments, including the Attorney General's that the courts of New York lack subject-matter jurisdiction to dissolve a foreign corporation, and find them to be without merit.").

[32] *See, e.g.*, *O'Donnel v. Marine Repair Serv's, Inc.*, 530 F. Supp. 1199 (S.D.N.Y. 1982); *see also Cuddle Wit, Inc. v. Chan*, 1990 WL 115620, at *1 (S.D.N.Y. Aug. 7, 1990) ("The Court

incorrect that federal courts cannot do so.[33] The NYAG points to a series of federal cases in which courts chose to abstain from hearing dissolution actions.[34] However none of those cases concerned involuntary dissolution actions instigated by states against political enemies which were broadly decried as unconstitutional. Under such circumstances, abstention is inappropriate.[35] Moreover, that the courts in cases cited by the NYAG ***chose to abstain*** is telling: none of the NYAG's cases stands for the proposition it asserts, which is that federal courts are incapable of hearing matters like this one.[36]

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finds that the instant counterclaim seeking judicial resolution of Cuddle Wit qualifies as an appropriate exercise of the Court's ancillary jurisdiction.").

[33] *See* Opp. at 10.

[34] *Id*.

[35] See *Hachamovitch v. DeBuono*, 159 F.3d 687, 697 (2d Cir.1998) (abstention is not required "even in cases where the state has a substantial interest if the state's regulations violate the federal constitution."); *Markel v. Blum,* 509 F. Supp. 942, 948 (N.D.N.Y. 1981) (where federal issues predominate, abstention is not favored).

[36] NYAG argues that abstention would be appropriate in those cases in order to avoid a federal court interfering in New York's regulatory scheme given its "strong interest in the creation and dissolution of its corporations and in the uniform development and interpretation of the statutory scheme regarding its corporations." It has advanced a similarly baseless argument in opposition to the NRA's federal action against it. As is clear by this unprecedented action, however, NYAG is in no way contributing to any "uniform development and interpretation" of New York not-for-profit corporation law and is in fact upending decades of its office's practice and judicial precedent by maintaining this action. Federal determination of these claims would therefore not "interfere" with anything and would not warrant abstention. Nor is there the requisite complexity of a regulatory scheme necessary to warrant federal abstention under *Burford. See Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus*, 60 F.3d 122, 127 (2d Cir. 1995) ("The straightforward statute and regulations invoked here have the comparatively modest goals of ensuring against waste, and requiring districts to prepare plans guiding the provision of social services. If these statutes indeed amount to a "scheme" as envisioned under *Burford,* it does not rise to the requisite degree of complexity" and "[a]s to the second prong, the regulations contain no broad terms requiring interpretation by a state agency or experts in the field."); *see also LILCO v. Cuomo*, 666 F. Supp. 370 (N.D.N.Y. 1987) ("Resolution of LILCO's claims will not threaten the uniform *application* of any regulatory scheme by creating potentially inconsistent interpretations of those regulations, nor do the issues raised in LILCO's Complaint require special expertise beyond the province of this court.").

Nor is there any merit to the NYAG's insistence that its dissolution action is not properly considered a compulsory counterclaim in the NRA's federal constitutional lawsuit. For this proposition, the NYAG relies heavily on *Audubon*,[37] which is not a New York case, cites no New York cases, and compels no such result. The *Audubon* court declined to treat a pre-emptive anti-enforcement suit as a compulsory counterclaim because it would in that case have "work[ed] more to encourage rather than discourage" a multiplicity of litigation, which would thwart "the purpose of Rule 13(a)." Here, by contrast, the NRA was already in the process of litigating claims in federal court concerning the exact conduct and transactions that are the focus of this lawsuit: although its constitutional claims against the NYAG were first-filed only by a matter of days, the *Ackerman* and *Stinchfield* lawsuits were pending long before the NYAG sought dissolution.[38] Indeed, the NRA filed an initial, predecessor lawsuit against Ackerman before the NYAG even announced its investigation.[39] Far from constituting tactical forum-shopping by the NRA, these already-pending federal lawsuits instead arise from the NRA's diligent, good faith efforts to recoup the same funds, and advance the same interests, for which the NYAG now purports to sue. In any event, the NYAG does not dispute that New York courts have found constitutional challenges to enforcement actions to be compulsory counterclaims to the enforcement actions themselves.[40] Federal Rule of Civil Procedure 13(a) defines such a claim as one arising out of the same transaction or occurrence as the opposing party's claim. The NYAG's enforcement action fits squarely within that definition.

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[37] *Audubon Life Ins. Co. v. FTC*, 543 F. Supp. 1362 (M.D. La. 1982); Opp. at 11 n.13.

