

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

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

7 PLAINTIFF,

8 -against-

Index No:  
451625/2020

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

12 DEFENDANTS.

13 -----X

14 Oral Argument

15 Via Microsoft Teams  
16 December 10, 2021

17 B E F O R E:

18 THE HONORABLE JOEL M. COHEN

19 J U S T I C E

20 A P P E A R A N C E S:

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Appearances Continued on next page:

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Senior Court Reporter

## Proceedings

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1 THE COURT: Good morning, everyone.

2 Let's begin with appearances beginning with the  
3 plaintiff.

4 MR. CONLEY: Good morning, your Honor.

5 My name is Jonathan Conley, I'm an Assistant  
6 Attorney General for the New York State Attorney General's  
7 Office. I'll be arguing in opposition to today's motions on  
8 behalf of the plaintiff, the People of The State of New  
9 York.

10 THE COURT: Okay. And your colleague?

11 MS. CONNELL: Good morning, your Honor.

12 Monica Connell of the New York State Attorney  
13 General's office, and I'll be addressing the discovery and  
14 sort of issues.

15 THE COURT: And for the defendants again, if you  
16 can, we're going to need you to go to a microphone when you  
17 speak, either the one on the table or the one at the  
18 lectern. For now, just to enter appearances, maybe we don't  
19 need to do too much running around, but it's going to be  
20 hard to hear through all the glass.

21 So for the defense?

22 MS. EISENBERG: Your Honor, Svetlana Eisenberg on  
23 behalf of the National Rifle Association of America. I'm  
24 joined by my colleague, David Partida, from Brewer,  
25 Attorneys & Counselors.

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1 Good morning.

2 THE COURT: Good morning.

3 MR. CORRELL: Your Honor, Ken Correll for Wayne  
4 LaPierre, and I'll be presenting on his motion to dismiss  
5 the four causes of action asserted against him in the  
6 complaint.

7 Good morning.

8 MR. FLEMING: Your Honor, good morning.

9 William Fleming for defendant John Frazer, and I  
10 will be arguing his motion to dismiss. Thank you.

11 MR. FARBER: Your Honor, this is Seth Farber on  
12 behalf of Mr. Phillips. Can you hear me?

13 THE COURT: Yes.

14 MR. FARBER: So I could not hear whichever  
15 attorneys were speaking before that.

16 THE COURT: Yeah. We were not -- everybody was in  
17 front of a mic. But if you can hear me now, you'll be able  
18 to hear folks when they're in front of a mic and they're all  
19 turned on.

20 MR. MACDOUGALL: Mark MacDougall of Akin Gump  
21 Strauss, along with John McLish and Samantha Block,  
22 representing defendant Joshua Powell, and we're here to  
23 address the question of the examination of possibly  
24 privileged communications in the possession of Mr. Powell.  
25 Thank you.

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1 THE COURT: Thank you.

2 All right. In terms of agenda, here's what I'd  
3 like to do: We have, roughly, till 12:30, and I'd like to  
4 reserve at least a half hour to deal with the various  
5 discovery-related issues. And if we can finish the argument  
6 before 12:00, that's great, but you should view 12:00 as a  
7 stop point for the argument, and then we're going to switch  
8 to a status conference; okay? And I think the best way to  
9 do it is to start with the NRA motion back and forth. And  
10 then the individuals, I don't know whether you're going to  
11 argue them together or one at a time, whichever order you  
12 all want to go is fine by me; okay?

13 MR. FLEMING: Yes, your Honor.

14 THE COURT: And I think there would be some  
15 efficiencies in having all the defendants go with their  
16 initial argument and then just the Attorney General respond,  
17 rather than going back and forth three times because most of  
18 the arguments -- some of the arguments overlap; fair?

19 MR. CORRELL: Fair enough, your Honor.

20 MR. FLEMING: Yes.

21 THE COURT: Okay. Let's begin then.

22 Ms. Eisenberg, for the NRA.

23 MS. EISENBERG: Thank you.

24 THE COURT: Slides, I see.

25 MS. EISENBERG: Good morning, your Honor.

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1 THE COURT: Good morning.

2 MS. EISENBERG: As you well know, in this case --

3 THE COURT: Can I just ask you to just either you  
4 move closer to the mic or the mic closer to you?

5 MS. EISENBERG: I'll be happy to do so, your  
6 Honor.

7 THE COURT: Okay.

8 MS. EISENBERG: As the Court well knows, in this  
9 action, the New York State Attorney General seeks a remedy  
10 against the NRA which is nothing sort of Draconian. In two  
11 of her six counts against the NRA, the Attorney General  
12 seeks to dissolve the Association. However, there are two  
13 problems with her claim at least, and you have multiple  
14 independent bases upon which to dismiss those claims.  
15 First, the law simply does not provide for dissolution based  
16 on the fact that the New York Attorney General alleged.  
17 She, herself, admitted in a recent bankruptcy proceeding  
18 that in order to prevail on her dissolution claim, she would  
19 have to show that the Association engaged in such egregious  
20 misconduct, that there is injury to the public, or at least  
21 menace to the public.

22 The statutes on which she relies requires her to  
23 plead that the NRA conducted its business in a persistently  
24 fraudulent or illegal manner. And the other statute  
25 requires her to show that directors and officers who are in

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1 control of the Association perpetrated the corporation for  
2 their, "sole" personal benefit. She does not allege any of  
3 those things and that is a basis for dismissing both of her  
4 dissolution claims pursuant to the CPLR.

5 THE COURT: Maybe we can have your colleague do  
6 the moving of the slides. I don't want you to have to go  
7 back and forth each time.

8 MS. EISENBERG: Thank you, your Honor.

9 As I mentioned, the statute talks about the NRA's  
10 business; right? It says if a corporation conducts its  
11 business or conducted its business in a persistently  
12 fraudulent or illegal way, that can be a basis for  
13 dissolution. So I want to speak, if I may, about the NRA's  
14 business. Here, we have a quote from the NRA's bylaws.  
15 Article 1 of the bylaws set forth the NRA's objectives and  
16 purposes, and they are, amongst others, to protect the  
17 United States Constitution, to promote public safety, law  
18 and order, to train members of law enforcement and others in  
19 marksmanship skills, to support the shooting sports and to  
20 promote hunter safety. Your Honor, I read the complaint  
21 back to back. Nowhere does the Attorney General even talk  
22 about any of these things, let alone allege that the NRA  
23 does any of them in a fraudulent way, in an illegal way or a  
24 persistently fraudulent and illegal way.

25 Would you please go to Slide 11? Your Honor, I

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1 apologize there's a bit of a delay with slides. I'm just  
2 going to go forward.

3 There's a separate and independent basis upon which  
4 the Court has discretion to dismiss the claims by the New  
5 York Attorney General, and that is the equitable doctrine of  
6 collateral estoppel. As the Court well knows, collateral  
7 estoppel, you must show that the issues that were decided in  
8 a prior proceeding are identical to the ones here and that  
9 they were necessary to the ruling in the previous case. As  
10 you know, your Honor, on May 11th, 2021, earlier this year,  
11 the United States Bankruptcy Judge for the Northern District  
12 of Texas ruled that the NRA's Chapter 11 proceeding should  
13 be dismissed, but he did so only after finding specifically  
14 that appointment of a trustee, which is the relief that the  
15 New York Attorney General sought, was not in the best  
16 interest of either the NRA's creditors or the NRA estate --

17 THE COURT: But that was in the context of sort of  
18 a bankruptcy-related trustee, not the kind of trustee that  
19 we're talking about here; right?

20 MS. EISENBERG: What --

21 THE COURT: The Court there didn't have the  
22 authority to appoint a trustee in the same manner that the  
23 Attorney General does.

24 MS. EISENBERG: I'm not aware of the Attorney  
25 General being able to appoint a trustee pursuant to New York



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1 law either, your Honor, so I'm not sure what the Court --

2 THE COURT: Well, the relief that the government  
3 is seeking here is different than appointing the trustee  
4 that was sought in Texas; right?

5 MS. EISENBERG: Yes, absolutely, your Honor.

6 THE COURT: Different standards would apply.

7 MS. EISENBERG: Yes -- well, no. The standard  
8 would be the same. And this is collateral estoppel. We're  
9 not talking about res adjudicata.

10 THE COURT: Well, I know. So what are the -- are  
11 you taking the position that all the factual findings, both  
12 positive and negative, would all just come into this court  
13 and are all assumed are -- you would also be estopped from  
14 challenging any of the factual findings the Judge there made  
15 about the various allegations made down there?

16 MS. EISENBERG: Your Honor, no. There are certain  
17 findings that Judge Hale made that were crucial to his  
18 ruling. The ruling starts on Page 18 and then the second  
19 part of it starts on Page 33. That's where he discusses  
20 whether there's cause to dismiss. And starting on Page 33,  
21 he is discussing whether there is a basis for appointment of  
22 a trustee or an examiner, and in the course of that  
23 discussion, he makes a variety of different factual  
24 findings. And yes, your Honor, some of them are of a  
25 slightly negative nature. And, yes.

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1           So as to those that are critical to his ruling,  
2           sure they can come in, but there's other rules or there's  
3           other comments that are clearly dicta. For example, there  
4           are documents made in the conclusion section after the Court  
5           already found that there was no basis for the appointment of  
6           a trustee or an examiner, and that is classic dicta and that  
7           should not come in.

