

1 SUPREME COURT OF THE STATE OF NEW YORK  
 2 COUNTY OF NEW YORK - CIVIL TERM - PART 3  
 3 - - - - -X

3 PEOPLE OF THE STATE OF NEW YORK, BY LETITIA  
 4 JAMES, ATTORNEY GENERAL OF THE STATE OF NEW  
 5 YORK,

5 Plaintiff,

6 v.

7 THE NATIONAL RIFLE ASSOCIATION OF AMERICA,  
 8 INC., WAYNE LAPIERRE, WILSON PHILLIPS, JOHN  
 9 FRAZER, and JOSHUA POWELL,

9 Defendants.

10 - - - - -X

11 Motions Teams Meeting  
 12 New York, New York  
 13 January 21, 2021

13 B E F O R E :

14 HON. JOEL M. COHEN, J.S.C.

15  
 16 A P P E A R A N C E S :

17 NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL  
 18 Attorneys for the Plaintiff  
 19 28 Liberty Street  
 20 New York, New York 10005  
 21 BY: JAMES SHEEHAN, ESQ.  
 22 EMILY STERN, ESQ.  
 23 JONATHAN CONLEY, ESQ.  
 24 MONICA CONNELL, ESQ.

21 BREWER, ATTORNEYS AND COUNSELORS  
 22 Attorneys for the Defendant - NRA  
 23 750 Lexington Avenue, `14th Floor  
 24 New York, New York 10022  
 25 BY: SARAH B. ROGERS, ESQ.  
 JENNIFER BLECHER, ESQ.

25 (Continues)

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1 A P P E A R A N C E S: (Continued)

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3 Attorneys for the Defendant - W. LaPierre  
4 250 Park Avenue - 7th Floor  
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13 Attorneys for the Defendant - W. Phillips  
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16 New York, New York 10166  
17 BY: SETH FARBER, ESQ.  
18 MARK WERBNER, ESQ.

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CAROLYN BARNA  
SENIOR COURT REPORTER

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## Proceedings

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THE COURT: Counsel, I'd like to take appearances,  
beginning with the plaintiff.

4

MR. SHEEHAN: This is Jim Sheehan, Chief of the  
Charities Bureau, Assistant Attorney General.

6

Thank you for having the hearing today.

7

MS. STERN: Good morning, your Honor.

8

This is Emily Stern, Assistant Attorney General and  
Co-Section Chief of the Enforcement Section of the Charities  
Bureau.

10

11

THE COURT: Good morning.

12

MR. CONLEY: Good morning, your Honor.

13

This is Jonathan Conley, Assistant Attorney  
General, with the New York State Attorney General's Office.

14

15

THE COURT: Good morning.

16

MS. CONNELL: Good morning, your Honor.

17

Monica Connell, Assistant Attorney General, Special  
Counsel for the plaintiff. Thank you.

18

19

THE COURT: Good morning.

20

And who is going to be the principal spokesperson  
for the State this morning?

21

22

MR. CONLEY: Your Honor, Jonathan Conley. I'll be  
handling the argument today.

23

24

THE COURT: Okay.

25

Your video doesn't seem to be operating, which will

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## Proceedings

1 make it a little difficult for the court reporters.

2 Anybody else see Mr. Conley or is it just me?

3 THE COURT REPORTER: I don't see him, Judge.

4 MR. SHEEHAN: We can see him.

5 MS. CONNELL: Your Honor, this is Monica Connell.

6 We saw him by video until a second ago and now I see just a  
7 picture.

8 THE COURT: In the meantime, let's take appearances  
9 for the defendant, starting with the NRA.

10 MS. ROGERS: Good morning.

11 This is Sarah Rogers. I'm appearing today on  
12 behalf of the defendant, The National Rifle Association.

13 I'm joined by my colleague, who you may also be  
14 able to see to my left, Jennifer Blecher.

15 MS. BLECHER: Good morning, your Honor.

16 THE COURT: Good morning.

17 MS. ROGERS: And we are also joined separately by  
18 counsel for Mr. LaPierre, who will make his appearance.

19 MR. CORRELL: Your Honor, Kent Correll, for Wayne  
20 LaPierre.

21 THE COURT: Good morning.

22 MR. FLEMING: Your Honor, William Fleming, for  
23 defendant John Frazer.

24 THE COURT: Good morning, Mr. Fleming.

25 MR. FLEMING: Good morning.

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## Proceedings

1 MR. FARBER: Good morning, your Honor. Seth Farber  
2 from Winston & Strawn.

3 I'm joined by my colleague Mark Werbner, who is  
4 also on separately from Winston & Strawn, on behalf of  
5 defendant Wilson Phillips.

6 THE COURT: Okay.

7 Mr. Farber, you cut out a little bit.

8 MR. FARBER: Is this better?

9 THE COURT: Yes.

10 MR. FARBER: What I was saying, Seth Farber from  
11 Winston & Strawn.

12 Also on separately is my colleague Mark Werbner  
13 from Winston and Strawn, for the defendant Wilson Phillips.

14 THE COURT: Okay.

15 Anyone else? I hear some echos which is par for  
16 the course today so far. Let's see how we do.

17 Good morning, everyone.

18 Before turning to the motions on the agenda today,  
19 I want to address briefly the NRA's Notice of Bankruptcy on  
20 Friday. I asked the parties to submit their views on the  
21 impact of the bankruptcy filing on the issues to be decided  
22 at the hearing, which they did by letter yesterday.

23 The Attorney General takes the position that  
24 although bankruptcy filings usually require that any  
25 lawsuits against the debtor be stayed, this case is covered

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## Proceedings

1 by statutory exception to that rule because it is an action  
2 by a governmental entity to enforce police or regulatory  
3 powers.

4 The NRA stated it had no objection to proceeding  
5 with this hearing today, but took no immediate position with  
6 respect to the bankruptcy stay and, instead, reserved the  
7 right to seek further orders from the Bankruptcy Court at a  
8 later date. The other defendants conveyed similar  
9 positions.

10 So, with that, I will proceed with the argument on  
11 the pending motions. I will say that I would not be  
12 proceeding unless I was comfortable, based on my own  
13 research, that there were reasonable grounds for doing so  
14 under federal law.

15 As you know, both federal and New York courts have  
16 found that state courts have authority to determine the  
17 applicability of a bankruptcy stay to cases that are pending  
18 before them. It is not the exclusive province of the  
19 Bankruptcy Court.

20 With that introduction, let's proceed. I would  
21 like to follow this agenda to keep things organized. Rather  
22 than doing all of the motions in series for the parties and  
23 then responses, I'd like to break it into two.

24 The first part would be the venue, the statutory  
25 venue motion, which, to me, is a statutory argument that

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## Proceedings

1 dismissal or transfer to Albany is mandated by statute, and  
2 then have the back and forth on that.

3 And then turn to the second set of grounds which  
4 are discretionary grounds for dismissing or staying the case  
5 because of, among other things, the pendency of other  
6 litigation in Albany.

7 So, if we can do it that way, I would appreciate  
8 it.

9 So, given that these are the defendants' motions,  
10 Ms. Rogers, I don't know if you want to go first, if we can  
11 start with the statutory venue motion.

12 MS. ROGERS: Thank you, your Honor.

13 I believe I am unmuted, so can everyone hear me?

14 THE COURT: I can.

15 MS. ROGERS: Thank you very much.

16 So, let's start with venue. We agree that's the  
17 appropriate place to start because, as courts have held,  
18 once you determine that the case is in the wrong court, all  
19 remaining substantive issues go to the correct court. And  
20 this case is in the wrong court.

21 Now, given the choice of where to commence its  
22 capital case against this particular political target, it's  
23 no surprise that the Attorney General would prefer  
24 Manhattan, but they're not given that choice. And, in fact,  
25 the statutory scheme that made this lawsuit possible takes

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## Proceedings

1       that choice away.

2               So, it was a deliberate choice by the New York  
3       State Legislature to depart from the parallel statutory  
4       scheme of the General Corporation Law which grants the  
5       Attorney General broad discretion as to where to venue a  
6       dissolution case.

7               Instead, the mandatory venue for a dissolution case  
8       under the N-CPL is prescribed in N-CPL 1110 and it's very  
9       simple and it's very discrete. And there's a verbatim  
10      definition that I will read that we've set forth in our  
11      papers.

12              So, this action has to be venued in the judicial  
13      district in which the office of the corporation is located.  
14      And according to the definition section of the same statute,  
15      the term office means the office, the location of which is  
16      stated in the Certificate of Incorporation.

17              That's very simple. That's very black and white  
18      language. It does not call for a Gestalt contacts analysis;  
19      a principal place of business analysis. The question is,  
20      you look at the Certificate of Incorporation, which is  
21      defined to include amendments thereto, and you identify the  
22      office stated therein.

23              If you look at the NRA's Certificate of  
24      Incorporation, the only office stated therein is 80 State  
25      Street in Albany. Now, when we raised this challenge, the

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1 Attorney General responded with a number of, you know,  
2 creative defenses of the New York county venue, which I will  
3 get to in a moment, but you can tell that they likewise  
4 acknowledge the sort of mandatory black and white language  
5 of this venue prescription because in their complaint they  
6 verified under penalty of perjury in paragraph 26, they  
7 allege that venue is proper because:

8 "The office of the NRA is in New York county as set  
9 forth in the Certificate of Incorporation."

10 But there is no office of the NRA in New York  
11 county set forth in the Certificate of Incorporation. The  
12 Attorney General knew that was a mandatory condition for  
13 venuing the case here, that's why they made that verified  
14 allegation, but that verified allegation is inaccurate.

15 Now, this isn't a mere technicality. It is an  
16 important substantive right that the legislature chose to  
17 confer on not-for-profit corporations when it drafted N-PCL  
18 1110. If you're a nonprofit and you are fighting for your  
19 very existence, you have the right to have that fight in the  
20 backyard that you chose. The location that you inscribed in  
21 your formation documents.

22 Now, admittedly, this case is a bit unique because  
23 if you form a nonprofit in New York nowadays, the statute  
24 requires a newly filed Certificate of Incorporation  
25 designate both an office location and a registered agent.

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1 But because the NRA was formed so early, so early on in the  
2 course of New York Corporate Law, there was no such  
3 requirement.

4 So, when the NRA lodged a Certificate of  
5 Incorporation with the Secretary of State in Albany, it did  
6 not designate an office location. It certainly did not  
7 designate one in Manhattan. And, over subsequent years,  
8 although the statute evolved to require a more specific  
9 designation, that requirement was never retroactive.

10 Now, the response to this from the Attorney  
11 General, I will characterize, is three-fold. The first  
12 argument, as I see it, is that you sort of acted like a New  
13 York county corporation, even if you didn't designate a New  
14 York office in your certificate as the statute requires.

15 So, for example, in 1871, when the founders of the  
16 NRA who, by the way, were military men stationed by the  
17 government that would later try to dissolve their  
18 organization, that happened to be in Manhattan and the  
19 signatures from a judge in Manhattan, the Attorney General  
20 argues that you were an active New York City corporation  
21 then, so you're a New York City corporation now.

22 The Attorney General further argues that because  
23 the NRA had continued to lodge copies of items that it filed  
24 over the years such as amendments in New York county, it  
25 acted like a New York county corporation so there must be a

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## Proceedings

1 constructive office here, even if there is not an actual  
2 office here.

3 But none of the conducts that the Attorney General  
4 alleges amounts to a waiver by the NRA of its crucial  
5 substantive right to face and fight dissolution in the  
6 judicial district it chose and it inscribed on its governing  
7 document.

8 The waiver of that right would have to be a known  
9 relinquishment, that's black letter law. And that's not  
10 what any of this amounts to. The Attorney General cannot  
11 allege that we've waived this right and established some  
12 illusory office in New York county.

13 And if we have, then my question for the Attorney  
14 General would be okay, you have alleged in your verified  
15 complaint that "The office of the NRA is in New York  
16 county", so where is that office? If you want to serve us  
17 with dissolution papers, where do you bring them? If you  
18 want to send us mail, where do you send it?

19 There is literally no office in New York county,  
20 certainly none designated on the Certificate of  
21 Incorporation or any prior iterations of it.

22 And we have filed with the Court as exhibits to our  
23 motion papers an exhaustive record of all of the documents  
24 lodged with the Secretary of State by the NRA since the  
25 NRA's initial formation in 1871. There's never been an

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1 address in New York county designated. By the plain terms  
2 of the statute, venue is improper in New York county.