[38] *See In re National Rifle Association Business Expenditures Litig.*, MDL No. 2979 (J.P.M.L. 2020), Dkt. No. 1 (schedule of actions).

[39] The NRA first sued Ackerman on April 12, 2019. *See National Rifle Association v. Ackerman McQueen, Inc. et al.*, Case No. CL19001757 (Va. Cir. Ct. 2019).

[40] *Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills*, 815 F. Supp. 2d 679 (S.D.N.Y. 2011).

B. The NYAG Does Not Dispute that This Action Substantially Overlaps with the NRA's First-Filed Federal Action.

CPLR 3211(a)(4) gives courts the discretion, where "justice requires," to dismiss an action "on the ground that ... there is another action pending between the same parties for the same cause of action in a court of any state or the United States." The NYAG does not attempt to dispute that the NRA's federal lawsuit involves "the same cause of action." Nor could it. Resolution of the NRA's constitutional claims against NYAG will necessitate the federal court examining the merits of NYAG's purported claims.[41] Instead, the NYAG insists that its own case was first-filed, on the ground that neither the NRA, nor the public, nor the Court, should be entitled to verification of the State's good faith belief that its asserted grounds for dissolution are true.[42] In the alternative, even if the N-PCL's verification requirement does apply, the NYAG urges the Court to disregard the defect in its own pleading.[43] Both arguments lack merit.

Although certain provisions of the N-PCL applicable to dissolution "petitions" sensibly exempt plenary actions (*e.g.*, summary hearing procedures), the NYAG identifies—and common sense countenances—no reason why a plenary action would be exempt from the requirement that the NYAG verify its belief that its allegations are true, and indeed the Attorney General did file a purported verification in conjunction with its original complaint.[44] Because it lacked the requisite verification, the complaint filed by the NYAG on August 6, 2020, was defective—full stop.

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[41] *See also* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WILLIAM AND MARY L. REV. (1980-81) ("Indeed, there are many cases (including important first amendment cases) in which the federal claim, when analyzed, turns out basically to consist of the contention that the state enforcement proceeding is without justification—a contention which cannot be tested without examining the case for enforcement itself.")

[42] Opp. at 16.

[43] Opp. at 17.

[44] Dkt. No. 1 at 169.

Regardless of whether the not-for-profit law applies, CPLR § 3020 requires that any verification state "under oath that the pleading is true to the knowledge of the deponent, except as to matters alleged on information and belief, and that as to those matters he believes it to be true." The verification attached to the original complaint against the NRA contained a purported verification but omitted the last clause: it did not state that matters alleged upon information and belief are believed to be true.[45] The complaint thus was not verified, and it is irrelevant what excuses the NYAG puts forth as to why this occurred; CPLR §§ 3020 and 3022 contain no "inadvertent omission" exception.

Despite the NYAG's arguments to the contrary, the remedy for an unverified pleading is clear: the adverse party upon whom a defective verification is served may treat it "as a nullity, provided he gives notice with due diligence" upon the attorney of the adverse party.[46] This is because the failure to verify or sign the complaint—for whatever reason—affects a substantial right of the defendant in that plaintiff's claims cannot be challenged as false, which imposes prejudice upon the defendant who seeks to challenge these allegations.[47]

An action is not deemed commenced in New York State until an index number is obtained and the initiating papers are filed.[48] Strict compliance is mandatory, and so long as noncompliance is timely raised by the opposing party, it warrants outright dismissal.[49] Unverified pleadings are

[45] NYAG's repeated contention that this amounts to a "typo" is facially implausible and should not be entertained by this Court.

[46] *Matter of Miller v. Bd. of Assessors of Town of Islip*, 90 N.Y.2d 802 (1997).

[47] See *Jack Vogel Assoc's v. Color Edge, Inc.,* 2008 N.Y. Slip Op. 31509(U) (Sup. Ct. N.Y. Cnty. 2008). NYAG argues, without basis, that the NRA should further elucidate what "prejudice" it suffered. No requirement is necessary. Prejudice is implied.

[48] CPLR §§ 304, 306-a

[49] *Fry v. Village of Tarrytown*, 89 N.Y.2d 714 (1997).

properly stricken.[50] Although the NRA did not pursue this remedy in light of the NYAG filing its amended complaint on August 10, 2020, the action should be deemed to have been filed as of that date. As the first-filed action, the NRA's federal litigation constitutes a "pending" lawsuit for purposes of CPLR 3211(a)(4).[51]

C. The Pendency of the *Ackerman* and *Stinchfield* Litigation Also Favors A Stay.

The NYAG seeks to punish the NRA and its members—via a corporate death sentence—for alleged misspending that was often committed by Ackerman, without the NRA's knowledge or consent, in transactions the NRA has already sued to unwind (or for which the NRA otherwise

[50] See *Morgan v. Maher*, 60 Misc.2d 642 (Sup. Ct. Nassau Cty. 1969); see also *Alden v. Gambino*, 53 Misc.3d 1204(A) (City Ct. Poughkeepsie Sept. 29, 2016) (acknowledging that striking a defective complaint is proper but declining to do so where defendant did not act with due diligence and seek a verified complaint in writing).