8           THE COURT:    Okay.

9           MS. EISENBERG:   Okay. And then there's other  
10          comments that the Judge made that I agree are somewhat  
11          negative, but if you read them in context, what he's really  
12          saying is, yes, the New York Attorney General has presented  
13          some evidence of past misconduct, yes, that is of concern,  
14          however, and then goes onto find to make his ultimate  
15          factual finding that underpins his trustee ruling. And what  
16          the finding is, your Honor, is that the NRA understands the  
17          importance of compliance; that the NRA can do the following  
18          three things: One, it can continue to fulfill its mission;  
19          two, it can continue to improve its governance; three, it  
20          can continue to improve its internal controls. And by the  
21          way, none of that would have been possible according to a  
22          credible witness who the Judge found, but for Mr. LaPierre's  
23          support for the self correction that the NRA did.

24          So, that's the factual finding that the Court made,  
25          it was necessary to the Court's ruling, and it's certainly

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1 an issue that the New York Attorney General litigated.  
2 Moreover, it is dispositive here because if you look at his  
3 factual findings and the ruling that it was not in the best  
4 interest of the estate to appoint a trustee, it cannot  
5 possibly be true that any of the potential basis under the  
6 statute for dissolution are true. For example, one of the  
7 basis is that the Association conducted its business in a  
8 persistently fraudulent and illegal manner --

9 THE COURT: Past tense.

10 MS. EISENBERG: Correct, yes. Without the "has",  
11 although it's used with the "has" in the complaint.

12 Now, no bankruptcy judge could ever forgo  
13 appointing a trustee if he or she found that that's what the  
14 corporation was doing. No bankruptcy --

15 THE COURT: Well, let me make sure I understand  
16 the procedure down there. The result was, essentially, to  
17 dismiss the bankruptcy petition; right?

18 MS. EISENBERG: Yes, your Honor, it is. However,  
19 the rule was contingent on two separate sub rulings or  
20 findings. First, under Section 1112 of Title 11 of the  
21 United States Code, the Court has to decide whether there is  
22 cause to dismiss the Chapter 11 proceeding and, that's what  
23 the Judge does. Starting on Page 18, he focuses on what was  
24 the purpose for the filing. He makes a finding, he says  
25 that's not a purpose that's intended by the Code, therefore,

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1       there is cause. And then very clearly, starting on Page 33  
2       and also in the introduction, he says there's a second  
3       requirement. Section 1112(b) of the Bankruptcy Code, which  
4       is the dismissal statute, directs him to look at Section  
5       1104(2). And let me just make sure I got the --

6               THE COURT:    1104(a)(2).

7               MS. EISENBERG:   Thank you, your Honor. 1104(a),  
8       and he has to determine whether the appointment of a trustee  
9       under Section 1104(a) is in the best interest of creditors  
10      and the estate. If he finds that it is, he cannot dismiss  
11      even if there's cause, he can only dismiss if he makes the  
12      opposite finding or ruling. And then, naturally, we'll look  
13      at Section 1104. Section 1104 consists of two sections;  
14      1104(a)(1) and 1104 (a)(2), and that is the section pursuant  
15      to which the New York Attorney General sought her trustee  
16      relief. A movant is entitled to that relief if he or she  
17      shows that present management engaged in present or past  
18      incompetent, mismanagement fraud or dishonesty or similar  
19      conduct, or, if its otherwise in the interest of the  
20      creditors and the estate for a trustee to be appointed.

21              So he sat through or listened to the evidence  
22      during the 12-day trial, heard from 23 witnesses. This came  
23      on the heels of wholesome discovery which, in turn, came on  
24      the heels of a wholesome investigation by the Attorney  
25      General. And after hearing all that evidence, he found that

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1 the NRA understands the importance of compliance, can  
2 continue to fulfill its mission and so on and so on. So at  
3 the end, it's very clear that each and every one of the  
4 requirements for the collateral estoppel exists here.

5 Now, the Attorney General says she didn't have a  
6 full and fair opportunity to litigate the issue. Your  
7 Honor, no basis for that assertion whatsoever. First of  
8 all, there was wholesome discovery; it involved 16  
9 depositions and over 24,000 documents being produced.  
10 Second, the trial itself was lengthy and involved many  
11 witnesses as I just said. And in her investigation that  
12 preceded the bankruptcy trial, she took testimony under oath  
13 of 13 witnesses, and over 100,000 documents were produced  
14 pursuant to subpoenas to the New York Attorney General.

15 Now, what's really interesting is that the Kaufman  
16 case, which we cite in our motion, makes very clear that the  
17 evidentiary burden is on the party resisting the application  
18 of collateral estoppel, here, the New York Attorney General,  
19 to show that she did not have a full and fair opportunity to  
20 litigate. Your Honor, I respectfully submit not only did  
21 they not meet that evidentiary burden, they failed to make  
22 any attempt to do so.

23 THE COURT: I assume you agree with it was an  
24 expedited proceeding. But putting that aside, how would any  
25 of this be dispositive of this case?

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1 MS. EISENBERG: Yes, your Honor.

2 So what we need to do is look at the dissolution  
3 statutes that she relies on and the motion that she filed.  
4 The motion that she filed sought two types of remedies:  
5 One, dismissal; and, two, appointment of a trustee. And in  
6 furtherance of her request to appoint a trustee, she  
7 incorporated wholesale her complaint in this case. She  
8 said, here it is, Exhibit A, and she said, Even the sampling  
9 that I provide in my complaint would make cause for  
10 appointments of a trustee, and then she went one by one  
11 through a variety of the allegations from the complaint and  
12 she said, And this happened and this happened and,  
13 therefore, you cannot trust current management, therefore,  
14 you must appoint a trustee. And she also argued that the  
15 management had engaged in persistently fraudulent or illegal  
16 conduct.

17 So even though the words are not identical, in sum  
18 and substance, the factual findings there are. And the  
19 findings that the Judge made in the bankruptcy proceeding  
20 are fatal to her ability to proceed with her dissolution  
21 claims --

22 THE COURT: And what's the relevance of the fact  
23 that the Judge who actually issued the decision stated that  
24 he was not seeking to decide any issues in this case? I  
25 mean, the whole point of -- well, a lot of the point of his

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1 decision was that the bankruptcy filing was an attempt to  
2 get out of this case, and now you're saying that in the  
3 course of making that ruling, he essentially let you out of  
4 this case. It seems to be a big circle.

5 MS. EISENBERG: Your Honor, I think you're  
6 referring to what appears on Page 28 of Judge Hale's ruling.  
7 And, respectfully, the weight and meaning that the Attorney  
8 General attaches to that phrase, there's no basis for that.  
9 If you read it in context, what the Judge is saying is,  
10 according to the Attorney General, in order to obtain  
11 dissolution, she has to show harm to the public, she has to  
12 show egregious conduct, she has to show all those things  
13 that I just discussed; right? And then he says, okay, well,  
14 a dissolution that requires this type of showing, this high  
15 type of showing, is not the type of dissolution that the  
16 Bankruptcy Code is meant to protect against. And then he  
17 says, I'm not saying one way or another whether she could  
18 prevail, but what I'm saying is that the threat that exists  
19 because she filed those claims is not the type of threat  
20 that the Bankruptcy Code protects against.

21 In addition, in a different part of the ruling, he  
22 specifically says the NRA can continue to fulfill its  
23 mission, improve its internal control and governance and  
24 contest her dissolution claims. So for anyone to cherry  
25 pick such statements and try to attribute holding-type

1 weight for it or ruling-type weight to it or  
2 collateral-estoppel-type weight to it, there's simply no  
3 weight to that.

4 THE COURT: You see the irony of your approach,  
5 right? That the whole thrust of that proceeding down there  
6 was that at least the Judge said that what he perceived as  
7 an attempt to avoid this case was an inappropriate basis to  
8 seek bankruptcy protection, and you're saying that in that  
9 same opinion, he made a ruling that you now say requires  
10 dismissal of this case.

11 MS. EISENBERG: Your Honor, there's surely irony,  
12 but nothing about it is unfair toward the New York Attorney  
13 General. And we tried to make it very clear in our papers,  
14 and I would like to go over it again.

15 THE COURT: Okay.

16 MS. EISENBERG: To be clear, the New York Attorney  
17 General voluntarily intervened in the Chapter 11 proceeding.  
18 There was no -- your Honor asked the parties when the  
19 Chapter 11 proceeding was filed whether this proceeding  
20 would be stayed, and the answer was, While we reserve our  
21 rights, we are not seeking a stay. So there was nothing  
22 compelling her to intervene, yet, she decided to intervene.  
23 There is nothing compelling her to seek the appointment of a  
24 trustee, yet, she decided to litigate that issue. There was  
25 nothing compelling her to base her request for relief on the



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1 very same facts that she alleges in this case, yet, that's  
2 exactly what she chose to do. And so and so on forth.

3 So when the Court issued a ruling that made those  
4 adverse factual findings that were against the Attorney  
5 General, that was all of her own making. And on top of  
6 that, the law is clear, there's Supreme Court precedent and  
7 Fifth Circuit precedent about that too, she could have  
8 appealed his ruling to reform to the extent it contained  
9 factual findings that are collaterally estopping her here  
10 from seeking the dissolution relief.