3 Another cluster argument the Attorney General makes  
4 essentially is that, you know, there are other claims in  
5 this case, too. So, even if there is a statutory mandatory  
6 venue for dissolution action in Albany or the Third Judicial  
7 District, they have also lodged claims against certain  
8 individual defendants, current and former executives, and  
9 those who form flexible venue under CPLR 503, and where  
10 there are conflicting venue provisions, the Attorney General  
11 gets more leeway.

12 The problem with that argument is that every single  
13 shred of authority on which the Attorney General relies  
14 involves cases where there is a genuine conflict in venue.  
15 For example, you have a case brought, you get two claims  
16 brought simultaneously, one could only have been brought in  
17 New York county, one could have only been brought in Albany  
18 County, there is no conflict here.

19 The Attorney General concedes it is a resident of  
20 any county, so unless there is a narrower statutory  
21 prescription as here, the Attorney General could have  
22 brought these claims anywhere it liked. And it could bring  
23 its claims against the individual defendants in the Third  
24 Judicial District where the dissolution claim belongs.

25 So, we think that that dispatches with the argument

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## Proceedings

1 about conflicting venue and how even throwing in additional  
2 claims lets you bring dissolution in New York county, but  
3 we're certainly happy to discuss that further if the Court  
4 would like.

5 THE COURT: Let me ask you a question.

6 Let's assume, hypothetically, you know, the  
7 organization was formed in 1871 and then there was not a  
8 single piece of paper filed from then until now, where would  
9 venue be appropriate?

10 MS. ROGERS: That's an interesting hypothetical.  
11 Fortunately, not the one before this Court. By the terms of  
12 the statute, venue would be appropriate at the office stated  
13 on the Certificate of Incorporation.

14 THE COURT: By definition there isn't one, so then  
15 what happens?

16 MS. ROGERS: So, my recommendation would be, your  
17 Honor, that you treat the NRA as sort of the way you would  
18 treat a nonresident or a corporation that does not have an  
19 office in the state. That seems to be the closest analog in  
20 that hypothetical.

21 THE COURT: And the result of that would be that  
22 the State Attorney General could sue in any county it wanted  
23 to; correct?

24 MS. ROGERS: Well, or as in the *Gilinsky* case that  
25 we cite in our reply is that you revert to the place where

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1 the registered agent is.

2 But I understand in your hypothetical --

3 THE COURT: In other words, if there is no "office  
4 of the corporation", you just revert back to the regular  
5 venue statute; correct?

6 MS. ROGERS: I think the reason you can't revert  
7 back to 503 is that by the terms of the CPLR and controlling  
8 Court of Appeals authority, the narrower prescriptive  
9 statute that overlays and supersedes 503 has to be given  
10 deference.

11 THE COURT: I know, but right now I'm hypothesizing  
12 that there is no office of the corporation. And so the way  
13 I look at 503 is it tells you where the venue is, unless  
14 another venue is prescribed by law.

15 So, what I'm getting at is, if there is no office  
16 of the corporation, therefore, the other statute doesn't seem  
17 to apply, then, the regular venue rules would apply.

18 I recognize we're going to get to the next question  
19 I have for you which is to talk about what happened in the  
20 150 years, but just analytically, if there is no office of  
21 the corporation, it seems to me that you're back to the  
22 regular venue statute.

23 MS. ROGERS: Analytically, if the NRA had never  
24 amended a Certificate of Incorporation to contain an  
25 address, then I think that approach could be viable.

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1 THE COURT: Let's talk about the evidence that you  
2 pointed to. I think you started with that there is an  
3 office designated in Albany. Why don't you just walk  
4 through what that evidence is.

5 MS. ROGERS: Certainly.

6 So, I apologize, your Honor, I don't recall which  
7 exhibit it is, but I would be happy to pull it up. We  
8 filed, in connection with our transfer motion, copies of all  
9 of the documents we've lodged for the Secretary of State  
10 over the years.

11 One of those, which if memory serves, was lodged in  
12 1985, designates the address of 80 State Street in Albany --  
13 sorry, in 2002, your Honor. It designated the State Street  
14 address for two separate purposes; that is the address of  
15 the registered agent and the address for mailing documents  
16 which are technically distinctive categories under the  
17 statute at that time. But that is, you know, that is the  
18 address that we -- the way the Certificate of Incorporation  
19 is defined under the N-PCL, and it's inclusive of amendments  
20 and documents. And I have that document here, your Honor.

21 THE COURT: I think it's NYSCEF 109; correct?

22 MS. ROGERS: I believe that is correct. My copy,  
23 unfortunately, doesn't have the stamp on it, but I think  
24 that is correct.

25 THE COURT: Okay.

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1 And so the document you're talking about, I think  
2 it's 29 or so pages in, is the one where an agent for  
3 service of process was named; is that correct?

4 MS. ROGERS: Yes. There's an agent for service of  
5 process named in the 2002 Certificate of Change, that's the  
6 official title of the document.

7 And there's two designations made you can see on  
8 this document. We designate a registered agent towards the  
9 bottom of the page. It says destination of registered  
10 agent, the corporation, service of company, 80 State Street.

11 And then separately, apart from your registered  
12 agent, you have to designate an address where the Secretary  
13 of State is supposed to forward documents that are addressed  
14 to you.

15 THE COURT: Above those two, which I'm sure is a  
16 question that you're expecting, so the company specifically  
17 checked boxes to change the address to forward copies of  
18 process, and it specifically checked a box to designate an  
19 entity to be the registered agent, but it left blank the box  
20 directly above it in which a company is permitted to change  
21 the "county location within this state in which the office  
22 of the corporation is located", which is the exact statutory  
23 definition, that was not checked.

24 So, the Attorney General argues, certainly, there  
25 seems to be some force behind that if the NRA intended to

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## Proceedings

1 designate an office of the corporation, they could have  
2 easily done so, and the fact that it didn't, arguably cuts  
3 the other way.

4 MS. ROGERS: Your Honor, obviously the NRA was not  
5 required to designate an office. Again, this is just a  
6 historical anomaly. If the NRA had been formed five or ten  
7 years later, they would have had to designate an office and  
8 that office would have been the office, unless we changed it  
9 via this form. But that's not what happened.

10 THE COURT: Right. But this is, as I read your  
11 papers, the only piece of evidence that you rely on for an  
12 Albany address, or a principal one.

13 And, in this one, it very specifically, I think,  
14 does not designate an office of the corporation. So, I  
15 don't know how you connect the two because the office of the  
16 corporation is a statutory phrase and the only thing that  
17 this provision, this form does, is it designates an agent  
18 for service of process. Which, I understand the point that,  
19 you know it has its certain meaning, but it's not the words  
20 of the statute.

21 MS. ROGERS: Your Honor, two responses to that.  
22 First, it's not technically true that the 2002 Certificate  
23 of Change is the only piece of evidence that we're citing.

24 We also filed a Certificate of Amendment in 1985,  
25 and that's also an exhibit to our brief. And in the

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1 Certificate of Amendment, paragraph 2 and paragraph 6, we  
2 designate the Secretary of State as the agent for service of  
3 process which, again, it's the agent for service of process,  
4 but the Secretary of State is located in Albany. There's  
5 two separate documents that designate an address in Albany.  
6 There are zero documents that designate an address in New  
7 York City.

8 Now, the Court may wonder, okay, aren't a  
9 registered agent and principal office distinct concepts.  
10 And that's ideally true, but we've seen courts, in imperfect  
11 situations like this, in the *Gilinsky* case we cite, we've  
12 seen them look to the registered agent when there is not a  
13 designated principal office.

14 THE COURT: You are using that word principal  
15 office as a careful lawyer because that is a phrase that has  
16 some relevance outside of the statutory context in trying to  
17 figure other things out for venue. But I have a statute to  
18 apply, so principal office is not the word. Service of  
19 process agent is not the word. It is "office of the  
20 corporation." So, I don't really understand how those cases  
21 are relevant.

22 MS. ROGERS: Well, your Honor, I think from a  
23 straight textual approach, the actual language is, "The  
24 office, the location of which is stated in the Certificate  
25 of Incorporation."

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1 And the Certificate of Incorporation is defined to  
2 include amendments like the one that I just cited.

3 So, applying the statute most strictly by plain  
4 terms, you first look to the Certificate of Incorporation  
5 for an address, for a location that is stated. And the only  
6 location that is stated in any of the documents that  
7 comprise our Certificate of Incorporation as defined under  
8 the statute is the 80 State Street, Albany address.

9 The statutory framework and the legislature's  
10 deliberate choice to depart from the General Corporation Law  
11 scheme which gives the AG more discretion as to where to  
12 venue a case, but we would argue should guide the Court's  
13 interpretation.

14 The NRA is fighting for its very existence. And to  
15 the extent that there's any ambiguity, why not let us fight  
16 for our existence in the place we chose, not the place that  
17 is sort of constructively construed; not a place where we  
18 throw up our hands and say well, this is a historical  
19 anomaly so the AG can sue anywhere it wants.

20 Venue is clearly proper in Albany. It's not  
21 clearly proper in New York county. So, we would urge the  
22 Court to sort of vindicate the intent of 1110, which is, you  
23 know, not to resort to these other constructs that exist  
24 under 503 or that exists under the Business Corporation Law.

25 THE COURT: Look, you have discretionary arguments

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1 to come, and I get that, but this is not discretionary. The  
2 venue statute says that it's the normal venue unless  
3 otherwise prescribed by law. That is not some judge  
4 deciding what, you know, what makes sense. It's either  
5 prescribed by law or it isn't. It's binary, I think, on  
6 this one.

7 There's a discretionary venue argument that you  
8 make later, which we'll get to. You know, I can't straddle  
9 here, this one. This is one or the other.

10 MS. ROGERS: We agree, your Honor, and we think the  
11 most straightforward reading of the text is, is there a  
12 venue prescribed by law. Clearly, yes. That is the obvious  
13 purpose and effect. And it prescribes a venue as a matter  
14 of statute. What does the statute say? It says that  
15 dissolution can only be brought in the judicial district or  
16 the offices. An office means the location of which is  
17 stated in the Certificate of Incorporation.

18 So what the statute prescribes is that this  
19 dissolution case can only be brought in the judicial  
20 district, the location of which is stated in the Certificate  
21 of Incorporation. There is only one location stated in our  
22 Certificate of Incorporation, and that's 80 State Street,  
23 Albany.

24 THE COURT: You were just reading from the  
25 statutory definition of the phrase "office of the

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1 corporation"; right?

2 MS. ROGERS: That's correct. Yes.

3 THE COURT: And the State gives companies a form to  
4 change the office of the corporation. So, whatever the  
5 embedded definition of it is, there was a way to do it, and  
6 you didn't.

7 MS. ROGERS: There would have been a way to be even  
8 more explicit about it, but I don't think it changes the  
9 straightforward application of the statute. There is a  
10 location stated in the Certificate of Incorporation and  
11 that's Albany.

12 THE COURT: Okay.

13 Anything else on this issue before I turn to the  
14 Attorney General? Do you or any of the other defendants  
15 have anything to add?

16 MS. ROGERS: One moment, your Honor.

17 (Pause in proceedings.)

18 MS. ROGERS: One additional thing, your Honor.

19 We don't think this ought to be dispositive, but  
20 the New York Attorney General in its papers references, you  
21 know, if you go to the Secretary of State website, that  
22 there are certain menu options you can toggle to produce a  
23 New York county address, but -- actually, I'm just going to  
24 let my co-defendant counsel address this because he's spent  
25 more time on the website than I have.

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1 MR. CORRELL: Your Honor, the Certificate of  
2 Incorporation is the only document that the Court should be  
3 looking at, but if the Court wants the color on that, the  
4 Attorney General has put into the record a printout,  
5 something that purports to be a printout of the website of  
6 the New York State Department of State.

7 And under selected entity address, the selected  
8 entity being National Rifle Association, it shows the  
9 address 80 State Street, Albany, New York.

10 So, apparently, the New York State Department of  
11 State regards the address of the NRA as 80 State Street,  
12 Albany, New York and that's -- -

13 THE COURT: Doesn't the website also -- and I may  
14 be confusing things in the record, and I'm sure the Attorney  
15 General will correct me, but I thought there was something  
16 on the website that you actually disputed because it lists  
17 the office of the corporation in New York county. I may be  
18 misremembering.