[51] With respect to Defendants Frazer and LaPierre, NYAG contends that their CPLR 3022 objections to the defective verification were waived due to passage of time and thereby defeats their motions to dismiss pursuant to CPLR 3211(a)(4). Opp. at 17. But there is no merit to the NYAG's assertion that courts "generally" consider 24 hours to be the outer bounds of timeliness for CPLR 3022 objections. *See, e.g.*, *Oceana Apartments v. Spielman* (164 Misc.2d 98, 623 (Civ. Ct. Kings Cnty. 1995) (verification challenge timely six weeks after action filed where movant was previously unrepresented). *Rodriguez v. Westchester Cnty. Bd of Elections*, 47 Misc.3d 956, 958 (Sup. Ct. Westchester Cnty. 2015) (rejecting claim that failure to assert lack of verification within 24 hours of being served constituted waiver and noting "not one court that has [found 24 hours untimely] cites to the actual origin of the alleged rule."). The Court of Appeals "has not employed a specific time period to measure due diligence" under CPLR 3022. *Aviles v. Santana*, 56 Misc. 3d 1206[A], at *2 (Civ. Ct. Bronx Cnty. 2017) (quoting *Rodriguez*, 47 Misc.3d at 958). The timeliness of an objection to the propriety of a verification "must turn on the particular circumstances." *Id.* Here, for example, LaPierre's objection—made within 30 days of his appearance in the case and within the time period stipulated and agreed upon by the NYAG for LaPierre to "answer or otherwise respond to the Complaint," *see* Dkt. No. 35 (Stipulation to Extend Time to Answer or Otherwise Respond to Complaint), was timely. The individuals also raised their objections only out of an abundance of caution in order to avoid any issue as to whether they were entitled to move to dismiss pursuant to CPLR 3211(a)(4). The NYAG fails to demonstrate, let alone even assert, that it has been prejudiced by the timing of the individuals' respective objections, as it knew of the defect when the NRA placed it on notice and had already corrected it. It would therefore be an appropriate exercise of the Court's discretion to disregard any alleged delay under CPLR 2001.

seeks appropriate relief). These matters lie at the heart of the *Ackerman* litigation and, by extension, the *Stinchfield* litigation (which entirely concerns the veracity of testimony in the *Ackerman* litigation, by a former Ackerman employee, that Ackerman misled the NRA about its practices).[52] The fact-finder in this case cannot adjudicate the NYAG's allegations without first deciding what the NRA knew and authorized, and when, with respect to Ackerman's activities. This Court should therefore stay this action pending resolution of these critical issues. The NYAG cavalierly and summarily dismisses this argument by noting it is not a party to the *Ackerman* litigation and "Defendants fail to identify how resolution of that action will dispose of any issue raised in the Complaint, let alone the entirety of the Complaint."[53] Nothing in CPLR 2201 requires that the NYAG be a party to the other litigation, and it is clear that the resolution of whether it is Ackerman or the NRA that is at fault for misspending of NRA funds will play an outsize role in determining whether the NYAG enforcement proceeding should go forward.

CONCLUSION

For the foregoing reasons, NYAG's action under Article 11 of the N-PCL for judicial dissolution and other relief should be dismissed, transferred to Albany County or stayed in its entirety, or in the alternative, the causes of action for judicial dissolution should be severed and dismissed or transferred, and the remainder of this action stayed.

[52] *See* NRA's Motion to Transfer for Coordinated Pre-Trial Proceedings, *In re National Rifle Association Business Expenditures Litig.*, MDL 2979 (J.P.M.L. 2020), Dkt. No. 1 at 7-12.

[53] Opp. at 30.

Dated: December 24, 2020

Respectfully submitted,

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ATTORNEY CERTIFICATION PURSUANT TO COMMERCIAL DIVISION RULE 17

I, Sarah B. Rogers, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that the Consolidated Reply Memorandum of Law by Defendants the National Rifle Association, Wayne LaPierre, and John Frazer in Support of Their Motions to Dismiss, Transfer or Stay 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 6,037 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: December 24, 2020
New York, New York

/s/ *Sarah B. Rogers*
Sarah B. Rogers