11 THE COURT: Okay. Well, let's move onto the next  
12 argument.

13 MS. EISENBERG: Yes, your Honor. I think that  
14 that was the main point that I wanted to communicate to the  
15 Court. If you have any additional questions, I would be  
16 happy to answer them.

17 THE COURT: Okay. So the collateral estoppel is  
18 your principal argument for dismissal?

19 MS. EISENBERG: I have two principal arguments;  
20 one is sufficiency under 3211(a)(7) because the test is so  
21 high, as she admitted to Judge Hale, and she alleges nothing  
22 of the kind. But then separate and apart, she's  
23 collaterally estopped from pursuing those claims.

24 THE COURT: Okay. Thank you.

25 I'm going to have the Attorney General respond to

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1 the NRA.

2 MR. CONLEY: Thank you, your Honor.

3 THE COURT: Mr. Conley.

4 MR. CONLEY: As a threshold issue, we believe that  
5 the motions brought today are barred by the single motion  
6 rule and CPLR 3211(e). Would you like me to address that  
7 now --

8 THE COURT: I think I have that argument.

9 MR. CONLEY: I'm sorry?

10 THE COURT: I understand the argument.

11 MR. CONLEY: Okay. With respect to the NRA's  
12 collateral estoppel argument, as set for in our opposition  
13 papers, the argument is fundamentally flawed and deeply  
14 cynical. The basis of the NRA's argument is a decision by a  
15 Texas Federal Court that granted the Attorney General's  
16 motion to dismiss the NRA's bankruptcy filing lack of good  
17 faith. In that decision, the Bankruptcy Court made clear  
18 that it was dismissing the bankruptcy petition because the  
19 NRA was improperly trying to use Chapter 11 bankruptcy  
20 protection to escape the state enforcement action. And in  
21 that decision, the Bankruptcy Court warned the NRA that were  
22 it to file for bankruptcy again, it would immediately take  
23 up its myriad of concerns regarding the lack of  
24 transparency, lack of disclosure, conflicts of interest with  
25 its litigation counsel and officers, and warned that this

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1 could result in the appointment of a trustee out of concern  
2 that the NRA could not fulfill its fiduciary duties as a  
3 debtor in possession. In short, the Bankruptcy Court  
4 rejected the NRA's illegitimate attempt to use bankruptcy to  
5 evade the State of New York's jurisdiction. It's perverse  
6 that the NRA is now trying to use the Bankruptcy Court's  
7 findings to defeat this action.

8 Collateral estoppel is an equitable doctrine and it  
9 would make no sense to preclude the Attorney General's  
10 claims in this action because a judicial finding expressly  
11 rejected the NRA's attempt to evade accountability here. In  
12 any event, the requirements for collateral estoppel are not  
13 met because the issues decided in the bankruptcy proceeding  
14 are not the same as those presented in the challenged causes  
15 of action, nor are they legally dispositive of those claims.

16 This action and the bankruptcy proceeding differ  
17 significantly in scope, procedural posture and the  
18 applicable legal standards. The bankruptcy proceeding was a  
19 plenary proceeding addressing two motions to dismiss on the  
20 limited factual record in which the Court addressed the  
21 limited issues of whether cause existed under federal law to  
22 dismiss the NRA's bankruptcy petition for lack of good  
23 faith, or, in the alternative, to appoint a trustee or an  
24 examiner. In contrast, the operative complaint here  
25 contains over 750 paragraphs of detailed factual allegations

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1 of corporate malfeasance that expands decades and asserts 18  
2 causes of action under numerous New York statutes against  
3 the NRA and four current and former NRA executives. The  
4 Attorney General did not intend and did not have the burden  
5 to prove out the 18 causes of action asserted here and the  
6 expedited federal hearing held on her motions in the  
7 particular bankruptcy proceeding. Consequently, the Attorney  
8 General did not have a full and fair opportunity to litigate  
9 the issues in this enforcement affirmation in the narrow  
10 confines of that proceeding which took place on an  
11 accelerated schedule that allowed for own truncated  
12 discovery.

13 The NRA bases its collateral estoppel argument on  
14 certain statements that are plucked from the Bankruptcy  
15 Court decision such as references to a compliance training  
16 program for employees and testimony about a  
17 whistle -- a concern about a whistleblower complaint that  
18 were purportedly addressed. But even taking those isolated  
19 statements as the NRA has inaccurately packaged them, they  
20 did not preclude any of the Attorney General's claims which  
21 are supported by extensive factual allegations, the legal  
22 self dealing, conflicts of interest, related party  
23 transaction, breach of fiduciary duty and other statutory  
24 violations.

25 Notwithstanding the NRA's rhetoric, the Bankruptcy

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1 Court's findings of facts and conclusions of law plainly did  
2 not address whether the standards for judicial dissolution  
3 under the N-PCL were satisfied. As your Honor noted, the  
4 Court expressly said that it was not weighing in on whether  
5 the Attorney General would be able to meet those standards  
6 in this action, nor did the Bankruptcy Court make any  
7 findings of facts that would preclude the Attorney General  
8 to related-party transactions or whistleblower causes of  
9 action.

10 It bears reiterating that the Bankruptcy Court  
11 dismissed the NRA's filing for lack of good faith based on  
12 findings of improper motive and conduct. The Bankruptcy  
13 Court found cringe-worthy evidence of past and ongoing  
14 misconduct that had been presented at trial, including  
15 repeat violations of internal procedure, Mr. LaPierre's  
16 failure to timely file financial disclosures and lingering  
17 issues of secrecy and a lack of transparency. These  
18 findings are hardly exculpatory and they do not preclude the  
19 Attorney General from asserting her claims in this action.

20 With respect to the NRA's arguments regarding the  
21 dissolution claims, the complaint plainly states viable  
22 dissolution causes of action under N-PCL-11101 and 1102 as  
23 set forth on Pages 17 to 19 of our opposition brief. The  
24 complaint lays out the Attorney General's factual findings  
25 are pervasive and persistent the legalities on the part of

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1 the NRA and the egregious trail of assets on the part of  
2 entrenched leadership. Among the allegations the complaint  
3 sets forth facts establishing the NRA and its board  
4 permitted the diversion of tens of millions of dollars away  
5 from the NRA's charitable mission imposing substantial  
6 reductions in the expenditures for core program services and  
7 contains numerous allegations demonstrating the NRA's  
8 systemic misconduct, illegality, mismanagement of charitable  
9 assets and abuse of its charitable status.

10 And if the Court doesn't have any --

11 THE COURT: Well, look, isn't the hard question  
12 here whether the conduct that you allege is proportionate  
13 and justifies the relief you're requesting? You know, you  
14 have many claims to go after what the complaint pleads at  
15 great length as wrongdoing by individuals, and it seems to  
16 me, fair to read it as those individuals allegedly tainting  
17 the audit committee and the like. But just to take a step  
18 back at the beginning of -- or in your complaint, you note  
19 accurately that over the course of 149 years, the NRA  
20 established itself as one of the largest and oldest social  
21 welfare charitable organizations in the country, and you  
22 know, that's -- the question is have you stated a claim that  
23 the right result, from all of the allegations made, is  
24 dissolving that organization rather than the other forms of  
25 relief, which are to change the management structure and

1       arguably more targetedly deal with your question. I mean,  
2       maybe an inelegant way to put it is why not use a scalpel  
3       rather than a sledgehammer?

4               MR. CONLEY: Your Honor, courts have long  
5       recognized that the Attorney General and the courts have a  
6       considerable amount of discretion in determining whether  
7       dissolution is warranted in any particular case. And the  
8       Attorney General's decision to pursue dissolution here is  
9       well supported by the factual allegations of persistent an  
10      ongoing illegality that are set forth in the complaint.

11             I don't want to rehash all the allegations --

12             THE COURT: Well, I get the point but it's the  
13      Court's discretion that you are seeking to have exercised  
14      here, and so why shouldn't my lean be to preserve an entity  
15      of this vintage rather than dissolving it? Isn't that  
16      really the key question?

17             MR. CONLEY: That is the question, your Honor.  
18      But at the motion to dismiss stage, when all allegations in  
19      the complaint are to be taken as true and all reasonable  
20      inferences are in the favor of the Attorney General, the  
21      allegations that are set forth showing 30 years of culture  
22      of indignant corporate malfeasance under Mr. LaPierre, Mr.  
23      Phillips, the other individual defendants, aptly supports  
24      the dissolution causes of action as well as the other  
25      issues.

1           THE COURT:   Do you think it's capable of reform or  
2           not? Again, taking your allegations as true, most of what  
3           the complaint says, it followed the through line, is, you  
4           know, the leadership has led to all of these things, you  
5           know, none of which are about the advocacy role or all of  
6           the reasons why the organization exists. It is a series of  
7           financial malfeasance, and so the question is why can't the  
8           two be separated? Why can't you address the financial  
9           issues without dissolving the entire entity, which, as you  
10          say, is a very substantial public purpose.

11          MR. CONLEY:   As alleged in the complaint, your  
12          Honor, the NRA has had numerous opportunities over several  
13          years, with red flags being presented, to correct its  
14          operations and it has, over and over again, elected not to  
15          do so --

16          THE COURT:   Which is why you brought this case and  
17          why a of the relief you seek seeks the Court's intervention  
18          to force that.