19 MR. CORRELL: Your Honor, we dispute the  
20 characterization that the Attorney General has put on that  
21 document, but they've read a line that says date of, I  
22 believe it's the date of filing of the original Certificate  
23 of Incorporation, and it's listed as November 20, 1871, and  
24 then below that it says county, New York.

25 And the fact is that the original Certificate of

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## Proceedings

1 Incorporation was filed in New York county on November 17,  
2 1871, so that date is incorrect. But the filing in New York  
3 county, that's an inference they are trying to draw from  
4 those two things which are not, in our view, connected. I  
5 think it's a misreading of the information set forth on the  
6 website.

7 THE COURT: Okay. I appreciate that.

8 Anything else before I turn to Mr. Conley, whose  
9 image has now --

10 MS. ROGERS: Vanished to me, but if you can see  
11 him, your Honor, that's the important part.

12 THE COURT: I can. It appears to be somewhat of an  
13 aberration.

14 Anyway, as long as Carolyn, can you see Mr. Conley?

15 THE COURT REPORTER: I can. Thank you.

16 THE COURT: All right.

17 Fire away.

18 MR. CONLEY: Thank you, your Honor.

19 To take a step back, the defendants do not dispute  
20 16 of the 18 causes of action asserted in the complaint are  
21 properly venued in this court. The defendants are  
22 challenging venue for the two dissolution causes of action  
23 which are governed by a separate venue provision and N-PCL  
24 1110.

25 Under N-PCL 1110, the proper venue for a

cb

## Proceedings

1 dissolution action is in the Supreme Court in the judicial  
2 district in which the office of the corporation is located.

3 And for purposes of this statute, the location of  
4 the office of the corporation is determined by an  
5 organization Certificate of Incorporation. As we  
6 established in our opposition papers, the NRA's office of  
7 the corporation is, and has always been, located in New York  
8 county.

9 Under the law in effect at the time of its  
10 formation, the NRA was required to file a Certificate of  
11 Incorporation in the office of the clerk of the county in  
12 which the office of such society shall be situated.

13 In accordance with this law, the NRA filed a  
14 Certificate of Incorporation in New York county, thereby  
15 designating it the county location of its office of the  
16 corporation. The NRA repeatedly reaffirmed that choice in  
17 later amendments to its Certificates of Incorporation which  
18 were filed in New York county and approved by justices of  
19 the First Department.

20 This designation of New York county is also  
21 reflected in current Department of State records for the  
22 NRA, the accuracy of which the defendants did not dispute in  
23 their reply papers.

24 And I do contest a couple of points made about the  
25 database records, which I'll get to in a moment. But, in

cb



## Proceedings

1 any event, venue is a matter of the plaintiff's choice. And  
2 on a motion to change venue, it's the defendant's burden to  
3 establish that the plaintiff's choice of venue is improper  
4 and that the defendant's choice of venue is proper. And the  
5 defendants have not established either here.

6 They put forth no credible evidence to establish  
7 that its office of corporation is in Albany county. To the  
8 contrary, the NRA's incorporations, both its historical and  
9 modern, reflected its office of corporation as in New York  
10 county.

11 Now, the defendants argue that the NRA has never  
12 had a physical office in the State of New York and the venue  
13 should, therefore, default to where its registered agent is  
14 located in Albany county, but this argument is flawed in  
15 several respects.

16 First, the N-PCL expressly states that an entity's  
17 office of the corporation is distinct from the physical  
18 location where an entity engages in business. That the NRA  
19 never had a physical location in New York has no bearing on  
20 venue.

21 Second, the defendant's argument that the NRA was  
22 never required to designate a county location for its office  
23 of the corporation ignores the legal effect of filing its  
24 original certificate in New York county. The act of filing  
25 its incorporation papers in the county where its office was

cb

## Proceedings

1 to be located was a condition precedent to the NRA's  
2 creation and corporate existence. It is as essential to its  
3 formation as setting out its name and core purposes.

4 THE COURT: The difficulty -- the difficulty with  
5 relying on an 1871 Act or action is that the statute I'm  
6 dealing with now didn't exist then and it references a  
7 statutory phrase, "office of the corporation", that didn't  
8 exist as a statutory definition until later.

9 So, I'm not sure how much value you get out of, you  
10 know, the initial thing. But I understand the point. It is  
11 some piece of evidence.

12 MR. CONLEY: Yes, your Honor.

13 And, again, in later amendments to its Certificate  
14 of Incorporation, the NRA was required to get approvals for  
15 changes to amendments to its Certificate of Incorporation by  
16 getting approval from justices in the judicial district in  
17 which its office was located. And the NRA got approval for  
18 those amendments from justices of the First Department.

19 Also, while the defendants focus a great deal on  
20 the location of the NRA's registered agent, they fail to  
21 cite to any legal authority that says the location of a  
22 corporation's registered agent is relevant, let alone  
23 conclusive evidence of where an entity's office of the  
24 corporation is located under N-PCL 1110.

25 And, as your Honor noted, if the NRA had wanted to

cb

## Proceedings

1 change its county location by designating a registered agent  
2 in Albany, it could have easily done so. The 2002 form had  
3 an option for changing its county location, but the NRA  
4 declined to make that change.

5 Since its formation, the NRA has been able to  
6 change its county location to wherever it wanted, but never  
7 has, instead electing to keep it fixed in New York county.

8 The Attorney General brought this action in New  
9 York county because venue is proper here. All along, the  
10 Attorney General has adhered to the statutory venue  
11 provision in the N-PCL by bringing and defending its choice  
12 to bring dissolution claims here.

13 THE COURT: Well, let me ask you the same question  
14 I asked Ms. Rogers. What if there is no office of the  
15 corporation, you know, it didn't have to have one when it  
16 first started, and let's just assume that all of these  
17 shreds of evidence that both sides sort of bring up don't  
18 really establish an office of the corporation, what do I do  
19 then?

20 MR. CONLEY: Your Honor, under the venue citing  
21 provisions in Article 5 of the CPLR, it would be treated  
22 like a foreign corporation and venue would be proper in any  
23 county that the Attorney General chose.

24 THE COURT: Okay.

25 Anything else on the venue motion?

cb

## Proceedings

1 MR. CONLEY: I will just note that the Court can  
2 resolve the instant venue motions without determining the  
3 location of the office of the corporation. Even if venue  
4 were improper for the two dissolution claims, which they are  
5 not, the Court may and should retain this entire action.

6 N-PCL 1110 doesn't deprive this Court over  
7 jurisdiction over the dissolution claims. And in the  
8 interest of judicial economy and efficiency, it plainly  
9 weighs in favor of retaining this entire case.

10 THE COURT: That argument I don't understand as  
11 well. I mean, if the statute has a mandatory venue  
12 provision for claims A and B, how do I just ignore that?  
13 I'm not aware of anything in here that says I have  
14 discretion to ignore something that's prescribed by law.

15 MR. CONLEY: If the Court were to find that the two  
16 dissolution claims were improperly venued, the Court may  
17 still find that because of the other 16 of 18 causes of  
18 actions are proper in New York county, the Court does have  
19 the ability and the authority to keep the entire action.  
20 It's not robbed of jurisdiction as the defendants insinuate.

21 THE COURT: The cases you cite for this  
22 proposition, at least my recollection is all or almost all  
23 of them, they did not have a mandatory venue provision that  
24 the Court was just sort of riding rough shot over. This one  
25 does.

cb

## Proceedings

1 MR. CONLEY: I believe the *Tashenberg* decision in  
2 the Third Department, your Honor, did involve a dissolution  
3 claim. And in that case it held that if venue was proper  
4 for one claim, it's proper for all of them.

5 THE COURT: Okay. All right.

6 Why don't I see if Ms. Rogers has anything to add  
7 and then she can move on to the other branches of the  
8 motion.

9 MS. ROGERS: Yes, your Honor. I would like to  
10 address the *Tashenberg* case. This is a 38 year old cursory  
11 opinion in another judicial department and it's  
12 distinguishable on a number of grounds.

13 THE COURT: I now have lost your picture, but I can  
14 --

15 MS. ROGERS: Hold on. Let me see if I can --

16 THE COURT: I'll do the best I can to imagine it.

17 MS. ROGERS: I'm here.

18 THE COURT: Okay. There you go.

19 MS. ROGERS: Your Honor, I want to address the  
20 *Tashenberg* case because it is the only case that defendant  
21 -- I'm sorry, that the plaintiff marshals that you could  
22 struggle to construe as being apposite and there are severe  
23 flaws in plaintiff's reliance on it.

24 So, *Tashenberg* is a 38 year old cursory opinion in  
25 another judicial department. We actually tried to track

cb

## Proceedings

1 down the underlying papers and submissions that led to this  
2 ruling and we couldn't because the case is so old.

3 In *Tashenberg*, it's important that the Court notes  
4 that this is an action by a stockholder, director and  
5 officer, so an insider action for dissolution, not an  
6 adversarial one by the State, was essentially -- the essence  
7 of the case was that it sought various types of relief for  
8 the stockholder, director and officer and, therefore, you  
9 know, it can be brought in a district where the stockholder,  
10 director and officer resides.

11 But that's not the case here. Here, we are dealing  
12 with a statutory mandatory venue provision that, when it was  
13 drafted, the legislature made a decision to strip the  
14 discretion that the AG would have as for for profit  
15 corporations.

16 But the nonprofit corporation, unlike under the  
17 General Corporation Law, you can't bring it in any county in  
18 which you want. It has to be the location of the office,  
19 the location of which is stated in the Certificate of  
20 Incorporation. That's one reason *Tashenberg* is inapposite.

21 I also want to point to you, this is a case we cite  
22 on page 7 of our reply, controlling Court of Appeals  
23 authority in *Lazarow, Rettig, & Sundel v. Castle*, and that's  
24 at 49 NY2D 508, and that's construing --

25 THE COURT REPORTER: Excuse me.

cb

## Proceedings

1 THE COURT: You faded out a bit.

2 MS. ROGERS: I'm sorry.

3 The *Lazarow* case, which is controlling Court of  
4 Appeals authority, construes a different statutory mandatory  
5 venue provision, one applying to banks, but it provides some  
6 insight on how the Court of Appeals treats these provisions.  
7 They treat them as this protection that is afforded to the  
8 entity being sued.

9 The Court of Appeals says in *Lazarow*:

10 "The rule that an actual bank may only be sued in  
11 the district or the county in which it is established was  
12 prescribed for the convenience of those institutions and to  
13 prevent interruption in their business that might result  
14 from their books being sent to distant counties. The  
15 mandatory character of the statute may not be blunted by  
16 judicially created exceptions."

17 This is pretty similar. The N-PCL 1110 was derived  
18 very closely from a parallel provision of the General  
19 Corporation Law, but the allowance was intentionally  
20 narrowed so that a nonprofit could only face the prospect of  
21 a corporate death sentence in the judicial district where it  
22 identifies where there is an office, the location of which  
23 is stated in the Certificate of Incorporation.

24 THE COURT: Okay.

25 Why don't you move on to the other branches of the

cb

## Proceedings

1 motion.

2 MS. ROGERS: Certainly, your Honor.

3 MR. CORRELL: Your Honor, if I may address this one  
4 narrow point going to *Tashenberg* before we move on.

5 The *Tashenberg* opinion was four sentences long.  
6 And saying that it's cryptic is an understatement. It's  
7 really hard to know exactly what the Court was doing there,  
8 but the Court did cite Section 503 of the CPLR without  
9 quoting the language and without referencing the exception  
10 in that provision.

11 And it also cited, I believe, CPLR 502 without  
12 acknowledging the limiting language of that provision which  
13 specifically limits its application to situations where  
14 there is a conflict of provisions under Article 5 of the  
15 CPLR.

16 So, our view is that CPLR 502 operates to give the  
17 Court discretion to resolve conflicts between venue  
18 provisions in Article 5 of the CPLR, but it doesn't give a  
19 court discretion to basically ignore a mandatory  
20 jurisdiction provision in another statute.

21 And that analysis is consistent with CPLR Section  
22 101 which says the CPLR applies except where its procedure  
23 is regulated by an inconsistent statute.