19          MR. CONLEY:   Yes, your Honor. And one of the  
20          statutory tools available to the Attorney General under the  
21          N-PCL is to seek dissolution when corporations like the NRA  
22          engage in a pattern of persistent illegality, corporate  
23          waste, of fraud. The standards have been pled and met here  
24          and are supported by the factual allegations that are  
25          derived from a very extensive investigation by the Attorney



1 General.

2 THE COURT: Well, when you look back at the cases  
3 that have ordered dissolution, they do tend to involve cases  
4 that go to the core of the existence and the business model,  
5 you know, that it's not really operating as a charity. And  
6 the question is -- and I know maybe it's a matter of degree,  
7 do you have a sense for if you took the amount of commerce  
8 or money that's involved in your allegations, how does that  
9 compare to the size of the entity as a whole?

10 MR. CONLEY: Your Honor, it's significant, but I  
11 wouldn't want to speculate. It's a significant amount of  
12 money that has been taken from the NRA's members based off  
13 of the illegal conduct that is described in the complaint,  
14 but I don't have a percentage figure for you. That, again,  
15 I think is a factual question that will be coming out during  
16 discovery and a trial.

17 THE COURT: Would you agree that, again, taking  
18 all the allegations as true, there's still some burden on  
19 both the Attorney General and the Court to reach the  
20 conclusion that the right remedy, or that an appropriate  
21 remedy, assuming all of this happened, and it's a lot, the  
22 complaint has an awful lot in it, that the law permits as a  
23 remedy dissolution rather than addressing the specific  
24 problems? And I'm mindful of the fact that the complaint  
25 does not talk about the rest of the NRA's mission and I

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1 understand that your focus is on something else, but can we  
2 really ignore the rest of what the NRA is and focus only on  
3 what seems to be financial malfeasance by a very small core  
4 that has expanded, according to the complaint, to broader  
5 reaches of the board?

6 So I get your point, but I'm still focused on when  
7 you look at the dissolution cases, don't they seem a little  
8 different than this?

9 MR. CONLEY: No, your Honor, I don't believe they  
10 are. The fact that a non-for-profit spent some money on its  
11 core mission doesn't immunize it from dissolution when --

12 THE COURT: Well, that's not quite fair. I mean,  
13 look, I get your point. The fact that a sham university  
14 might spend some money on books doesn't mean that they can't  
15 be dissolved because they're ripping off their students and  
16 they don't really operate as a school. But isn't this  
17 really the other, and I'm being devil's advocate a little  
18 bit here, that the vast majority of what the NRA does is not  
19 paid for somebody's flights to the Bahamas?

20 MR. CONLEY: Your Honor, I think I was just trying  
21 to say that there isn't a percentage cutoff on what, if it's  
22 appropriately spent, it takes dissolution off the table or  
23 where dissolution is appropriate.

24 What really is at issue, and what we will prove at  
25 trial, is that the entrenched leadership of the NRA under

1 Wayne LaPierre for decades has continued to engage in  
2 corporate malfeasance and that it doesn't want -- if he  
3 continues to engage in a corporate malfeasance and has not  
4 shown any inclination in remedying of those problems and has  
5 made repeated attempts to evade New York's --

6 THE COURT: Look, the malfeasance is all in one  
7 sort of broad category; right? It's sort of this  
8 entrenchment and really financial entrenchment, you know,  
9 using the organization as a means for enrichment and then  
10 bringing in people who are just going to foster that  
11 environment, I get that. And, again, this whole point is do  
12 we need a trial on this if I accept every horrible thing  
13 that's in the complaint.

14 The question is in the exercise of discretion,  
15 assuming all of that, can a Court or should a Court find  
16 that the appropriate remedy is to essentially get rid of the  
17 other parts of the NRA, which are the parts that are not  
18 subject to this case. And I'm trying to get a sense for how  
19 you balance that when it's a lot of activity that you  
20 complain about, but it's all sort of focused in one area,  
21 right? So I mean, that's -- I mean, it seems like now is  
22 the right time to have that discussion, because you can  
23 spend the next two years proving everything that's in the  
24 complaint and then we'll still be left with the same  
25 question.

1                   And do you have any other dissolution cases that  
2                   you think are similar in the sense, that is, financial  
3                   malfeasance in an extremely large enterprise where,  
4                   hypothetically, if you got rid of all the bad actors, why  
5                   wouldn't the rest of the entity be worth saving?

6                   MR. CONLEY:   Well, your Honor, this case is unique  
7                   in the size of the entity, the scope and the nature of the  
8                   wrongdoing, which is really unparalleled in the non-profit  
9                   sector. And so there is no close analogy that I can point  
10                  to that I have a case offhand that I can provide. But that  
11                  doesn't, like, negate the fact that -- that doesn't mean  
12                  that dissolution is not warranted given just the scope and  
13                  significance of the wrongdoing that's alleged.

14                 THE COURT:    So I assume we're in common ground  
15                  that the nature of the advocacy is irrelevant, or of the  
16                  charity. So, for example, and I'm not sure if the  
17                  defendants have this analogy in here, but if The Red Cross  
18                  had a streak of people running it that was misusing funds,  
19                  would the right result, all things being equal, to dismantle  
20                  The Red Cross?

21                 MR. CONLEY:   Well, I don't want to answer that  
22                  hypothetical. It would depend on the --

23                 THE COURT:    Say everything that happened here, the  
24                  trips to the Bahamas, all of it. But I'm just saying that  
25                  The Red Cross serves a purpose, and does the New York

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1 statute provide that that's the right answer here? And,  
2 again, you know, it says that you can seek a petition when  
3 there's persistent and all this other activity, it doesn't  
4 say whether that is the appropriate remedy in an individual  
5 case.

6 MR. CONLEY: Yes. If the facts and circumstances  
7 in any other non-profit were the same as those presented  
8 here, it would be well within the discretion of the Attorney  
9 General and appropriate to pursue the claims of the causes  
10 of action that are --

11 THE COURT: I know you can pursue it, but now the  
12 question is whether a Court should do it.

13 MR. CONLEY: And the answer would be yes, we  
14 believe it would be appropriate for the Court to do so.

15 THE COURT: To dismantle The Red Cross?

16 MR. CONLEY: Or any non-profit, any non-profit  
17 that has engaged in this misconduct, if everything was  
18 identical, yes.

19 THE COURT: And I'm supposed to take into account  
20 the interest of the public and the like, that's, you know,  
21 what the statute says. So should that not matter at all  
22 that there are five million members, a number of whom had  
23 tried to appear here and have taken the position, well,  
24 look, don't throw out everything just because of some bad  
25 actors? You know, isn't the right thing to do is to get rid

1 of bad actors, if that's what they're found to be, and let  
2 the organization reform? That's really what I'm getting at  
3 here.

4 MR. CONLEY: Right, your Honor. And I think that  
5 goes to the public interest component of this test. If the  
6 Attorney General establishes a standard for dissolution  
7 under the N-PCL, then the Court would assess whether it's in  
8 the public interest to dissolve it. And as you noted in a  
9 prior argument, a hearing, what that encompasses and the  
10 procedure for making that assessment is something that we  
11 need to --

12 THE COURT: Well, we have all the facts. The  
13 question is your complaint does not suffer from a lack of  
14 detail. I mean, the references from the defendants to it  
15 being conclusory are hard to grapple with, it is not. So  
16 what we're saying -- what I'm saying is assume all of that  
17 is proven, and it's a lot, what is the public interest in  
18 dissolving an entity that has five million members who  
19 probably care a lot about the financial malfeasance if it  
20 happened, but probably also want the organization to  
21 continue?

22 MR. CONLEY: It's in the public interest to ensure  
23 that non-profits, who have all of the benefits of being a  
24 non-profit under the law, follow the law. And because that  
25 when entrenched leadership is shown, no interest in changing

1 or reforming in a circumstance like this, it makes  
2 dissolution --

3 THE COURT: But don't your other claims handle  
4 that? Your other claims ask, if you got the relief, to  
5 clean house; right? I mean, it's pretty muscular relief you  
6 have in the rest of the complaint to have court-enforced  
7 removal of people and they can't work in any charity,  
8 certainly not this one, and restitution and all sorts of  
9 things; why wouldn't that cleaning of house address the ills  
10 that are set out in the complaint? Because none of those go  
11 to the advocacy part of the organization, they go to whether  
12 people are syphoning or taking money they shouldn't be  
13 taking.

14 So I think that's the hard question here, because  
15 your other relief would address almost everything you just  
16 said, right? I mean, if it was done correctly and you got  
17 rid of all vestiges of any negatives that you're able to  
18 prove, what's the reason to dissolve the entity at that  
19 point?

20 MR. CONLEY: Well, the reason we are pursuing  
21 dissolution is because the NRA has, under the entrenched  
22 leadership that remains in power, engaged in conduct that  
23 violates New York law, and has consistently. And as set  
24 forth in the comprehensive complaint, there are just  
25 numerous examples of willful disregard of the law and --

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1 THE COURT: By the leadership. In other words, you  
2 know, you could argue that this is an otherwise -- you know,  
3 perfectly acceptable -- people might disagree on the merit  
4 or demerit of various positions taken, but it's a perfectly  
5 acceptable First Amendment protected kind of organization.  
6 And the question is if you can resolve the concerns, because  
7 they're all very much leadership focused, they're not  
8 mission focused, and you were very careful in the complaint  
9 to do that, but why shouldn't the remedy fit the wrongdoing?