24 We don't view the Not-for-Profit Corporation Law as  
25 inconsistent with the CPLR. If you read them properly,

cb



## Proceedings

1 they're consistent. But the Attorney General seems to be  
2 reading them in a way that produces a conflict, and if  
3 that's so, then they run up against the bar of CPLR 101  
4 which is if there is conflict, then the Not-for-Profit  
5 Corporation Law preempts the CPLR and takes precedence.

6 On that basis, all of the cases they have relied on  
7 are distinguishable in that the parties did not raise those  
8 issues and did not cite CPLR Section 101.

9 And there is Supreme Court authority on that point  
10 that where a separate statute sets forth a comprehensive  
11 procedural scheme, as the not-for-profit corporation does  
12 here, that the Court must give precedence to that other  
13 scheme.

14 And that's kind of an extension of the old rule  
15 that if you have a general statute and a specific statute,  
16 the specific one applies, not the general one.

17 THE COURT: Right.

18 MR. CORRELL: Thank you, your Honor.

19 THE COURT: I think I have what I need on the venue  
20 motion.

21 Now, the remaining motions, I think we can argue as  
22 a group. Ms. Rogers, you can take us -- and it's hard to  
23 group them together, but it's forum non conveniens and, you  
24 know, dismissal based on the pending federal action. Those  
25 are somewhat related. So, I'll let you argue them however

cb

## Proceedings

1       you would like, but --

2               MS. ROGERS: Your Honor, it seems that the concepts  
3       implicated in the motions are overlapping and it makes sense  
4       to argue them simultaneously.

5               So, we now depart the land of strict statutory  
6       construction to analyze a number of provisions where the  
7       Court has a lot of discretion to determine what the interest  
8       of substantial justice favors and where good cause exists.

9               So, the forum non conveniens doctrine simply  
10      requires, you know, is there a more convenient forum and  
11      would it serve the interest of substantial justice for the  
12      action to be heard there.

13              This action is not only technically commenced after  
14      our lawsuit against the New York AG which was commenced on  
15      August 6th, it's only the latest in a tangled nest of  
16      litigation that is pending largely in federal court, some of  
17      it in state court, that raised overlapping factual and legal  
18      issues about the NRA's business expenditures.

19              A lot of the transactions and events that are  
20      alleged in this complaint relate to the NRA's dealing with  
21      Ackerman McQueen. For example, these travel expenses, these  
22      expenses that have garnered a lot of ink in the press, those  
23      were all incurred, to the extent they were indeed incurred,  
24      were incurred by Ackerman McQueen.

25              There is a previously pending federal litigation

cb

## Proceedings

1 between the NRA and Ackerman McQueen where all of the issues  
2 are in play. And that's in the Northern District of Texas.  
3 That's one of the many federal cases that we are in the  
4 process of moving to consolidate in an MDL proceeding.

5 There is also an ancillary litigation. We had a  
6 former Ackerman employee come forward and provide  
7 essentially whistleblower testimony that Ackerman was lying  
8 to the NRA about the nature of the expenditures. He  
9 testified in that NRA Ackerman litigation. Ackerman filed  
10 oddly a distinct lawsuit against him, and that's also  
11 pending in federal court.

12 Then, we have the Delatil (sic) litigation pending  
13 in the Middle District of Tennessee, exact same issues,  
14 previously filed action, already in federal court, already  
15 in discovery.

16 The constitutional dispute between the NRA and the  
17 New York State of the Office of the Attorney General has  
18 been brewing for a while. It was commenced by the NRA in  
19 the Northern District of New York on August 6, 2020, and I  
20 don't need to belabor, and I won't, but I'll mention because  
21 it's so salient, you know, this is a case of historical  
22 constitutional importance because the ACLU weighed in for  
23 us.

24 We've had 16 amici states weigh in for us, wave a  
25 red flag and say, you know, what the AG is doing here is

cb

## Proceedings

1 unusual and wrong. Multiple constitutional scholars;  
2 Jonathan Turley; Feldman, we cite them in our brief, have  
3 come out and said look, even if some of these allegations  
4 were true, it is clear that this effort to dissolve the NRA  
5 is unconstitutional.

6 Now, we understand that, you know, that's going to  
7 be argued and the AG has a different view on it, but those  
8 Article 3 constitutional claims were brought in a federal  
9 forum and deserve to be heard there. And it's not that we  
10 doubt the sophistication of the Court to hear those claims,  
11 but they were technically first filed and there are  
12 efficiencies to be gained from trying all of these  
13 interrelated cases in a federal forum, especially because  
14 some of the most salient claims here are the NRA's  
15 constitutional claims which are federal questioned claims.

16 There are --

17 THE COURT: You said -- you may have used the words  
18 technically filed first. I'm not sure what that means. I  
19 think it is uncontested that the papers were filed by the  
20 Attorney General here first. Then, later, I think in the  
21 same day, the NRA filed in federal court.

22 And, you know, I understand that there was an  
23 amendment or a change to the verification, but it wasn't  
24 actually filed first; right?

25 MS. ROGERS: Well, so technically, your Honor, the

cb

## Proceedings

1 AG's case was filed first, but it wasn't commenced first.  
2 And that's the difference ---

3 THE COURT: Your reference to technically filed  
4 earlier, and I'm just trying to figure out what you meant.  
5 It was technically filed here, the question is whether that  
6 matters.

7 MS. ROGERS: Right.

8 Your Honor, it was technically filed here, but the  
9 action filed here was a nullity. That's the term in the  
10 CPLR and we are entitled to treat that complaint as a  
11 nullity under the CPLR because it was improperly verified.

12 Now, the AG in its papers urges the Court to  
13 exercise its discretion to disregard what it characterizes  
14 as something in the nature of a typographical error, but, in  
15 fact, that deficit in the verification is not just  
16 technical.

17 It is not a technicality when the Attorney General  
18 of the State of New York files a 168 pages of corruption  
19 accusations, the statute requires it to verify it at least  
20 believes those allegations are true. That's what was left  
21 out of the initial filing.

22 We were entitled to treat it as a nullity if we  
23 followed the appropriate procedure; we gave immediate  
24 notice, which we did, and an amended filing was made, but  
25 the NRA's federal action, when you consider that the

cb

## Proceedings

1 attempted filing of the State action on August 6th was a  
2 nullity, then the first filed of these two overlapping cases  
3 is the NRA federal case which was filed and successfully  
4 commenced the morning of August 6th a few minutes after  
5 Letitia James commenced her press conference announcing that  
6 she was going to destroy the National Rifle Association.

7 THE COURT: One thing I guess I have to note,  
8 because it was in front of me, when the NRA decided to bring  
9 a lawsuit last year, it brought it in Manhattan, in fact, in  
10 front of me. So, it didn't seem terribly inconvenient to  
11 litigate in New York City at that point.

12 MS. ROGERS: Your Honor, I have a couple of  
13 responses to that.

14 I mean, I understand that you're raising this in  
15 the context of the forum non conveniens and dismissal  
16 arguments, but obviously that plays no role in the statutory  
17 venue analysis because you can't change the plain text of  
18 the venue provision based on some kind of purposeful  
19 availment argument.

20 THE COURT: That's why I'm raising it now.

21 MS. ROGERS: I apologize, your Honor. I just  
22 wanted to cover that for the record.

23 But we were in a different posture then. Several  
24 of the federal cases that we're now seeking to consolidate  
25 in a multidistrict litigation either didn't exist or were

cb

## Proceedings

1 much, much less advanced at the time.

2 Also, we have another federal constitutional case  
3 pending in Albany. We filed ours as a related case, so the  
4 dispute that was in front of your Honor was a pretty narrow  
5 indemnity dispute with a director. It did not implicate the  
6 broader First Amendment and the Fourteenth Amendment issues  
7 which are already being tried in a related case in Albany.

8 THE COURT: So, your point is not that Manhattan is  
9 just inherently inconvenient. It's that there's sort of a  
10 locus in Albany of other cases; is that what your argument  
11 is?

12 MS. ROGERS: That's one strand of my argument, your  
13 Honor. It's not that Manhattan is harder to fly to than  
14 Albany.

15 THE COURT: That's often, when you seek forum non  
16 conveniens, it's more along those lines that we're being  
17 asked to go to a location distant and hard to get to and  
18 it's going to cost all sorts of money and the like. That  
19 typically would send you toward a major city center that's  
20 easier to travel in and out of rather than away from.

21 MS. ROGERS: We understand, your Honor. We  
22 understand that it's not a typical forum non conveniens  
23 argument, but we think that it's one that comes within the  
24 statute and the doctrine.

25 Another aspect of the forum non conveniens argument

cb

## Proceedings

1 is that it would be more convenient to be not just in the  
2 Northern District, but in federal court where these  
3 interrelated actions are pending, where we have the  
4 efficiencies of the multidistrict litigation mechanisms and  
5 where this case, which has an incredible footprint, and we  
6 attach to our motion just a partial list, just based on the  
7 AG's allegations, but we have dozens of witnesses and  
8 documents in other states, other countries.

9 Now, we know that the Commercial Division in  
10 Manhattan has tried complex cases before, but it's difficult  
11 to deny, at least from my perspective, that federal court is  
12 designed for this and there are inherent efficiencies there  
13 that will make the case more efficient and least costly,  
14 among those being the ability to serve subpoenas across  
15 state lines.

16 So, that's another reason the federal forum is more  
17 convenient and, you know, we are already going up to Albany  
18 for two other constitutional lawsuits against the State.

19 THE COURT: The federal court thing raises a sort  
20 of a different issue, sort of more under the broadened  
21 umbrella of federalism. You know, your motion is basically  
22 saying that the Chief Law Enforcement Officer of New York  
23 potentially shouldn't be able to maintain an action in state  
24 court.

25 You know, we spent the first part of this argument

cb



## Proceedings

1 with you telling me that the statute mandated that it be  
2 filed with the state court, albeit a different one, and now  
3 your argument is well, it actually shouldn't be in state  
4 court at all, it should all be swept under the federal case.  
5 And I don't know how you square all of that. It's a big  
6 lift to ask that the State Attorney General cannot bring  
7 suit in state court.

8 MS. ROGERS: Well, your Honor, this is a unique set  
9 of circumstances. One of those circumstances being the  
10 existence of a parallel and previously filed federal action  
11 litigating these exact same facts. And, you know, when the  
12 State Attorney General is being, you know, is credibly  
13 alleged to unconstitutionally have targeted the defendant,  
14 perhaps the federal court is an even better forum.

15 Certainly, in the cases that state law enforcement  
16 officers routinely find themselves litigating in federal  
17 court against claimants and defendants and objects of their  
18 law enforcement activity who allege that they have behaved  
19 unconstitutionally, you know, that is the purpose of Section  
20 --

21 THE COURT: As you know, state courts under our  
22 federal system have the ability to address and resolve  
23 federal constitutional claims unless congress has granted  
24 exclusive jurisdiction to the federal court. So, you do  
25 have a forum for it in state court as well.

cb

## Proceedings

1 But, look, I get your point. You're not saying  
2 that it is mandated to go to federal court. You're saying  
3 that I should exercise my discretion to essentially cause it  
4 to be put in a position where it might be consolidated with  
5 the federal action.

6 You're making a discretionary argument, but to the  
7 extent it's based on you need a different forum to raise  
8 constitutional arguments, I don't think that's accurate.  
9 This may not be the preferred forum, but it's, you know, our  
10 doors are open.

11 MS. ROGERS: Well, certainly, your Honor, we would  
12 never contend that the Court isn't equipped or couldn't hear  
13 federal constitutional arguments, only that the interest of  
14 substantial justice designate federal court as the optimal  
15 most convenient forum.

16 I also wanted to address the idea of a  
17 contradictory and inconsistency between the venue argument  
18 and the jurisdiction argument. We are already locked in  
19 multiple federal lawsuits against the State of New York  
20 based on conduct that highly placed New York State officials  
21 announced in the press years before we got to court that  
22 they were going to target the NRA; they were going to go  
23 after the NRA and investors; the NRA is a terrorist  
24 organization. And that's what the State of New York did.

25 Unsurprisingly, we are now up in Albany in our case

cb

## Proceedings

1 against Governor Cuomo and the Department of Financial  
2 Services and we have our case about, you know, gun stores  
3 and COVID and now we have this one. So, we're already in  
4 federal court in Albany on several of these actions.

5 The latest case is technically, the AG's claim is  
6 technically a compulsory counterclaim. They're claiming  
7 they are technically compulsory counterclaims in our federal  
8 action, makes sense to put it there, and although the state  
9 court can hear federal constitutional claims, it is also  
10 clear that a federal court can adjudicate issues under state  
11 corporate law.

12 THE COURT: Your position is that the dissolution  
13 claims in this case would be a compulsory counterclaim in  
14 your federal case?

15 MS. ROGERS: Well, if you read the language of  
16 Federal Rule 13, they arise from the same facts and  
17 circumstances as the previously filed claims.

18 We do cite a case, and I'll find it right now, that  
19 basically argues that where the New York court basically  
20 determines, that is the *Mosdos Chofetz* case that's cited on  
21 page 16 of our motion to dismiss, where the Southern  
22 District of New York determined that Section 1983 claims  
23 were compulsory counterclaims in a state enforcement action.  
24 This involved, I believe it was the health department  
25 against an Orthodox Jewish Organization.

cb

## Proceedings

1                   And so if our claims are compulsory counterclaims  
2                   in their first- filed case, then their claims should be  
3                   compulsory counterclaims in our first-filed case is another  
4                   argument.

5                   But just to get back briefly to this idea that our  
6                   forum and venue arguments are inconsistent, we think the  
7                   best optimal place for these claims is the place where the  
8                   same facts, the same legal issues are already being  
9                   litigated, and that's our Third District of New York action.

10                  It is also, you know, consistent with, even though  
11                  technically -- because it's federal court, it's not  
12                  technically, but it is consistent with the mandatory venue  
13                  provision. The only location we have identified in our  
14                  Certificate of Incorporation was Albany, that needs to be  
15                  litigated in Albany, it would fit.

16                  Now, if the case were going to be in state court,  
17                  obviously we would oppose that, but we think that the best  
18                  and most rational state court would be the Albany state  
19                  court consistent with 1110 and it would be, as we previously  
20                  requested, the Commercial Division given the breadth and the  
21                  complexity of the matter.

22                  THE COURT: Okay.

23                  I'd like to give Carolyn's fingers a few minutes to  
24                  cool down, so why don't we take five and then we'll pick up  
25                  with the rest of the defendants and then back to the

cb

## Proceedings

1 Attorney General and see if we can't get close to finishing  
2 up.

3 Let's reconvene at 11:30. Don't sign off. You can  
4 just turn your microphones off and your cameras off.

5 (Brief recess is held.)

6 THE COURT: Ms. Rogers, before I leave you and go  
7 to see if any other defendants want to discuss, are there  
8 any cases that you are aware of where a forum non conveniens  
9 motion was granted on the ground that a federal forum in the  
10 same state is more convenient than a state forum?

11 MS. ROGERS: Not that we've identified, your Honor.  
12 We also haven't identified any authority opposing that.

13 THE COURT: All right.

14 Are there any other defense counsel who want to be  
15 heard on the motions to dismiss or transfer?

16 MR. CORRELL: Your Honor, I would just like to ask  
17 Ms. Rogers to make one point that we did discuss during the  
18 break that I thought might inform the Court on one of the  
19 issues the Court had raised.

20 THE COURT: Sure.

21 MS. ROGERS: Thank you.

22 There is a case that we cite -- actually, it's a  
23 case that the Attorney General cites on page 26 of their  
24 opposition, that's *Astarita v. Acme Bus Corp.*, 55 Misc. 3d  
25 767, and they cite this for the proposition Secretary of

cb

## Proceedings

1 State --

2 THE COURT: Hang on.

3 If folks who are not talking can go on mute; we're  
4 getting lots of feedback. So, stay on mute until we can  
5 hear Ms. Rogers.

6 MS. ROGERS: Thank you, your Honor.

7 So, there's actually this sort of policy analysis  
8 contained in that opinion talking about why Secretary of  
9 State records are dispositive and it's noted that  
10 corporations often failed to amend their office location  
11 over time. So, that's not unusual.

12 The language is:

13 "Business entities often failed to amend even after  
14 relocating."

15 And the implication is that the sort of very  
16 straightforward black and white reliance on what the  
17 Certificate of Incorporation says is intentional by the  
18 state, even knowing that, you know, people might fail to  
19 file amendments. There might be opportunity to say what the  
20 real location is and you fail to.

21 Nonetheless, under 1110, you look at the judicial  
22 district of the office, the location of which is stated in  
23 the Certificate of Incorporation under the definition  
24 section of the same statute.

25 The Certificate of Incorporation is defined to

cb

## Proceedings

1 include amendments. The 1985 and 2002 documents are part of  
2 that four corners that your Honor is supposed to look at.  
3 There is only one location stated there and it's 80 State  
4 Street in Albany.

5 MR. CORRELL: And, your Honor, the frustration here  
6 is that the way this should have worked is the Attorney  
7 General should have typed in NRA into the website and looked  
8 at the selected entity address which would have been 80  
9 State Street, Albany, New York, and then, because they are  
10 good and careful lawyers, they should have ordered up the  
11 documents and checked to make sure that that was accurate,  
12 that's what was actually stated in the Certificate of  
13 Incorporation, and then they would be done.

14 And the legislature intended to create a front line  
15 task that was easily applicable, very easy to apply. And I  
16 think that this Court, by ruling in our favor, could create  
17 a precedent that would create clarity around that issue and  
18 encourage people to not get involved in motion practice like  
19 this that required people to go back 150 years and be  
20 reading handwritten documents from 1871 to try to discern  
21 the address of the entity.

22 THE COURT: One quirky thing about this case is it  
23 may be one of a kind in that we're talking about an entity  
24 that was created before the statute even existed, and maybe  
25 there are others, that both were created before that time

cb

## Proceedings

1 and where there is no clear amendment changing the office of  
2 incorporation. And so I'm not sure if this is going to be  
3 precedent setting, really, in any direction. But I get the  
4 point.

5 I suppose you could say that, you know, careful  
6 lawyers representing the company would have also been able  
7 to see on the website it does list New York county and  
8 didn't take steps to change that either.

9 Anyway, I guess it's over to the State to respond  
10 on the remaining motions to dismiss, stay or transfer on  
11 discretionary grounds. Is that you again, Mr. Conley?

12 MR. CORRELL: Your Honor, before we move on, if I  
13 may address that last point that you made, which is the  
14 reading of the printout on the website.

15 Again, if you read that printout, it is fair to  
16 read that as the New York county referring to the county in  
17 which the original Certificate of Incorporation was filed as  
18 opposed to the county in which the current office of the  
19 corporation is located.

20 And the statute Section 1110 is very precise in  
21 saying it's the -- you have to file in the Supreme Court in  
22 the judicial district in which the office of the corporation  
23 was located at the time of service on the corporation of the  
24 summons and the action.

25 So, there's a temporal component there that really

cb



## Proceedings

1 makes those two lines in the printout irrelevant because  
2 what happened 150 years ago in what county is sort of  
3 irrelevant under this statutory test.

4 The real question is what is the address of the NRA  
5 currently. And it has been, since 2002, the only address of  
6 the NRA listed in the New York State Department of State  
7 website or information database is 80 State Street, Albany  
8 county.

9 THE COURT: I mean, not to be too persnickety, but  
10 the word address is not in the statute. It's the office of  
11 the corporation, you know. And I'm trying to be very  
12 precise here.

13 Mr. Conley, I still can't see your picture; you  
14 seem to have vanished again, but why don't you start talking  
15 and we'll see if you get back on the screen; otherwise, we  
16 will make do.

17 MR. CONLEY: Okay, your Honor.

18 Do you see me yet?

19 THE COURT: No, I don't. If others can, I will  
20 just --

21 MS. ROGERS: The NRA, we can see Mr. Conley.

22 THE COURT: Carolyn, can you?

23 THE COURT REPORTER: I cannot.

24 THE COURT: It's also more for Carolyn, but if  
25 you're the only one talking then, and hopefully we can

cb

## Proceedings

1 figure this out.

2 So, go ahead, Mr. Conley.

3 MR. CONLEY: Thank you, your Honor.

4 The defendants' forum non conveniens arguments boil  
5 down to their preference for federal court, but that's not a  
6 legitimate basis for dismissing or staying the State  
7 enforcement action. This action has a substantial nexus to  
8 New York and this Court is clearly the proper forum to  
9 adjudicate this case.

10 Under New York law, the plaintiff's choice of forum  
11 should rarely be disturbed and the defendants have not met  
12 the heavy burden required to upset that choice here. The  
13 State of New York and this Court have a vital interest in  
14 retaining this State enforcement action.

15 The New York Attorney General brings this action in  
16 the name and on behalf of the People of The State of New  
17 York, pursuant to her supervisory authority of her New York  
18 charities and their fiduciaries.

19 The complaint is premised entirely on New York law.  
20 Adjudicating the merits of this action will require the  
21 interpretation and application of New York law that was  
22 enacted by the legislature to safeguard the public against  
23 fraud and misconduct and ensure New York charities and their  
24 assets are not misused or abused.

25 This action implicates public interest and

cb

## Proceedings

1 questions of state law that are of critical importance to  
2 this state and this Court.

3 The defendants argue that the federal countersuit  
4 pending in the Northern District of New York is a suitable  
5 alternative forum to litigate the merits of the State  
6 enforcement action, but that federal court has no nexus to  
7 jurisdiction over or interest in the merits of this case.

8 The defendants' unsupported argument that a federal  
9 court could, in theory, exercise supplemental jurisdiction  
10 over this case ignores what federal courts have done in  
11 practice for the last century.

12 The defendants have failed to identify a single  
13 instance where a federal court has exercised supplemental  
14 jurisdiction over a State enforcement action brought by a  
15 State Attorney General.

16 THE COURT: Mr. Conley, can you just talk a little  
17 more slowly. I'm watching Carolyn and I trying to --

18 MR. CONLEY: Of course, your Honor. Yes.

19 And every federal court that has confronted a state  
20 law dissolution claim in the Second Circuit has either  
21 declined jurisdiction on abstention grounds or noted  
22 abstention would be appropriate if jurisdiction existed in  
23 order to avoid improper interference with the strong  
24 interest that New York has in regulating corporations formed  
25 under its own laws.

cb

## Proceedings

1 As this Department has recognized, business  
2 entities are creatures of state law and the state under  
3 whose law and entity was created should be the place that  
4 determines whether its existence should be terminated.

5 None of the other applicable factors in a forum non  
6 conveniens analysis weigh in the defendants' favor. It is  
7 undisputed that there are no potential witnesses or relevant  
8 evidence in Albany. None of the underlying transactions  
9 took place there. And litigating this action in this Court  
10 will impose no hardship on the defendants.

11 The defendants focus a lot on the need for out of  
12 state discovery, but that's not a legitimate basis for  
13 dismissing a case in a New York State court on forum non  
14 conveniens grounds.

15 As your Honor observed, New York courts have  
16 procedures in place that are used every day to deal with out  
17 of state non-party witnesses and discovery. And complex  
18 disputes frequently involve out of state discovery.

19 The scope and complexity of a matter has never been  
20 deemed a legitimate ground for dismissal under the forum non  
21 conveniens doctrine. And there's a good reason for that.  
22 Because if that's all it took to upset a plaintiff's choice  
23 of forum, the doctrine would quickly morph into a de facto  
24 federal removal statute invoked any time a defendant needed  
25 an alternative vehicle to move a case to federal court.

cb

## Proceedings

1           That's not what the doctrine was intended to do  
2           which is why there is no precedent for what the defendants  
3           are asking of this Court. No New York State court has ever  
4           dismissed a case on forum non grounds in favor of a federal  
5           court located in the same State. And this Court should  
6           reject the defendants' invitation to be the first.

7           And notwithstanding the defendants' claims in their  
8           motion papers, this Court is perfectly capable of  
9           adjudicating this action fairly.

10          Also unavailing is the defendants' false claim that  
11          this action would place unnecessary burdens on this Court.  
12          The Commercial Division routinely adjudicates complex  
13          disputes which the defendants are well aware of, given  
14          that's why they petitioned to have the action here. And  
15          there is no reason to believe this action would place an  
16          undue burden on this Court.

17          The forum non conveniens doctrine is intended to  
18          give defendants hailed into a foreign jurisdiction a  
19          procedural device to move for dismissal in the interest of  
20          substantial justice. It is not a tool to force a state  
21          court action into federal court simply because that is where  
22          the defendant would prefer to be.