10 MR. CONLEY: Well, the leadership controls the  
11 actions of the corporation, and the misconduct that its  
12 engaged in and its had control over the organization and is  
13 responsible for all of its actions. And the one statutory  
14 tool as a remedy when a non-profit, which acts through its  
15 agents, is dissolution. We think that that is an  
16 appropriate --

17 THE COURT: Well, we can go around this, but  
18 answer my -- the core question I have is what is the public  
19 interest, which is the guiding principle in deciding along  
20 dissolution, in dissolving this entity?

21 MR. CONLEY: The public interest is the ensuring  
22 that charities that cannot engage in perpetual persistent  
23 illegal conduct as a not-for-profit chartered in New York.

24 THE COURT: Okay. Do you want to address any of  
25 the other -- Ms. Eisenberg didn't really get into the other



1 claims. Is there anything you wanted to raise on any of the  
2 other claims?

3 MR. CONLEY: I think with respect to the NRA's  
4 arguments, we're comfortable resting on our papers.

5 THE COURT: Which one? Both sides are silent.

6 MS. EISENBERG: May I respond very briefly, your  
7 Honor?

8 THE COURT: Sure.

9 MS. EISENBERG: Thank you, your Honor.

10 THE COURT: If you can go do it from over there  
11 though.

12 MS. EISENBERG: Yeah, certainly.

13 Your Honor, my esteemed opposing counsel can use  
14 the words "entrenched leadership" however many times he has,  
15 but that doesn't change the fact that the complaint contains  
16 only allegations against only two officers who are part of  
17 the current management, Mr. LaPierre and Mr. Frazer. And  
18 the on against Mr. Frazer entirely sounds in negligence.

19 THE COURT: Well, I would quibble with you --  
20 well, more than quibble with you. The complaint takes dead  
21 aim on the audit committee, and on the board as well, in  
22 terms of false statements to the State, financial  
23 mismanagement, not overseeing whoever was in charge at  
24 whatever point in time. There are claims, only maybe  
25 against certain individuals. But I don't think you can read

1       that 193-page complaint and leave saying they didn't really  
2       talk about the organization. They certainly do, but it's,  
3       again, in this area.

4               I mean, the audit committee would rubber stamp  
5       things that happened when they found out things that got  
6       done without approval, they would retroactively approve  
7       them, you know, on and on and on and on. I think the  
8       allegations are a lot broader than two officers. They may  
9       flow from one or two people, but according to the complaint,  
10      which I have to accept as true, they infected a lot more  
11      than that.

12             MS. EISENBERG: Your Honor, I understand what  
13      you're saying.

14             In terms of the numbers that you were asking for,  
15      the NRA has a 76-member board, and there are allegations in  
16      the complaint about related-party transactions with five of  
17      them and the NRA has 500 employees, and there are  
18      allegations in the complaint about a select few.  
19      Importantly, Mr. Phillips doesn't work at the NRA anymore;  
20      Mr. Powell does not work at the NRA anymore. Mr. Phillips'  
21      successor, Ms. Rawling (ph) is the one who Judge Hale said  
22      was the exemplar of compliance and said it was encouraging  
23      that she, in fact, became the CFO.

24             I think, just very specific point on the collateral  
25      estoppel. My opposing counsel stated that it was a

1 different legal standard. It doesn't appear to be an issue  
2 that the Court is focused on, but just to make the record,  
3 the standard certainly was the same. The New York Attorney  
4 General is basing their --

5 THE COURT: I don't know how you can say the  
6 standard is the same. You know, it's an entirely different  
7 statutory structure, different statutory scheme. You have a  
8 regulator here of New York charities making decisions that  
9 go well beyond what a Bankruptcy Court might have to worry  
10 about in terms of protecting creditors, which is the  
11 Bankruptcy Court's concern, that's not my concern. I'm not  
12 here principally worried by the NRA's creditor.

13 MS. EISENBERG: Your Honor, the statute that the  
14 Bankruptcy Judge interpreted and applied also talks about  
15 the estate, and the estate is a broad term encompassed to  
16 include people like the millions of our members and the  
17 public whom we serve. But when I reference the standard, I  
18 thought perhaps opposing counsel was referring to the burden  
19 of proof, so I just wanted to make the record on that.

20 Both dissolution claims, as the New York Attorney  
21 General admitted, require a high burden showing, and both of  
22 them sound in fraud. And under New York law, it's very  
23 clear that fraud has to be proved by clear and convincing  
24 evidence. And I have two citations for the Court, if I may,  
25 224 AD2d 231 and 54 AD3d 682. So just to address that

1 point. But the bottom line, your Honor, it is not quite  
2 fair. Rule 3211 of the CPLR exists for a reason. If she  
3 hasn't alleged facts to merit such relief, even if she  
4 proved all of them, the case -- the dissolution claims  
5 should be dismissed, and that's what this motion is really  
6 about.

7 THE COURT: Okay. Thank you.

8 Anything further before we move onto the individual  
9 claims?

10 MR. CONLEY: Just quickly, your Honor, to address  
11 opposing counsel regarding the dissolution claims in our  
12 conversation earlier.

13 Four years after the NRA claims it knew it was  
14 being investigated, misconduct in the organization  
15 continues. Entrenched leadership remains stretching into  
16 the board, dissension has been squashed and retaliated  
17 against, and members' requests for reform has been silenced,  
18 and no other charity has continued to allow such corrupt  
19 leadership to remain.

20 THE COURT: Well, that's the point, right? The  
21 question is I take everything you just said and, again, I'm  
22 taking the allegations as true. If the problem is  
23 entrenched management, isn't dissolution to get rid of the  
24 entrenched management rather than to get rid of the entire  
25 organization?

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1 MR. CONLEY: Well, your Honor, the NRA has shown  
2 no willingness to remove entrenched leadership --

3 THE COURT: Because the leaders are the ones who  
4 are entrenched, right? I mean, who would be the ones  
5 removing them if not -- you know, this is presumably part of  
6 the reason why you brought the petition because they're not  
7 reforming themselves, so you feel like you need to step in  
8 as the regulator and ask the Court to do it. The fact that  
9 entrenched management -- entrenched management is, in my  
10 experience, really removes itself; that's what entrenchment  
11 means.

12 MR. CONLEY: Right, your Honor. But dissolution  
13 is a statutory tool available here and the investigation has  
14 shown that the NRA leadership has siphoned millions of  
15 dollars every year away from mission services. And being  
16 above the law is an abuse of charitable status and this  
17 waste of charitable assets is simply unacceptable. We've  
18 pled claims for dissolution, believe that they're  
19 sufficiently supported for all their causes of action,  
20 including --

21 THE COURT: I mean, just to be clear, none of my  
22 comments, and these are just questions, are saying that any  
23 of it's acceptable if it happened, it's just about what you  
24 do about it.

25 Okay. For the individuals? Thank you.

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1 MR. FLEMING: Good morning, your Honor.

2 THE COURT: Good morning.

3 MR. FLEMING: May it please the Court, I'm William  
4 Fleming, and I represent Mr. Frazer.

5 I just want to speak to one point that was just  
6 talked about and that's this notion of entrenched  
7 management. I just think it's important to note that these  
8 are officers, and Mr. Frazer is an officer who is elected  
9 every year by the board. He can be voted out. The board,  
10 of course, changes a lot. I think you've known from all the  
11 parties' prior papers on these issues. So there is a sort  
12 of a dynamism of the organization that does exist. I don't  
13 know that entrench is really the word that works here, but  
14 let me speak to --

15 THE COURT: Well, you've had the -- the leader has  
16 been there for more than 30 years. There's not necessarily  
17 anything wrong with that, but it's certainly a long tenure.

18 MR. FLEMING: Okay. Well, Mr. Frazer, to speak to  
19 him for a minute personally, so he is the secretary of the  
20 NRA, which is an officer position voted on, like I said.  
21 He's also the general counsel, which is an employee  
22 position, not voted on, not an officer. The secretary's  
23 duties are listed under the bylaws. The bylaws are attached  
24 to my affidavit at Exhibit 1, I think it's Exhibit 1. He's  
25 responsible for the archives; he's responsible for

1 publication of notices and reports and attestations; he's  
2 responsible for other duties as assigned; and he serves as  
3 secretary to the board of directors, the executive  
4 committee, the nominating committee and the committee on  
5 selections, and that's the scope of his bylaw-determined  
6 responsibilities.

7 Now, he was never interviewed in this  
8 investigation, the Attorney General's investigation. He was  
9 just named a defendant when they filed in August of 2020,  
10 and he was named as a defendant in four causes of action  
11 that seek, in order, to compel him to account for his  
12 official conduct under N-PCL 720(a)(1), to secure the proper  
13 administration of a not-for-profit corporation under EPTL  
14 8-1.4(M), to enjoin him from continuing the solicitation and  
15 collection of funds under Executive Law 175(2), and to  
16 disgorge his compensation under the common law theory of  
17 unjust enrichment.

18 I'm going to start with the last, your Honor. We  
19 spent, I think it's fair to say, a majority of our briefing  
20 on the last cause of action, which is the derivative claim  
21 from common law relief. Now, the Attorney General brought  
22 the derivative claim in the right of members under Section  
23 623, which we're all familiar with by now, and they do it to  
24 assert a common law claim. And as we've noted at length,  
25 the Court of Appeals has spoken very clearly that common law

1 relief under the N-PCL is not permitted.