23          This Court should reject the defendants' invitation  
24          to fundamentally alter and expand the scope of the forum non  
25          conveniens doctrine as it asks the Court to depart from

cb

## Proceedings

1 settled precedent and to undermine the comity of the state  
2 courts and the respect properly accorded to a sovereign  
3 state prosecuting violations of its own laws.

4 Turning briefly to the Rule of 3211(a)(4) motions.  
5 The same equitable factors that are relevant in a forum non  
6 conveniens analysis apply here as well. And it similarly  
7 militate against dismissing or staying this action. There  
8 is no legal or equitable basis for the NRA's collateral  
9 lawsuit challenging this enforcement action to take  
10 precedent over the State enforcement action itself.

11 The motions also fail for several independent  
12 reasons that are fully set out in our opposition papers.

13 But the federal countersuit that the NRA filed  
14 against the Attorney General in the Northern District of New  
15 York was filed after this action was commenced. A necessary  
16 but not sufficient factor for moving for dismissal under  
17 3211(a)(4) is that the NRA's federal action must have been  
18 already pending. It was not, so the defendants' motions  
19 fail.

20 The defendants argue that an error in the original  
21 verification somehow nullify the commencement of this  
22 action, but that's wrong as a matter of law. The defendants  
23 were not entitled to a verified complaint, and even if they  
24 were, the CPLR provides that actions are commenced by the  
25 filing of a summons and complaint. And an error in the

cb

## Proceedings

1 original verification did not change that.

2 The defendants have failed to rebut in their reply  
3 papers that that type of error in the verification is  
4 properly ignored under the CPLR. CPLR 3026 provides that an  
5 error of this nature should be ignored absent a showing of  
6 substantial prejudice and does not nullify the commencement  
7 of this action.

8 The defendants have not identified any prejudice  
9 that resulted from the original verification and their claim  
10 that the defective verification itself affects the  
11 substantial right runs counter to the plain language of CPLR  
12 3026 and lacks any support in the case law.

13 The defendants' elevation of form over substance  
14 finds no home in the liberal pleading standards of the CPLR.  
15 Rule 3026 in 2001 admonished against precisely this type of  
16 rigid reading of the law by providing proof of prejudice by  
17 the defect and form which the defendants have not shown  
18 here.

19 THE COURT: Let me ask you a practical question  
20 about how these two cases are going to work if they both  
21 proceed. So, the defendants here, the plaintiffs in the  
22 federal case, are making a bunch of arguments that would  
23 undermine or undercut or outright say this present action  
24 cannot go forward.

25 Now, they may, if this case proceeds here, raise

cb

## Proceedings

1 those defenses here, but you're then going to have two  
2 courts working on the same sets of issues. How do you --  
3 and that happens from time to time, but how do you -- why  
4 does it make sense and how would I do that?

5 MR. CONLEY: Your Honor, while the NDNY action  
6 arises from and is related to this action, the two cases are  
7 not the same. This action is brought under state law to  
8 enforce state law against an entity and individuals who are  
9 subject to state oversight.

10 It's a regulatory law enforcement action. It seeks  
11 multiple forms of relief including restitution; an  
12 accounting; removal of defendants LaPierre and Frazer, and  
13 judicial dissolution.

14 The NDNY action involves none of the individual  
15 defendants --

16 THE COURT: You're saying N-D-N-Y; right?

17 MR. CONLEY: Yes.

18 THE COURT: Okay.

19 MR. CONLEY: The federal action involves none of  
20 the individual defendants and it raises distinct  
21 constitutional claims that collaterally challenge --

22 THE COURT: You have to go slower.

23 MR. CONLEY: Challenge the propriety of the  
24 Attorney General's investigation into the NRA and the  
25 propriety of bringing dissolution claims here.

cb



## Proceedings

1 Now, in the NDNY action, the Attorney General has  
2 moved to dismiss on multiple dispositive grounds, including  
3 that on abstention, the NRA's constitutional claims should  
4 be raised, if at all, before this Court on a proper record.

5 We fully expect the federal court will dismiss the  
6 action because this court will assess and determine whether  
7 the Attorney General's claims against the NRA have merit.  
8 That federal action is a textbook case for abstention under  
9 the Younger and Burford abstention doctrines.

10 But to the extent there are any overlapping factual  
11 or legal issues, those can be dealt with, and that case does  
12 proceed, those can be dealt with with well settled doctrines  
13 of preclusion and res judicata. It certainly doesn't  
14 warrant staying or dismissing this case and giving  
15 precedence to collateral challenge to the state enforcement  
16 action itself.

17 THE COURT: Okay.

18 MR. CONLEY: Just to turn back briefly, opposing  
19 counsel mentioned the nullity point. I think the defendants  
20 fundamentally misunderstand the relief that is available to  
21 them in the event of a defective verification.

22 The defendants assume that their filing of a notice  
23 to treat the complaint as a nullity, in fact, rendered the  
24 complaint a nullity. And this is not the case. Instead, if  
25 the defendants were entitled to a verification and if it had

cb

## Proceedings

1       been defective and never corrected, then the complaint would  
2       have been susceptible to a motion to dismiss, but the  
3       defendants were not entitled to a verification. And they  
4       did, in fact, receive a corrected verification. So, there  
5       is no basis for dismissal on that ground.

6               And the defendants unsupported claim that the  
7       filing of the corrected verification altered when this case  
8       was first commenced is meritless and finds no support in the  
9       law.

10              THE COURT: Thank you, Mr. Conley.

11              Anything further from the defense before we take a  
12       short break for me to consider and see if I have any other  
13       questions?

14              MS. ROGERS: Yes, your Honor. I would just like to  
15       respond to a few points Mr. Conley raised.

16              Mr. Conley argues --

17              THE COURT: Can you turn your video on just so we  
18       can try to follow along?

19              MS. ROGERS: Unfortunately, I have my video on.  
20       I'll try again. Can you see me now?

21              THE COURT: No.

22              You can Just go ahead.

23              MS. ROGERS: Your Honor, Mr. Conley argues that a  
24       defective verification does not violate a substantial right.  
25       Courts have held otherwise. We cited some of these cases.

cb

## Proceedings

1 One is *Alden v. Gambino*, that's 2016 NY Slip Op. 51394.  
2 That, in turn, cites *Jack Vogel Associates v. Color Edge*,  
3 2008 Slip Op. 31509.

4 I'll quote language from the *Alden v. Gambino* case:  
5 "The failure to sign a verified complaint affects a  
6 substantial right of the defendant in that the plaintiff's  
7 claims cannot be challenged as false."

8 THE COURT: When you're reading, you have to read  
9 more slowly to enable the reporter to get it down. Sorry.

10 MS. ROGERS: I apologize.

11 Well, I'll reread and emphasize this language.:

12 "The failure to sign a verified complaint affects a  
13 substantial right of the defendant."

14 That is the holding in multiple state cases that we  
15 have cited. And it makes sense here. The case was lodged  
16 with unprecedented fanfare, very lurid accusations, and did  
17 not verify in the first instance that the AG believed the  
18 accusations were true.

19 THE COURT: Well, let's hang on a second.

20 This was not filed with no verification; right? I  
21 mean, the verification was sort of garbled and incomplete  
22 for whatever reason, but it had a verification that just  
23 wasn't finished. As I have it, and you tell me if I'm  
24 wrong, it says:

25 "To my knowledge, based on such acquaintance with

cb

## Proceedings

1 the fact, the complaint is true, except as to those  
2 allegations made upon information and belief. And as to  
3 those allegations", and then it sort of ends.

4 You know, I don't think you can read that as saying  
5 they weren't trying to verify. It's just something seems to  
6 have gone wrong. This doesn't seem to be a plaintiff that  
7 is backing away from understanding that it should verify the  
8 accuracy.

9 So, I mean, I understand your point and sometimes  
10 technicalities matter, but I don't think you can stretch it  
11 to the point of somebody trying to distance themselves from  
12 having to stand by the allegation that they were very  
13 publicly adopting.

14 MS. ROGERS: Well, your Honor, we do note that  
15 after, you know, in accordance with the CPLR, we promptly  
16 served notice of our election to treat the defectively  
17 verified complaint as a nullity, then the verification was  
18 corrected. So, the AG obviously chose to stand behind  
19 rather than back away from its initial allegations, but,  
20 nonetheless, given the profile and the nature of the  
21 allegation, we are reluctant to reduce the verification  
22 requirement or even a partial failure to satisfy it to a  
23 mere technicality.

24 And it's not like this was a semi colon. It is  
25 language that, you know, whether admitted unintentionally or

cb

## Proceedings

1 not, has substance of importance especially in respect to a  
2 weekend contending with media who were willing to take the  
3 AG at their word.

4 I also want to address that we are entitled to a  
5 verification because a petition and complaint are different  
6 under the CPLR. Under CPLR 105, that's not true. I can  
7 read the definition. CPLR 105 (b), Action and Special  
8 Proceedings:

9 "The word action includes a special proceeding.  
10 The words plaintiff and defendant include petitioner and  
11 respondent respectfully. Any special proceeding the word  
12 summons and complaint includes notice of petition and  
13 petition."

14 So, the idea that if this had been a summary  
15 proceeding, you would have had to verify the truth of the  
16 allegation, but because this is a 168 page complaint, they  
17 don't. We don't think that's supported by the CPLR.

18 You know, we didn't have to bring a motion to  
19 dismiss. We can, quote, "elect to treat a defective  
20 verified complaint as a nullity", which we did.

21 THE COURT: You can elect to treat it as one; until  
22 a court says it is one, it's not.

23 MS. ROGERS: We would argue that the election  
24 language sort of vests, puts the ball in our court. Not  
25 that it, you know, the Court is deprived of discretion, but

cb

## Proceedings

1 that we had the election and we took it.

2 I separately would like to address the argument Mr.  
3 Conley made that state dissolution claims are never heard in  
4 federal court and that federal court would be an  
5 inappropriate forum.

6 We cite in our briefing one specific instance of a  
7 case, *Nutronics Imaging v. Danan* in the Second Circuit where  
8 they were entertaining a state dissolution cause of action.  
9 The Attorney General points out that abstention arguments  
10 were later made in that case. And in other cases similarly  
11 federal courts have not indicated that they don't have  
12 jurisdiction over state law dissolution claims, but they  
13 have chosen to abstain.

14 The problem with that argument is that there's a  
15 giant and deliberate carve out in the Younger abstention  
16 doctrine that occurs, and I'm quoting here, 401 US 37 at  
17 pages 45, 46:

18 "A refusal to abstain is justified where a  
19 prosecution or proceeding has been brought to retaliate or  
20 to deter constitutionally protected conduct, or where  
21 prosecution and proceeding are otherwise brought in bad  
22 faith or for the purpose to harass."

23 So, this is sort of -- we are not questioning the  
24 fairness or competence of this Court, but it cannot be  
25 denied that in a situation like this one which, as the Court

cb

## Proceedings

1 has said, is a one of a kind case, you know, this is part of  
2 what federal courts exist for. The situation where you have  
3 Eric Schneiderman warning the NRA that the highest level of  
4 the New York State government are going to come after it;  
5 the NRA bringing constitutional claims in response to the  
6 multi-pronged hostilities against it from multiple state  
7 agencies which ensued.

8 We don't impugn this Court whatsoever, but we have  
9 real constitutional claims here that we filed promptly and  
10 Mr. Conley's effort to diminish or deny the factual overlap  
11 vis-a-vis this action, I don't think, would stand scrutiny.

12 I mean, we've made a selective enforcement claim.  
13 And we've already got a selective enforcement claim, another  
14 one, against the State of New York based on its financial  
15 blacklisting. It's not central here, but it's in discovery.  
16 So, we've experienced litigation; it's a recent experience.

17 What the State of New York is going to do is  
18 they're going to allege that all of the comparators, the,  
19 you know, five page chart of other situations we have  
20 analogized where entities that were not the form of  
21 political enemies, Governor Cuomo would treat it  
22 differently, and would distinguish the fact that the NRA was  
23 worse somehow, and they already do that in their abstention  
24 briefing in the federal case. They argue that this case is  
25 different because the culpable executives are still at the

cb

## Proceedings

1 helm.

2 So, the factual question of the specific executive  
3 culpability is going to be litigated here, it's going to be  
4 litigated there. We brought a First Amendment retaliation  
5 claim. I think its highly likely that the State will argue  
6 that even, but for the NRA's constitutionally protected  
7 activity, it would have taken the same enforcement action.  
8 That's what they typically do in response to retaliation  
9 claims.