2 THE COURT: That was a parens patriae action, I  
3 assume you're referring to the Grasso case.

4 MR. FLEMING: Yes.

5 THE COURT: Isn't that different than this kind of  
6 case, which the Court was concerned there that sort of  
7 upsetting the statutory regime and the like? And, here, the  
8 statute says that they can essentially exercise member's  
9 rights, and one of the member's rights is this kind of a  
10 claim. So I don't see how Grasso comes into it.

11 MR. FLEMING: Well, your Honor, first of all, the  
12 Court determined on grounds other than the parens patriae,  
13 they kind of ruled that out, okay. And what he said very  
14 clearly, very clearly, was that the N-PCL is a comprehensive  
15 enforcement scheme for not-for-profits and that it is  
16 incompatible with that scheme -- that's their word,  
17 incompatible with that scheme to assert a claim for  
18 liability without fault. You have to show or allege and  
19 then ultimately show that the actor had knowledge of  
20 unlawfulness, while he executed whatever act, is at issue.  
21 And with Mr. Grasso, in that case, they determined that  
22 there had been no allegation, no proof, that he had acted  
23 with knowledge of unlawfulness, and that is the overriding  
24 requirement of this N-PCL scheme.

25 THE COURT: But when you read this complaint, do



1       you think that there are no allegations that Mr.  
2       Frazer -- you know, again, Mr. Grasso, just received his  
3       salary and he said, you know, I had nothing to do with it,  
4       they decided to pay me, what can I do. That's not the  
5       allegations here. I mean, they have a lot of specific  
6       allegations about financial malfeasance, may or may not be  
7       true, but it's not the same as Grasso.

8               MR. FLEMING: I don't agree with it, your Honor,  
9       for two reasons; one is, let's just be clear about one  
10      thing: A common law claim, unjust enrichment, as a matter  
11      of its elements, does not require proof of fault. So it is  
12      out, it has to be out. I mean, Grasso is very clear on it,  
13      it says that unjust enrichment does not require proof of  
14      fault, therefore, you are subjecting a defendant to a lower  
15      burden of proof than the NRA requires; that's point one.

16             Point two, your other question is with respect to  
17      the statutory claims. They also require fault, and then the  
18      question is whether the allegations sufficiently make out  
19      fault. And we contend, for a lot of reasons in our brief  
20      and that I'll get to, that they do not with respect to Mr.  
21      Frazer, they do not. They don't allege knowledge of  
22      unlawfulness -- can you hear me okay?

23             THE COURT: Yes.

24             MR. FLEMING: They allege a lot of things. They  
25      allege that he's -- I mean, it's a little insulting, but

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1       they allege that he's incompetent; they allege that he's  
2       inexperienced; they allege that he's negligent, but they  
3       don't allege that he knew what he was doing was unlawful.  
4       They just don't do it, it's not in the complaint.

5               Now, the common law claim also we have written in  
6       our brief, and I will just move quickly passed it, you know,  
7       violates 623. It doesn't allege the five-percent  
8       requirement; it does not allege with any particularity  
9       whatsoever why it would be futile to make this claim on the  
10      board. And I think that's especially important and relevant  
11      in the wake of the bankruptcy case decision, because as we  
12      put in Page 10 of our moving brief, there's a number of  
13      reasons to reach the opposite conclusion. That would not be  
14      futile to make such a demand on the board. The board  
15      authorized investigations, subsequent to which they examined  
16      related-party transactions and vendor contracts. They  
17      instituted a lawsuit against the company's largest vendor  
18      on that basis. They terminated personnel, they terminated  
19      compensation arrangements and they recovered expenses from  
20      individuals putting Mr. LaPierre that were deemed not  
21      sufficiently corporate. So the board acted. And for the  
22      Attorney General to claim that its futile to seek -- to make  
23      a demand on the board, I think, is erroneous.

24              So I think the 18th cause of action, your Honor,  
25      has to go. I would urge you to read Grasso very closely.

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1 I've read it, unfortunately, like 20 times now, and so I'm  
2 very familiar with it, but I don't see -- it's four square,  
3 that's my contention.

4 THE COURT: Okay. I'm going to take a short break  
5 for my court reporter to -- I usually do it after an hour  
6 and I just looked down and I realized I didn't. So just  
7 five minutes.

8 MR. FLEMING: Very good.

9 (Recess taken.)

10 (Case recalled.)

11 THE COURT: I'm sorry. I thought, Mr. Fleming,  
12 you were finished.

13 MR. FLEMING: I'm sorry. I have three more causes  
14 of action to go through.

15 THE COURT: Okay. Well, we're going to start  
16 losing time here. So since your other colleagues are going  
17 to be addressing some of the same points, I would ask you to  
18 try to consolidate.

19 MR. FLEMING: Okay. Your Honor, I will try to  
20 consolidate. I'll be quick as best I can. I do think  
21 there's some difference. For instance, the next cause of  
22 action, I believe, without being completely sure, is  
23 specific to Mr. Frazer.

24 The 17th cause of action under the Executive Law  
25 which governs solicitation of funds, as I said, they're

1 seeking to enjoin his continued solicitation selection of  
2 fund. The first point I would like to make is that he does  
3 not and has not ever collected or solicited funds, so  
4 there's nothing to enjoin. And it's very confusing for that  
5 reason and there's no allegation to the contrary. They  
6 don't say, He collects, he solicits, therefore we need to  
7 enjoin him. It's not in there.

8 Second, this is the charge that relates to  
9 falsities in the filing of the CHAR 500 form. You know, Mr.  
10 Frazer relied on specialists. And as I said before, the  
11 N-PCL is a comprehensive enforcement scheme, and though this  
12 is the Executive Law, the N-PCL specifically governs this as  
13 well. N-PCL 520 ensures that, it says, and I quote, "all  
14 registration and reporting requirements pursuant to Article  
15 7-A of the Executive Law" -- which is this claim that we're  
16 talking about -- "and Section 8-1.4 of the EPTL" -- which is  
17 the next claim we'll be talking about -- "are expressly  
18 included as reports required by the laws of this state to be  
19 filed within the meaning of this section", which is  
20 N-PCL-520. So as an overarching matter, I would contend  
21 that the interpretation of the N-PCL supplied by the Court  
22 of Appeals in Grasso requiring proof that the actor acted  
23 with knowledge of unlawfulness has to apply to these  
24 Executive Law claims and the EPTL claims.

25 Next point on this same cause of action, so he

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1       relied on specialists, and the N-PCL 717, it statutorily  
2       endorses such reliance, and it makes sense as well, your  
3       Honor. Mr. Frazer gets a report or is helping -- doing a  
4       solicitation report that attaches a tax form 990 and  
5       attaches the audited financial statements for which he  
6       doesn't play a role in their creation, and they are  
7       finished and certified by independent auditors --

8               THE COURT:   How is that a motion to dismiss? In  
9       other words, you're bringing in facts outside the complaint.

10              MR. FLEMING:   No, no. I think it is a question of  
11       law, because what he says is, These are true and correct to  
12       the best of my knowledge and ability, or words to that  
13       effect. I have them here, but in the interest of time, I'll  
14       move on. That statement is stated to the contrary, so you  
15       don't have the belief that they're shown incorrect; that's  
16       actionable. But if you believe they're true and correct,  
17       that is not actionable. The statements made by others do  
18       not glom onto with us on the matters of strict liability  
19       which Grasso says is forboded.

20              Now, the last thing on this Executive Law claim is  
21       the New York Attorney General ignores the legislature's  
22       chosen remedial scheme for violations of this sort. So even  
23       if there were violation, they say what is permitted in the  
24       statute is, as I said, to enjoin continued solicitation and  
25       collection of funds, and what their relief requested is is a

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1 lifetime bar, which is not in the statute anywhere, a  
2 lifetime bar from ever working as an officer, director or  
3 trustee of any non-profit who is authorized to do business  
4 in New York. It is beyond the remedial scheme set forth by  
5 the legislature. It creates a separation of powers problem.  
6 It breathes into the statute something that's not there. I  
7 would just say that in this case, we've got a case where the  
8 Attorney General has combed through the corporate records of  
9 a targeted organization to find a basis to impose extra  
10 statutory punishments. And it's an overreach, it really  
11 should not be permitted.

12 Your Honor, the eighth cause of action, very  
13 quickly, this is the EPTL claim. I've already spoken a  
14 little bit about it. You know, it alleges a breach of trust  
15 that entitle it, according to the Attorney General, to  
16 restitution damages and a lifetime bar again, but that's not  
17 the remedy. The remedy permitted is -- this is 8- 1.4M,  
18 "the Attorney General may institute appropriate proceedings  
19 to secure compliance with this section and secure the proper  
20 administration of any trust or corporation". That's the  
21 remedy that's permitted. Not restitution, not damages, not  
22 certainly a lifetime bar, which is what is being requested.  
23 Again, it is an overreach. And, again there are no  
24 allegations to demonstrate fault.