10 So, we're going to litigate were there real  
11 violations of the law, to what extent do they exist. We're  
12 going to litigate both of those factual issues in turn and  
13 implicate the intent level of the individual defendants and  
14 individual executives.

15 If a transaction was processed through Ackerman  
16 McQueen, who knew about it, or who directed it. That's an  
17 issue that is being litigated in a previously filed federal  
18 case that was filed in 2018 which is the Ackerman  
19 litigation. It's also being litigated in the Delatil (sic)  
20 litigation.

21 The point is it's very difficult to overt the  
22 overlapping inconsistent adjudication problem. And the  
23 notion that we should rely on collateral estoppel and res  
24 judicata when there's two cases progressing on an almost  
25 identical timeline, is not one that is tenable to us and we

cb



## Proceedings

1 think it raises very thorny issues.

2 And the federal court is competent to hear these  
3 claims. And perhaps state court is too. But, again, we're  
4 not making argument that this Court is incompetent. We're  
5 making argument that the interest of substantial justice  
6 favor litigating this latest case arising out of the same  
7 facts as all of those other cases in a forum where it can be  
8 efficiently consolidated and managed with those other cases  
9 in an Article 3 forum where the NRA's Section 1983 claims  
10 are, you know, fundamentally designed to be heard.

11 THE COURT: Well, one could ask that if the main  
12 concern, and I'll put aside the state versus federal  
13 competence, I'll take you at your word that you acknowledge  
14 that I can do it, and I assume you recognize that the  
15 judiciary and executive branches are separate and  
16 independent, but if the NRA wanted to avoid litigating in  
17 two places, why didn't it just bring its case here to have  
18 them be in the same place?

19 The duplicativeness or the existence of a second  
20 case in a different place was the NRA's doing, not the  
21 State.

22 MS. ROGERS: A couple of points, your Honor.

23 First, this isn't really even the second case  
24 because, as I mentioned, there are multiple federal actions  
25 that have been pending since 2018 that raise similar issues.

cb

## Proceedings

1 One of those is a federal action against Governor Cuomo and  
2 the Department of Financial Services that was already  
3 pending in the Northern District. We filed this case as a  
4 related case to that one.

5 So, this was not arbitrary. This was consistent  
6 with the pattern that has emerged over the course of the  
7 past few years as these same exact factual and legal issues  
8 have been contested in other forums before the AG brought  
9 its case.

10 THE COURT: Okay. All right.

11 I think I have everybody's argument well in hand.  
12 I can't see if Mr. Conley is waving his arms at me, so I'll  
13 assume he's not.

14 I'd like to take a ten-minute break to look through  
15 my notes and then I'll be back with you.

16 Is somebody on the -- I see a blue light flashing  
17 on Ms. Rogers' screen. Are you trying to say something?

18 MS. ROGERS: No, your Honor. I must be some kind  
19 of aberration as well.

20 THE COURT: You have some sort of a gremlin.

21 Anyway, I'll be back in about ten minutes, so why  
22 don't we assume 12:10.

23 Thank you very much.

24 (Brief recess is held.)

25 THE COURT: Look, I appreciate everybody's hard

cb

## Proceedings

1 work. Your briefs were exceptional. Your arguments were  
2 exceptional. I am ready to render a decision that I will  
3 describe for you now.

4 After a careful review of one of the larger records  
5 I've seen on motions to dismiss, the defendants' various  
6 motions to dismiss, transfer or stay this action, which  
7 involve a number of interrelated issues, are denied. I will  
8 file a written order, but in the meantime will provide my  
9 reasons on the record.

10 At the outset, I note that these motions relate  
11 only to whether the Attorney General can maintain this  
12 action in this court or some other court. They have nothing  
13 to do with the underlying merits of the case, which are not  
14 before me today.

15 I'd like to start with the statutory motion to  
16 either dismiss or transfer because of venue. Analytically,  
17 starting with the first point. Venue is appropriate in New  
18 York county unless another venue is prescribed by law.

19 Under the CPLR, the place of trial of an action  
20 shall be in the county designated by the plaintiff, that's  
21 CPLR 509, and then you turn to CPLR 503(a) which provides  
22 that the place of trial shall be in the county in which one  
23 of the parties resided when it was commenced, except where  
24 otherwise prescribed by law.

25 So, it's undisputed that the Attorney General is

cb

## Proceedings

1 deemed to be a resident of New York county as well as every  
2 other county, so venue here is proper under CPLR 509 and  
3 503, unless another venue is "prescribed by law".

4 So, the question here is whether the New York  
5 Not-for-Profit Corporation Law prescribes a different venue  
6 with respect to the claims for dissolution of the NRA. I  
7 find it does not.

8 Under Section 1110 of the Not-for-Profit  
9 Corporation Law:

10 "An action or special proceeding for dissolution  
11 shall be brought in the Supreme Court in the judicial  
12 district in which the office of the corporation is located  
13 at the time of the service on the corporation."

14 And, as counsel had pointed out during the  
15 argument:

16 The "office of the corporation" is further defined  
17 as the office, the office location of which is stated in the  
18 Certificate of Incorporation.

19 And continuing down the line of definitions:

20 The Certificate of Incorporation is defined to  
21 include the original Certificate of Incorporation or any  
22 other instrument filed or issued under any statute to form a  
23 domestic or foreign corporation as amended, supplemented or  
24 restated by Certificate of amendment, merger or  
25 consolidation, or other certificate or instruments filed or

cb

## Proceedings

1 issued under any statute.

2 That's enough of the quoting.

3 For these purposes, the parties agree that the  
4 NRA's actual headquarters, at least currently, are in  
5 Virginia, but that that's irrelevant. Only its statutorily  
6 designated New York office, if it has one, is relevant to  
7 which court can hear this case.

8 Now, both sides, exhaustively and very  
9 impressively, combed the historical records from 1871 to  
10 present to find any shred of evidence as to the location of  
11 the NRA's corporate office in New York.

12 While interesting, ultimately I find that all of  
13 that is beside the point. The definition of the "office of  
14 the corporation" is statutory and very specific. It has to  
15 be the location designated in the Certificate of  
16 Incorporation as amended.

17 The quirk here, as I mentioned earlier, is that the  
18 NRA was formed under an 1865 statute that didn't require  
19 designation of a specific office, so the original  
20 corporation didn't do so. And it has not been amended to do  
21 so, based on my review of the record in the 150 years since.

22 Under the plain language of the statute, then, the  
23 NRA does not have an "office of the corporation", and was  
24 not required to have one, let alone that mandates venue in  
25 Albany.

cb

## Proceedings

1           The NRA relies heavily on a 2002 filing which we  
2           discussed during the argument which is NYSCEF Document 109,  
3           in which it specifically changed the address to which the  
4           Secretary of State shall forward copies of process accepted  
5           on behalf of the corporation to an address in Albany, and  
6           also named CSC as its designated agent to receive process.

7           But in that very same form, immediately above the  
8           boxes that were checked by the NRA, includes the option to  
9           change the "county location within this state in which the  
10          office of the corporation is located."

11          In other words, the exact statutory language that  
12          is set forth in the Not-for-Profit Corporation Law venue  
13          provision. The NRA left that space blank.

14          In my judgment, that disposes of the argument that,  
15          you know, in the remainder of the form designating an agent  
16          for service of process was intended or had the effect of  
17          designating for the first time an "office of the  
18          corporation" in any county.

19          So, while the defendants cite to cases that appear  
20          to equate the location of the registered agent with the  
21          residence of a party under CPLR 503, those cases are not in  
22          the context of the statutory language at issue here, which I  
23          am bound to follow.

24          That is especially true, given that the same form  
25          permitted the NRA to change its agent for service of

cb

## Proceedings

1 process, gave it an easy means of changing the location of  
2 the office of the corporation.

3 So, they clearly are not the same for statutory  
4 purposes. Service of process and agent is a different piece  
5 on the amendment of the corporate documents. So, to argue  
6 now that they're the same, I think, just conflicts the plain  
7 language of the amendment itself.

8 I note, as the parties have gone back and forth,  
9 that the New York Department of State Division of  
10 Corporation lists the NRA's "county" to be New York. You  
11 know, the NRA presumably could have changed it if it felt it  
12 wasn't accurate, but it didn't. I don't give tremendous  
13 weight to that. It's just an indicia that because no  
14 changes had been made, certainly not checking the boxes I  
15 described, then there was no change in the State's records.

16 By contrast, as the defendants point out, there is  
17 the reference to the Albany address with respect to service  
18 of process which is, again, consistent with the 2002 form  
19 that it changed.

20 The bottom line, in my view, is that there is no  
21 statutory basis to conclude that the NRA's "office of the  
22 corporation" is in Albany. In fact, as far as I can tell,  
23 the NRA has never designated an office of corporation and  
24 wasn't required to.

25 As discussed with both counsel during the argument,

cb

## Proceedings

1 in the absence of any office of incorporation in any  
2 particular county, the default provisions of the CPLR  
3 control and venue in New York county is permissible.

4 Now, even if I were inclined to consider the  
5 historical evidence, which I, again, don't think is  
6 necessary because there is no office of the corporation, I  
7 would deny the motion to change venue anyway.

8 The 1865 Act under which the NRA was launched  
9 required the Certificate of Incorporation to be filed "in  
10 the office of the clerk of the county in which the office of  
11 the corporation shall be situated."

12 So, similar language to what ended up being in the  
13 subsequent statute. By that measure, the NRA chose New York  
14 county as its office location by filing its certificate at  
15 the very beginning with the clerk in New York county.

16 There is also no evidence that the NRA chose --  
17 there was also some evidence, at least, that the NRA chose  
18 New York county as the location of its office by seeking and  
19 obtaining approval for certain corporate changes by justices  
20 in this county when the law required the approval of "a  
21 justice of the Supreme Court in the judicial district in  
22 which the office of the corporation is located."

23 So, again, just inferring from that language which  
24 ends up in the currently applicable statute, the NRA took  
25 certain steps long ago which indicated that if there is an

cb



## Proceedings

1 office of the corporation, the weight of the evidence is  
2 that it is New York county.

3 In 1956, for example, when the NRA first amended  
4 its corporate purposes, it sought approval of the amendment  
5 certificate from a justice in this judicial district.

6 The NRA did something similar in 1977 when it  
7 sought and received approval by a justice in this district  
8 as well.

9 The NRA argues that the probative value of these  
10 filings is limited because they were required under the 1865  
11 statute to continue making filings where they made their  
12 first one. And, frankly, that's a fair point. But if we're  
13 in the business of trying to define the location of the  
14 corporate office by historical precedent, these filings that  
15 I just went through tip in favor of New York county.

16 And, again, the main argument the NRA really raises  
17 here and relies on is the 2002 filing where they created an  
18 Albany address for service of process. And I've already  
19 gone through why I think that is not persuasive. And, in  
20 fact, I think it cuts the other way, the fact that they  
21 chose an Albany address for one purpose and did not choose  
22 it for purposes of designating an office of corporation, to  
23 me, cuts against them.

24 So, all things considered, I believe the Attorney  
25 General has the better of the argument that if we go to

cb

## Proceedings

1 historical precedent, the NRA has an office of the  
2 corporation, and if the NRA has an office of the  
3 corporation, then it would be New York county, unless and  
4 until the NRA amends their Certificate of Incorporation or  
5 otherwise.

6 So, the bottom line is that even using the  
7 historical evidence here, I don't see a mandatory venue in  
8 Albany county. Given that ruling, I need not, and do not,  
9 reach the alternative argument that the Attorney General has  
10 made, that even if the statute mandated venue in Albany for  
11 the dissolution claims, that I could still retain all of her  
12 claims, including that one as a matter of discretion, I'm  
13 just not going to reach that, which I think is unnecessary  
14 since I'm keeping the NRA claim here anyway.

15 All right. So that's the statutory venue motion.

16 Moving on to the motion to dismiss on grounds of  
17 forum non conveniens, the doctrine which has now been  
18 codified in CPLR 327 (a) permits a court to dismiss an  
19 action when, although it may have jurisdiction over a claim,  
20 the court determines that in the interest of substantial  
21 justice the action should be heard in another forum.

22 And the factors that courts consider are well  
23 established. They include the residence of the parties; the  
24 situs of the underlying transaction; the existence of an  
25 adequate alternative forum; the location of potential

cb

## Proceedings

1 witnesses and relevant evidence; potential hardship to the  
2 defendant, and the burden on the New York courts.

3 In this setting, the plaintiff's choice of forum is  
4 entitled to strong deference. The cases make clear that the  
5 defendants bear a heavy burden of demonstrating that the  
6 plaintiff's selection of New York was not in the interest of  
7 substantial justice, and unless the balance tips strongly in  
8 favor of the defendants, then the plaintiff's choice of  
9 forum will not be disturbed.

10 And here's why I don't think that the defendants  
11 meet that burden:

12 First, this is an action by New York's Chief Law  
13 Enforcement Officer pursuant to her supervisory authority  
14 over a New York not-for-profit corporation for violating New  
15 York law.

16 To be sure, some witnesses and evidence may be  
17 located outside of New York. Albany is a great, great city.  
18 It's hard to argue that it is easier to get to Albany from  
19 out of state than it is to get to New York City.

20 To this extent that defendants must bear the  
21 burden, or at least the NRA must bear the burden of  
22 litigating in two New York courts at the same time, this  
23 one, and the federal court in Albany, that is something that  
24 the NRA could have chosen to do otherwise by bringing its  
25 action here.

cb

## Proceedings

1 I'm not saying it had to, but if it's going to say  
2 that it's inconvenient to litigate in two places at the same  
3 time, it could have avoided that.

4 In many ways, the defendants are really arguing for  
5 removal of this case to federal court. I'm not aware and  
6 the parties have not cited any case applying forum non  
7 conveniens to move a case from a state court to a federal  
8 court in the same state. And that is not what forum non  
9 conveniens is about.

10 And what the defendants are really doing are moving  
11 for removal and forum non conveniens is not a removal  
12 statute. The doctrine is concerned with geographic  
13 convenience largely, not choosing between state and federal  
14 courts within the same state.

15 In any event, I'm confident I'll be able to work  
16 with the parties and whatever other courts have cases that  
17 are in any way related to coordinate discovery to minimize  
18 inefficiencies and duplication of effort. This Court does  
19 that in many, many cases and I have no doubt we can do that  
20 here.

21 Turning next to the motion to dismiss based on CPLR  
22 3211 (a) (4) which provides for a dismissal of a cause of  
23 action when "there is another action pending between the  
24 same parties for the same cause of action in a court of any  
25 state or the United States, the court need not dismiss upon

cb

## Proceedings

1 this ground, but may make such order as justice requires".

2 So, here, the defendant places enormous weight on  
3 the fact that the Attorney General's initial complaint  
4 omitted or garbled certain words from its verification  
5 statement. This is, in my judgment, placing far too much  
6 weight on what was obviously a nonsubstantive error that was  
7 quickly fixed.

8 The original verification, which was signed,  
9 includes a sentence that sort of ends before completion. It  
10 says, in part:

11 "To my knowledge, based on such acquaintance with  
12 the facts, the complaint is true, except as to those  
13 allegations made upon information and belief, and as to  
14 those allegations", and then it trails off and the rest of  
15 the words are missing.

16 In the defendants' view, this typo, which was  
17 promptly corrected, requires the dismissal of this action  
18 because the federal case was already pending by the time the  
19 OAG corrected it. I just flatly disagree with that.

20 The Attorney General filed first. One cannot say  
21 that the other action was pending at that time. The fact  
22 that the verification was later amended doesn't change the  
23 priority of the filings. The federal action was not pending  
24 when this case began.

25 In any event, even if one assumes contrary to those

cb

## Proceedings

1 facts that the federal case was pending, dismissal would not  
2 be appropriate anyway. The first-filed rule is not a rule  
3 at all, especially when the timing of the two cases is very  
4 close in time, it's a matter of discretion. And, here, for  
5 a variety of reasons, I don't think discretion favors  
6 dismissing or staying the case.

7 And some of these are similar to the forum non  
8 conveniens. In fact, the First Department, in *White Light*  
9 *Productions*, 231 AD2d 90 {First Dept. 1997} says explicitly  
10 that the inquiry under this pending action statute is  
11 similar to that undertaking in applying the doctrine of  
12 forum non conveniens, that is, whether the litigations and  
13 the parties have sufficient contact with the State to  
14 justify burdens imposed on our system.

15 And, again, the first-filed factor is particularly  
16 weak when they're essentially contemporaneous.

17 So, here are factors I think warrant denial of this  
18 motion:

19 First, there are, in my opinion, basic questions of  
20 federal literature. The Attorney General is the Chief Law  
21 Enforcement of the State of New York. She's enforcing a New  
22 York State statute against a not-for-profit company and its  
23 officer organized under the laws of the State of New York.

24 Indeed, as the NRA argued, the statute under which  
25 the Attorney General sues specifically envisions filing in a

cb

## Proceedings

1 state court.

2 And I think it would be inappropriate, in these  
3 circumstances, to find that the Attorney General cannot  
4 pursue her claims in state court just because one of the  
5 defendants would prefer to proceed in federal court.

6 You know, again, to the point about, you know,  
7 state and federal courts, you know, I don't take any umbrage  
8 in any of those statements, but whatever one's views may be,  
9 we're all part of a federal system and the state courts have  
10 their role to play, particularly when enforcing state law.  
11 And to the extent that any constitutional arguments need to  
12 be raised or will be raised here, you know, that's something  
13 that this Court and others do on a regular basis and there's  
14 no, you know, legal requirement that that be done in federal  
15 court.

16 Beyond that, the federal cases that exist don't  
17 address many of the claims in this case and the individuals  
18 here are not parties in the federal case that's in Albany at  
19 least. In light of these factors, dismissing this action as  
20 second in time would elate form over substance and would, in  
21 my view, not be appropriate.

22 Again, I would work with the parties to coordinate  
23 discovery and other matters and minimize inefficiency and  
24 avoid duplication of effort.

25 Last, and we didn't address this too much in the

cb

## Proceedings

1 argument, but it's in the papers, the motion to stay this  
2 case based on the pending Ackerman action in Texas, under  
3 Section CPLR 2201 is also denied.

4 CPLR 2201 permits me to grant a stay in a proper  
5 case upon such terms as may be just. Obviously, it's a  
6 discretionary call. And, as a general matter, this will be  
7 done in one action -- I'm sorry.

8 "In general, only where the decision in one action  
9 will determine all of the questions in the other action, and  
10 the judgment on one trial will dispose of the controversy in  
11 both, is a stay justified. This requires the complete  
12 identity of the parties, the causes of action, and the  
13 judgment sought."

14 That is a quote from the *952 Associates* case, 52  
15 AD3d 236 {First Dept. 2008}.

16 That is not an ironclad rule, but it certainly is  
17 important guidance. Here, the AG and the individual  
18 defendants are not parties to the NRA's action against  
19 Ackerman, and the defendants failed to identify how  
20 resolution of that action will dispose of, you know, any of  
21 these issues in the complaint, let alone the entirety of the  
22 complaint. Therefore, defendants are not entitled to a stay  
23 under CPLR 2201.

24 I'll file a written order confirming the result on  
25 these motions.

cb



## Proceedings

1 I'll ask the parties to upload the transcript upon  
2 receipt from the court reporter. I'll ask you to stay on  
3 after we're done to get Carolyn's information to do so.

4 So, with the resolution of those motions, we now  
5 have to talk about next steps in the litigation. I  
6 understood from one of the letters that the parties were  
7 planning to Meet and Confer, maybe as early as tomorrow,  
8 with respect to proceeding with the action. So, why don't I  
9 hear from the parties as to what the plan would be, in light  
10 of this decision.

11 Let me start with the Attorney General.

12 MR. SHEEHAN: Your Honor, this is Jim Sheehan, the  
13 Charities Bureau Chief.

14 I think what we would like to see happen, based  
15 upon the Court's decision today, is, number 1, we would like  
16 to proceed with the Meet and Confer, which is planned for  
17 tomorrow. There are a number of issues that we addressed  
18 during that meeting and we are planning to have the  
19 parties (inaudible) --

20 THE COURT: You just went on mute. And I'm sorry,  
21 I was the culprit. I was trying to get your picture to  
22 appear.

23 So, Mr. Sheehan, you're going to have to unmute  
24 yourself.

25 MR. SHEEHAN: I just did, your Honor. Thank you.

cb

## Proceedings

1           Your Honor, what we would like to see, at this  
2           point, based upon the Court's decision here, is first we  
3           would like to proceed with the Meet and Confer which is  
4           scheduled for tomorrow, that the parties could proceed in  
5           good faith with the guidance we obtained from this decision  
6           today and plan out a schedule for discovery in this case  
7           that will bring the case to a trial in early 2022.

8           The second thing we would like to see is that an  
9           order be entered, and we would like to discuss this with the  
10          Court and the parties, if there are any additional motions  
11          to dismiss, that they be consolidated into one proceeding as  
12          opposed to seriatim.

13          And I think the third is that they will keep the  
14          Bankruptcy Court advised as to the current status of this  
15          litigation because it may affect other events that are going  
16          on in that court.

17                 THE COURT: Okay.

18                 And for the defendants.

19                 MS. ROGERS: Thank you, your Honor.

20                 I don't know if you can see me, but I hope you can  
21          hear me.

22                 The NRA has no objection to proceeding with the  
23          Meet and Confer tomorrow. I leave it to Mr. Fleming as to  
24          whether Mr. Frazer is in a position to discuss long term  
25          discovery and case schedules and things like that until he

cb

## Proceedings

1 obtains replacement counsel, but that's not an issue for the  
2 NRA, per se.

3 We also have no objection to informing the  
4 Bankruptcy Court of developments as appropriate.

5 As to whether future motions will be consolidated,  
6 we obviously think that depends upon who is bringing them  
7 and the substance of them and we would, you know, reserve  
8 our rights on that.

9 THE COURT: I mean, the CPLR does not envision any  
10 sort of an endless series of motions under 3211, so I don't  
11 know what motions people are talking about, but I certainly  
12 would like to, you know, coordinate and organize so that we  
13 don't have another wave. I would like to get moving on the  
14 case.

15 So, are you aware, as you sit here now, of motions  
16 to dismiss? I mean, the complaint hasn't changed. What are  
17 you talking about?

18 MS. ROGERS: Your Honor, that's just it. Sitting  
19 here, I don't have a discrete intention to bring a specific  
20 motion, but Mr. Sheehan has proposed that any future motions  
21 be consolidated, and I'm simply saying that I don't know  
22 what the other defendants are doing, but we would approach  
23 that on a case by case basis.

24 THE COURT: Well, let me take it one step at a  
25 time.

cb

## Proceedings

1 And has there been an answer?

2 MS. ROGERS: My understanding is one defendant or  
3 maybe two defendants have answered.

4 THE COURT: I should set a schedule for answers now  
5 that the motions to dismiss have been denied. I know it's a  
6 long complaint, but you've had it for quite a while. I  
7 would normally say 20 days. Let me know if that works.

8 MS. ROGERS: Given the volume of the complaint and  
9 the fact that we anticipate coordination among the  
10 defendants, and one of the defendants is currently searching  
11 for substitute counsel, we would request 30 days rather than  
12 20, if that's agreeable to the Court.

13 THE COURT: 30 days is fine.

14 MS. ROGERS: Thank you, your Honor.

15 THE COURT: And then we should also set a  
16 preliminary conference for this case. That should not get  
17 in the way of you all meeting and conferring and working on  
18 a schedule, because that's going to be an important part of  
19 the preliminary conference anyway.

20 How about March 9th? March 9th at 11:30?

21 MR. SHEEHAN: That's satisfactory to the  
22 plaintiffs, your Honor.

23 MS. ROGERS: That works for the NRA, your Honor.

24 THE COURT: Okay.

25 Thank you very much.

cb

## Proceedings

1                   Again, I will issue an order on today's decision.  
2                   And I do appreciate all of your hard work and patience  
3                   through the technical and other pitfalls.

4                   Is there anything else I need to address for today  
5                   for anyone?

6                   MS. ROGERS: Not for the NRA, your Honor.

7                   THE COURT: Okay.

8                   Thank you, all.

9                   (Record is closed.)

10

11

                  \*\*                  \*\*                  \*\*

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13

                  This is certified to be a true and accurate  
transcription of my stenographic notes.

14

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16



17

CAROLYN BARNA  
SENIOR COURT REPORTER

18

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