25 And I'll make another point about this. The

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1       allegations against Mr. Frazer are specifically that he is  
2       responsible for holding and administering property. This is  
3       different from allegations made against Mr. LaPierre and Mr.  
4       Phillips that say they held and administered property. And  
5       what I would argue to your Honor is what they're saying is  
6       that Mr. Frazer has a nominal responsibility, not that he  
7       actually held anything, not that he actually administered  
8       anything, but that he's responsible and, therefore, liable.  
9       That's strict liability. Again, that cannot be permitted.

10           You know, there are also questions about whether  
11       he's even a trustee. There's one bald alleged in Paragraph  
12       31 of the complaint that says the individual defendants are  
13       each trustees. No authority for it, there's no factual  
14       explanation for it. The language of the statute is a little  
15       ambiguous. It certainly says that the corporation, the NRA  
16       is a trustee. It also says that individuals can be  
17       trustees, but it includes a lot of language about -- it's a  
18       little vague, but it says pursuant to an instrument, a will,  
19       agreement or by operation of law. We're confused because we  
20       have no understanding of what trustees. The corporation  
21       doesn't treat us as trustees on tax forms, which is not  
22       before your Honor. I just mention it in passing. So it's  
23       confusing that there's an open question there as well. But  
24       the other point I make are absolutely the case. The  
25       remedies sought are beyond the statute permits. They don't

1       allege knowledge of unlawfulness, which is what they must  
2       do.

3               And the last cause of action -- I'm sorry, it's  
4       hard to breathe -- under N-PCL, this is the fourth cause of  
5       action, N-PCL 720(a)(1), that statute needs to be read very  
6       closely. It's odd, but it says an officer can be held  
7       liable to account, to account, for his official conduct,  
8       basically, that's (a)(1); (a)(2) says you can set aside a  
9       transfer provided that the transferee had knowledge of its  
10      unlawfulness; and (a)(3) says you can enjoin that type of  
11      conduct. So it's account for, or, in my view, explain, set  
12      aside (a)(2), which is not here, or enjoin if it's (a)(3),  
13      which is not here. And 720(b) indicates by its language  
14      that those are the remedies, that's it; 720(a) permits you  
15      got to be called to account, and I don't think that's  
16      accounting. And I made the mistake myself of putting  
17      "accounting" in my brief and it occurred to me that I was  
18      mistaken. You call to account. If, after doing so, there's  
19      a basis of wrongdoing is established, the Attorney General's  
20      remedy, as they appear to acknowledge, is removal under 714  
21      or 706 for cause. Once again, the fault standard  
22      consistently be applied in the N-PCL, and it's an error, we  
23      believe, respectfully, to read it to not have that fault  
24      standard.

25             So, your Honor, that's the whole of our motion. We



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1 think that the claim should be thrown out. I'm happy to  
2 answer questions or get up on rebuttal.

3 THE COURT: No. That's very good. Thanks.

4 Mr. Correll.

5 MR. CORRELL: Thank you, your Honor. I'll try to  
6 keep this very brief. I know we're a little short on time.

7 First of all, I want to adopt the arguments that  
8 Mr. Fleming has made to the extent that they apply to my  
9 client, Wayne LaPierre. And I'll simply take my time to  
10 talk a little bit more about Grasso, which I know the Court  
11 has probably read and may even want to read again. But --

12 THE COURT: Maybe not 20 times, but...

13 MR. CORRELL: So, in 1969, the legislature sat  
14 down to grapple with the idea of non-profits and how they  
15 should be overseen and regulated, and what, if any, remedies  
16 should be provided for enforcement and came up with a  
17 comprehensive scheme that seemed to work well for a while  
18 until 2004, when the Grasso situation emerged, and it drew a  
19 lot of attention. And the Attorney General, then Attorney  
20 General Spitzer, commenced an action asserting eight causes  
21 of action, six against Mr. Grasso, one against the New York  
22 Stock Exchange and one against Kenneth Langone. And Judge  
23 Ramos was faced with a motion like the motion that you're  
24 faced with today, which is to dismiss the claims, and he  
25 denied the motion. And it went to the Appellate Division.

1 The Appellate Division in a split decision majority reversed  
2 on the ground that the legislature had codified a  
3 fault-based scheme and that the non-statutory causes of  
4 action, which there are four asserted against Mr. Grasso,  
5 were inconsistent with that scheme and incompatible with the  
6 remedies that had been created by the legislature and raised  
7 very serious separation of powers issues, constitutional  
8 issues, and --

9 THE COURT: Well, wasn't the key to that whole  
10 case that he played a sort of a passive role of -- you know,  
11 the Attorney General can't just wake up and say, Well, you  
12 received too much money, therefore, give it back, you know.  
13 But that's not really what the allegations are here.

14 MR. CORRELL: Well, your Honor, there were two  
15 sets of claims, and the Appellate Division split them into  
16 two categories, statutory and non-statutory. The  
17 non-statutory claims, two of those were unjust enrichment  
18 claims just like the 18th cause of action here, virtually  
19 indistinguishable. The other ones were purportedly  
20 statutory claims, but they actually alleged knowledge of  
21 unlawfulness, which is the element that is absent from an  
22 unjust enrichment claim. And so the Court of Appeals, the  
23 Appellate Division and the Court of Appeals kind of split  
24 the baby. They allowed the two statutory claims to proceed.  
25 They were eventually dismissed for other reasons, but

1 dismissed the four non-statutory claims including the two  
2 unjust enrichment claims. There was one related to a loan  
3 and there was one related to some other transaction, but the  
4 Court found that the statute was infused with this idea of  
5 fault and this notion that, in order to promote non-profit  
6 organizations and track non-profits to this state so the  
7 people considering forming non-profits will form them here  
8 and to encourage people to accept the responsibility of  
9 serving as officers and directors of non-profit.

10 They wanted -- the legislature wanted to give them  
11 protection, a safe harbor good faith, and said, There shall  
12 be no liability by reason of being an officer or director of  
13 officer or director of a non-profit if you do your duty.  
14 And they provided it specifically in Section 720. And  
15 Section 717 and Section 720 were the two provisions that  
16 were the key fault-based provisions on which both the  
17 Appellate Division and the Court of Appeals focused. It  
18 expressly stated that a transfer could only be set aside if  
19 you allege and proved knowledge of unlawfulness.

20 Now, if you look at the complaint here, you will  
21 not find the statement that Mr. LaPierre acted with  
22 knowledge of unlawfulness with respect to any of these  
23 transactions. And they certainly don't say it with respect  
24 to the unjust enrichment --

25 THE COURT: You don't say -- again, you know, when

1 dealing with a motion to dismiss, I'm supposed to take all  
2 reasonable inferences in the plaintiff's favor. You don't  
3 think, over that long stretch of the complaint where they  
4 talk about, whether it's airfare or other kinds of  
5 related-party transactions, or conflicts of interest, that I  
6 can infer that the person doing those was aware that it was  
7 unlawful?

8 MR. CORRELL: Your Honor, I know it's a tough  
9 standard to meet, but I don't think you can. And I think  
10 that there are no facts that suggest that Wayne LaPierre  
11 knew that flying private for security reasons or for  
12 efficiency reasons, or for whatever reason, was unlawful and  
13 that he did it anyway. I've read the complaint. When I  
14 read that complaint, I cannot come to that conclusion, even  
15 giving the Attorney General the benefit of the doubt.

16 So let me move to another issue. There are two  
17 causes of action which seek damages, and if you look at 720,  
18 and Mr. Fleming did a nice job of going through 720, there's  
19 no authorization to seek that relief in 720. The  
20 legislature gave the Attorney General a toolkit, gave the  
21 Attorney General certain authority, said, These are the  
22 actions you can bring against officers and directors, this  
23 is the standard of proof you've got to meet, and this is the  
24 relief you can obtain. And if you look at 720, you won't  
25 see damages mentioned. So what I'm asking you to do for Mr.

1 LaPierre is to dismiss the four causes of action asserted  
2 against him on the grounds that they are --

3 THE COURT: I'm sorry. Hang on just one second.  
4 We just lost our -- unless you have people listening who you  
5 don't want to proceed without, we'll just keep going.

6 MR. CORRELL: I'm happy to keep going, your Honor.

7 THE COURT: Okay.

8 MR. CORRELL: And I'm almost finished.

9 But the point is is that these claims against Mr.  
10 LaPierre do not pass Grasso muster. And, Judge, Chief Judge  
11 Kaye wrote an elegant opinion that was unanimous and laid  
12 out the reasoning, and I thought that the Appellate Division  
13 did a very nice job also of explaining the reasoning. So  
14 it's not that the Court has to go back and interpret the  
15 statute again. It's been interpreted by the Appellate  
16 Division First Department and also by the Court of Appeals.  
17 And I'd respectfully submit that that is binding precedent,  
18 at least with respect to the unjust enrichment claim, and, I  
19 would also argue, with respect to the other claims because  
20 if you look at them, you'll see no mention of knowledge of  
21 unlawfulness, you'll see no allegation of bad faith. And  
22 all the Attorney General can do is say, Well, like we've  
23 said so many things about so many people that one could  
24 reasonably infer bad faith or knowledge of unlawfulness on  
25 the part of Mr. LaPierre. But to get there, you've got to

1 impute to Mr. LaPierre things that other people have done,  
2 which the AG alleges were concealed, were done without  
3 anyone's knowledge.

4 So I respectfully submit that applying the Grasso  
5 standard to these claims requires dismissal.

6 THE COURT: Thank you.

7 Mr. Conley, are you handling this one? One-man  
8 band.

9 MR. CONLEY: As a threshold matter, however the  
10 defendants want to qualify it, we're on motions to dismiss  
11 that are barred by the single motion rule, and these  
12 arguments should've been included in their original set of  
13 motions that were denied by this Court, but were not.

14 With respect to the arguments by Mr. Frazer and Mr.  
15 LaPierre's counsel, we are confident that on a full record,  
16 we will establish all of the causes of action that's pled in  
17 the complaint, including the causes of action asserted  
18 against them.

19 With respect to Mr. Frazer's alleged in the  
20 complaint, Mr. Frazer served as the NRA secretary and  
21 general counsel since 2015, and over those six years, is one  
22 of the NRA's five salaried officers. He has  
23 routinely turned a blind eye to egregious displays of  
24 corporate waste and malfeasance and taken part in disputing  
25 a culture of self dealing, mismanagement and negligent

1 oversight. Individually and collectively, we believe that  
2 the allegations in the complaint amply support viable causes  
3 of action for Mr. Frazer for breach of fiduciary duty,  
4 improper administration of the NRA's charitable assets,  
5 false filing and unjust enrichment. Regarding Mr. Frazer's  
6 counsel's arguments with respect to the remedies, all of the  
7 remedies sought against Mr. Frazer are accomplished by the  
8 statutes and properly pled.

9 With respect to the 17th cause of action for false  
10 filing, Executive Law 175 is a remedial provision for  
11 violations of charitable solicitation and Mr. Frazer signed  
12 and certified the NRA's annual reports filed with the  
13 Attorney General for several years, as is alleged in the  
14 complaint. The EPL provides the Court with the power of  
15 providing equitable relief with the authority to impose a  
16 bar and a fashion remedy that address the harms to the  
17 charitable sector. And as the general counsel and  
18 secretary, Mr. Frazer cannot disavow fiduciary obligations  
19 to protect the administration of NRA's assets.

20 Regarding the dependance on the Court of Appeals  
21 decision in Grasso, Grasso does not apply here. The  
22 arguments that Mr. Frazer and Mr. LaPierre make with respect  
23 to Grasso is a misreading of what is really a pretty narrow  
24 holding. There, the Court held that the Attorney General  
25 does not have parens to treat authority to bring common law

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1 claims on her behalf because the legislature provided a  
2 specific statutory vehicle to pursue those claims. The  
3 Court did not address the corporations authority to bring  
4 common law claims for the Attorney General's authority to  
5 assert those claims in a derivative capacity on behalf of  
6 the corporation.

7 And for the 18th cause of action for unjust  
8 enrichment, the Attorney General is bringing those claims  
9 under her statutory authority in N-PCL 12(a)(7) --

10 THE COURT: Let me ask you about the 18th cause of  
11 action for a moment. That one is explicitly a derivative  
12 claim; correct?

13 MR. CONLEY: Yes.

14 THE COURT: So the demand futility, we were here a  
15 few months ago with an intervenor, and the argument was made  
16 and accepted, principally on the five-percent rule, but also  
17 at that stage, I don't remember what the Attorney General's  
18 position was frankly, but that, well, you know, the NRA has  
19 a special litigation committee and et cetera, and that they  
20 had not, they had not anyway, sufficiently pleaded demand  
21 futility. So, A, does the Attorney General have to plead  
22 demand futility, and if so, what do you make of the argument  
23 that I've already held that demand was not futile, at least  
24 in the context of a different complaint?

25 MR. CONLEY: Your first question, your Honor, the



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1 Attorney General takes the position that she does not need  
2 to plead demand of futility under 623, as your Honor noted  
3 in the Court ruling on intervention motions in September.  
4 These procedural requirements, and that was largely in the  
5 context of the five-percent threshold requirement, but I  
6 think it applies equally with respect to the Attorney  
7 General's authority to bring claims on behalf of members.

8 THE COURT: Did you say I held that the Attorney  
9 General doesn't have to plead futility back then?

10 MR. CONLEY: No, no, your Honor. It's consistent  
11 with your reasoning in saying that the five-percent rule  
12 wouldn't necessarily --

13 THE COURT: Yeah. Look, I don't think that the  
14 five-percent rule probably applies because that would mean  
15 the Attorney General would need four hundred or four million  
16 people to join her, which doesn't seem like that's what's  
17 required. But the demand futility is a more substantive  
18 question, you know, at least part of Grasso and -- I'm  
19 sorry, the Leftwoods (ph) case, I think. The Attorney  
20 General does not have roving authority to just come in and  
21 bring every conceivable common law claim that shareholders  
22 could bring. Does she have to make a demand on the Board?  
23 And if not, why not? I think you do plead demand futility.

24 MR. CONLEY: We do plead demand futility. We did  
25 not think that the procedural requirements in 623 applied to

1 the Attorney General, and just in that with respect to the  
2 five percent rule.

3 With respect to the demand futility requirement, we  
4 think that it is different for the Attorney General in that  
5 she exercises rights differently in her unique role as a law  
6 enforcement officer with supervisory authority. But --

7 THE COURT: Well, in this setting, she's  
8 operated -- I assume the statutory basis for that one claim  
9 is that the provision that says she can exercise the rights  
10 of the members. So in that setting, she's not the Attorney  
11 General, she's -- well, she is the Attorney General, but  
12 she's exercising the rights of a member and the member can't  
13 just bring a case for a derivative action on her or his own  
14 without pleading demand futility.

15 But let me just get the substantive point. You  
16 know, they say that, look, the board has gone after some  
17 people, it's not been inert, why can't the board, in the  
18 first instance, make the decision whether to go after any of  
19 these defendants?

20 MR. CONLEY: Well, as we set forth in the  
21 complaint at Paragraph, I believe, 750, we think that we  
22 have met the particularity standard. We've alleged with  
23 particularity a demand by the members to assert the claim  
24 for unjust enrichment would be futile because the NRA's  
25 board and its committees have failed to fully inform

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1           themselves about a challenge transaction.

2                       Again, the NRA has been on notice with respect to  
3           the allegations in the complaint and the Attorney General's  
4           investigation for years and has not done anything to try to  
5           address or account for that. They've just -- as is  
6           exemplified by the fact that they tried to escape this  
7           action, by fueling for bankruptcy in Texas.

8                       THE COURT:    So you think you've succeeded where  
9           the intervenor failed. I'm trying to get a sense of whether  
10          you're trying to say that I need to reconsider that part of  
11          my decision from the intervenor motion. The intervenors  
12          still lose because of the five-percent issue, but I did say  
13          in there that they did not adequately allege demand futility  
14          and they make some of the arguments you are.

15                      I am genuinely grappling with this to understand  
16          what the right answer is on this one. You know, obviously  
17          you have lots of arguments that one of the defendants  
18          controls some of the board if not more than that, but do I  
19          have to revisit that decision?

20                      MR. CONLEY:   No, your Honor, I don't believe. But  
21          at the same time, I do believe that we have adequately  
22          demand futility in our complaint for all of the reasons set  
23          forth.

24                      THE COURT:    All right. Thank you.

25                      MR. CORRELL:  Your Honor, if I may respond.

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1 THE COURT: Yes, of course.

2 MR. CORRELL: Just the main point is that I wanted  
3 to remind the Court that the Appellate Division did not  
4 reach the parens patriae issues and nor did the Court of  
5 Appeals, and so it's really unfair to characterize the  
6 holding as being limited in that way.

7 The holding of Grasso, as I read it, is that the  
8 Attorney General, in exercising powers over non-profits or  
9 non-profit officers or directors, is limited to the causes  
10 of action and the relief provided for by the legislature in  
11 the statutes, and that if the Attorney General steps beyond  
12 that to assert, say, a cause of action for unjust  
13 enrichment, then the Attorney General is out of bound. If  
14 the Attorney General steps beyond that to, say, asked for  
15 damages rather than restitution, the Attorney General is out  
16 of bound.

17 So all I'm asking you to do on Mr. LaPierre's  
18 behalf is to take that scalpel out and go through and trim  
19 off whatever it is that is hanging over the edges that  
20 Grasso says is more than the remedial package that the  
21 legislature gave. And you have to do that because the Court  
22 doesn't have the power either to go beyond what the  
23 legislature said. It's not just the AG, so it's a double  
24 separation of powers issue. So I'd just urge the Court to  
25 read the case carefully and to apply the rule faithfully.

1 Thank you, your Honor.

2 THE COURT: Anything further?

3 MR. FLEMING: Your Honor, I'll resist the  
4 temptation. It's really more of the same, so I'll rest.  
5 Thank you.

6 THE COURT: Are there any of the folks who are on  
7 Teams who have anything they need to add?

8 Mr. Farber, you're on mute.

9 MR. FARBER: I apologize, your Honor. No, I  
10 don't. Thank you.

11 THE COURT: Okay. Well, I think that concludes  
12 the oral argument, and I thank everyone.

13 I'll take the motions under submission. And we can  
14 now go off the record for a brief moment and convene the  
15 status conference.

16 \*\*\*\*\*  
17 CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE  
18 ORIGINAL STENOGRAPHIC MINUTES TAKEN OF THIS PROCEEDING.

19   
20 VANESSA MILLER  
21 Senior Court Reporter  
22  
23  
24  
25